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THE ALL INDIA REPORTER

1930

NAGPUR SECTION

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THE NAGPUR JUDICIAL COMMISSIONER'S COURT REPORTED IN

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1930

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| CrC) | A. I. R. | CrC) | A. I. R. | CrC) | A. I. R. | CrC) | A. I. R. | CrC) | A. I. R. |
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| 1084 | 1930 O 460 | 1120 | 1930 C 720 | 1149 | 1930 M 854 | 1182 | 1930 B 595 | 1211 | 1930 O 505 |
| 1087 | " C 802 | 1121 | " M 865 | 1151 | " R 335 | 1185 | " L 1024 | 1214 | " P 622 |
| 1089 | " P 545 | 1123 | " " 867 | 1153 | " C 753 | 1187 | " M 971 | 1216 | " M 1002 |
| 1094 | " " 550 | 1125 | " " 869 | 1154 | " " 754 | 1188 | " " 972 | 1217 | " L 1041 |
| 1100 | " " 556 | 1126 | " " 870 | 1154 | " " 754 | 1189 | " " 973 | 1219 | " " 1043 |
| 1101 | " N 291 | 1129 | " C 721 | 1156 | " " 756 | 1191 | " " 975 | 1220 | " " 1044 |
| 1104 | " C 664 | 1136 | " " 728 | 1157 | " " 757 | 1193 | " " 977 | 1221 | " " 1045 |
| 1105 | " " 705 | 1137 | " A 834 | 1159 | " " 759 | 1194 | " " 978 | 1222 | " " 1046 |
| 1106 | " " 706 | 1137 | " " 34 | 1160 | " " 760 | 1196 | " " 980 | 1224 | " " 1048 |
| 1108 | " " 708 | 1138 | " " 836 | 1161 | " O 497 | 1197 | " " 981 | 1227 | " " 1051 |
| 1110 | " " 710 | 1140 | " B 593 | 1164 | " " 500 | 1199 | " " 983 | 1230 | " " 1054 |
| 1111 | " " 711 | 1141 | " M 929 | 1166 | " " 502 | 1201 | " A 817 | 1231 | " " 1055 |
| 1112 | " " 712 | 1142 | " S 305 | 1168 | " R 332 | 1202 | " " 818 | 1232 | " A 835 |
| 1113 | " " 713 | 1145 | " " 308 | 1171 | " PC 291 | 1204 | " " 820 | 1233 | " R 355 |
| 1115 | " " 715 | 1147 | " " 315 | 1176 | " M 927 | 1206 | " C 645 | 1238 | " " 360 |
| 1116 | " " 716 | 1147 | " " 315 | 1177 | " R 349 | 1206 | " C 645 | 1238 | " " 360 |
| 1117 | " " 717 | 1149 | " M 873 | 1179 | " " 351 | 1207 | " P 593 | 1239 | " A 887 |

13 & 14 All India Criminal Reports=All India Reporter.
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1930 Allahabad.

31 Cr. L. J. & 121 to 128 Indian Cases=All India Reporter
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1930 Lahore.

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1930 Nagpur Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the NAGPUR LAW REPORTS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1930, NAGPUR.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1930 Nagpur=Other Journals.

| A.I.R.) Other Journals | A.I.R.) Other Journals | A.I.R.) Other Journals | A.I.R.) Other Journals |
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| 1FB 26 N L R 33 | 26 118 I C 674 | 49 13 A I Cr R 406 | 61 12 N L J 180 |
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| 12 N L J 164 | 28 121 I C 61 | 51 (2) 121 I C 34 | 63 1930 Cr C 151 |
| 3 121 I C 41 | 12 N L J 92 | 53 120 I C 413 | 120 I C 733 |
| 26 N L R 121 | 32 121 I C 641 | 54 124 I C 701 | 31 Cr L J 164 |
| 5 121 I C 658 | 33 25 N L R 194 | 55 (1) 119 I C 684 | 64 1930 Cr C 152 |
| 26 N L R 127 | 1930 Cr C 89 | 55 (2) 120 I C 411 | 120 I C 414 |
| 6 121 I C 38 | 12 N L J 127 | 56 25 N L R 186 | 31 Cr L J 109 |
| 7 122 I C 446 | 14 A I Cr R 115 | 122 I C 439 | 65 26 N L R 1 |
| 8 121 I C 39 | 31 Cr L J 382 | 57 121 I C 650 | 123 I C 449 |
| 26 N L R 130 | 122 I C 258 | 26 N L R 111 | 73 123 I C 417 |
| 10 ... | 34 121 I C 663 | 120 I C 209 | 12 N L J 185 |
| 11 119 I C 677 | 35 118 I C 871 | 59 (1) 1930 Cr C 147 | 86 26 N L R 56 |
| 12 119 I C 680 | 40 119 I C 695 | 120 I C 416 | 121 I C 669 |
| 13 119 I C 690 | 42 122 I C 444 | 31 Cr L J 110 | 88 120 I C 414 |
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| 20 120 I C 408 | 43 120 I C 326 | 121 I C 646 | 13 N L J 1 |
| 12 N L J 113 | 48 26 N L R 30 | 31 Cr L J 282 | 90 121 I C 667 |
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| 92 | 26 N L R 94 | 145 | 30 Cr L J 224 | 188 | 124 I C 249 | 240 | 13 N L J 100 |
| 96 | 1930Cr C 201 | | 113 I C 881 | 189 | 26 N L R 103 | | 124 I C 241 |
| | 120 I C 223 | | 12 A I Cr R 216 | | 124 I C 703 | 241 | 13 N L J 79 |
| | 31 Cr L J 24 | | 1930Cr C 501 | 191 | 124 I C 250 | | 122 I C 438 |
| 97 | 120 I C 721 | 148 | 120 I C 734 | 193 | 26 N L R 190 | 242FB | 26 N L R 229 |
| | 31 Cr L J 153 | | 31 Cr L J 165 | | 124 I C 252 | | 125 I C 673 |
| | 1930Cr C 305 | | 1930Cr C 504 | 195 | 122 I C 376 | | 31 Cr L J 881 |
| 108 | 122 I C 434 | 149 | 121 I C 665 | | 26 N L R 340 | | 1930Cr C 818 |
| | 31 Cr L J 417 | | 31 Cr L J 278 | | 13 N L J 23 | 255 | 124 I C 619 |
| | 1930Cr C 316 | | 26 N L R 158 | 196 | 122 I C 374 | | 31 Cr L J 705 |
| | 14 A I Cr R 196 | | 13 A I Cr R 17 | | 26 N L R 292 | | 1930Cr C 831 |
| 111 | 120 I C 406 | | 1930Cr C 505 | 198 | 122 I C 437 | | 124 I C 459 |
| | 26 N L R 125 | 150 (1) | 31 Cr L J 413 | | 26 N L R 204 | 259 | 31 Cr L J 661 |
| 113FB | 26 N L R 66 | | 122 I C 384 | | 13 N L J 41 | | 1930Cr C 835 |
| | 13 N L J 51 | | 14 A I Cr R 168 | 199 | 26 N L R 187 | | 125 I C 686 |
| | 123 I C 470 | | 1930Cr C 506 | | 124 I C 246 | 265 | 26 N L R 303 |
| 116FB | 26 N L R 136 | 150 (2) | 122 I C 442 | 200 | 122 I C 379 | | 123 I C 907 |
| | 123 I C 474 | | 31 Cr L J 419 | 204 | 123 I C 906 | 267 | 13 N L J 240 |
| 119 | 122 I C 697 | | 26 N L R 172 | | 13 N L J 94 | | 26 N L R 178 |
| | 12 N L J 156 | | 1930Cr C 506 | | 27 N L R 1 | 270 | 13 N L J 97 |
| 121 | 119 I C 679 | 151 | 123 I C 897 | 205 | 13 N L J 33 | | 123 I C 901 |
| 122 | 26 N L R 24 | | 13 N L J 93 | | 122 I C 703 | | 123 I C 911 |
| | 127 I C 887 | 152 | 127 I C 351 | 206 | 13 N L J 83 | 271 | 26 N L R 309 |
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| 129 | 121 I C 647 | | 13 N L J 13 | 207 | 13 N L J 4 | 273 | 13 N L J 138 |
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| 130 | 120 I C 221 | 166 | 127 I C 881 | | 26 N L R 300 | | 13 N L J 113 |
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| 134 (1) | 121 I C 664 | 177 | 122 I C 445 | 212 | 123 I C 473 | 282 | 26 N L R 265 |
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| 143 | 122 I C 440 | | 124 I C 247 | 237 | 13 N L J 36 | 298 | 127 I C 889 |
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| | 13 N L J 62 | 188 | 26 N L R 154 | 239 | 123 I C 480 | 300 | 13 N L J 166 |

LIST OF ABBREVIATIONS

| | | | |
|------------------------|-----|-----|---|
| A. I. Cr. R. | ... | ... | All India Criminal Reports. |
| All. or A. | ... | ... | Indian Law Reports, Allahabad Series. |
| A. L. J. | ... | ... | Allahabad Law Journal. |
| A. I. R. All. | ... | ... | All India Reporter, Allahabad. |
| Bom. or B. | ... | ... | Indian Law Reports, Bombay Series. |
| Bom. L. R. | ... | ... | Bombay Law Reporter. |
| A. I. R. Bom. | ... | ... | All India Reporter, Bombay. |
| Bur. L. T. | ... | ... | Burma Law Times. |
| Cal. or C. | ... | ... | Indian Law Reports, Calcutta Series. |
| C. L. J. | ... | ... | Calcutta Law Journal. |
| C. L. R. | ... | ... | Calcutta Law Reports. |
| Cr. C. | ... | ... | Criminal Cases. |
| C. W. N. | ... | ... | Calcutta Weekly Notes. |
| A. I. R. Cal. | ... | ... | All India Reporter, Calcutta. |
| Cr. L. J. | ... | ... | Criminal Law Journal. |
| I. A. | ... | ... | Law Reports, Indian Appeals. |
| I. C. | ... | ... | Indian Cases. |
| Lah. or L. | ... | ... | Indian Law Reports, Lahore Series. |
| A. I. R. Lah. | ... | ... | All India Reporter, Lahore. |
| Lah. L. J. or L. L. J. | ... | ... | Lahore Law Journal. |
| L. B. R. | ... | ... | Lower Burma Rulings. |
| A. I. R. L. B. | ... | ... | All India Reporter, Lower Burma. |
| L. R. A. | ... | ... | The Law Reporter, Allahabad. |
| Luck. | ... | ... | Indian Law Reports, Lucknow Series. |
| Mad. or M. | ... | ... | Indian Law Reports, Madras Series. |
| M. L. J. | ... | ... | Madras Law Journal. |
| Mad. Cr. C. | ... | ... | Madras Criminal Cases. |
| M. L. T. | ... | ... | Madras Law Times. |
| L. W. or M. L. W. | ... | ... | Madras Law Weekly. |
| M. W. N. | ... | ... | Madras Weekly Notes. |
| A. I. R. Mad. | ... | ... | All India Reporter, Madras. |
| N. L. J. | ... | ... | Nagpur Law Journal. |
| N. L. R. | ... | ... | Nagpur Law Reports. |
| A. I. R. Nag. | ... | ... | All India Reporter, Nagpur. |
| O. C. | ... | ... | Oudh Cases. |
| A. I. R. Oudh | ... | ... | All India Reporter, Oudh. |
| O. L. J. | ... | ... | Oudh Law Journal. |
| O. W. N. | ... | ... | Oudh Weekly Notes. |
| P. R. | ... | ... | Punjab Record. |
| P. L. R. | ... | ... | Punjab Law Reporter. |
| P. W. R. | ... | ... | Punjab Weekly Reporter. |
| Pat. or P. | ... | ... | Indian Law Reports, Patna Series. |
| P. H. C. C. | ... | ... | Patna High Court Cases (Suppl. to C. W. N.) |
| A. I. R. Pat. | ... | ... | All India Reporter, Patna. |
| A. I. R. P. C. | ... | ... | All India Reporter, Privy Council. |
| Pat. L. J. | ... | ... | Patna Law Journal. |
| Pat. L. T. | ... | ... | Patna Law Times. |
| Pat. L. W. | ... | ... | Patna Law Weekly. |
| Rang. or R. | ... | ... | Indian Law Reports, Rangoon Series. |
| A. I. R. Rang. | ... | ... | All India Reporter, Rangoon. |
| Sar. | ... | ... | Saraswati's P. C. Judgments. |
| S. L. R. | ... | ... | Sind Law Reporter. |
| Suther. | ... | ... | Sutherland's P. C. Judgments. |
| A. I. R. Sind | ... | ... | All India Reporter, Sind. |
| U. B. R. | ... | ... | Upper Burma Rulings. |
| A. I. R. U. B. | ... | ... | All India Reporter, Upper Burma |
| W. R. | ... | ... | Weekly Reporter. |

OTHER ABBREVIATIONS.

| | | | | | | | | |
|-------|-----|----------------|------------|-----|-----------------|-------|-----|----------------|
| Appl. | ... | Applied | Disc. | ... | Discussed. | F. B. | ... | Full Bench. |
| Appr. | ... | Approved. | Diss. from | ... | Dissented from. | P. C. | ... | Privy Council. |
| Cons. | ... | Considered. | Expl. | ... | Explained | Ref. | ... | Referred to. |
| Dist. | ... | Distinguished. | Foll. | ... | Followed. | S. B. | ... | Special Bench. |

THE ALL INDIA REPORTER 1930

NAGPUR J. C's. COURT

** A. I. R. 1930 Nagpur 1 Full Bench

MACNAIR, OFFG. J. C., AND JACKSON
AND SUBHEDAR, A. J. CS.

Shankar Ganesh—Appellant.

v.

Kesheo and others—Respondents.

Second Appeal No. 175 of 1928, Decided on 28th October 1929, against decree of Dist. Judge, Nagpur, in Civil Appeal No. 23 of 1926, D/- 14th December 1927.

**** Evidence Act, S. 13—Judgment that does not fall under Ss. 40, 41 and 42 is not relevant under S. 13 for decision of same point in subsequent suit—Evidence Act, S. 43.**

A. I. R. 1926 Nag 109=22 Nag. 49, Overruled.

Where a judgment is not in rem nor relating to matters of public nature, nor between the parties to a subsequent suit, the fact that the Court by that judgment decides a point in a particular way is not relevant for the purpose of the decision of the same point in the subsequent suit: *A. I. R. 1929 P. C. 99 and 1 Lah. 540, Rel. on. : 19 All. 277 (P. C.), Expl.: 22 Cal. 533 (P. C.), Dist. A. I. R. 1926 Nag. 109, Overruled ; 29 Cal. 187 (P. C.) ; 35 Cal. 701 and A. I. R. 1921 Mad. 248, Ref. [P 3 C 1]*

M. R.. Bobde and N. R. Alekar—for Appellant.

W. H. Dhabe and K. A. Potey—for Respondents.

Order of Reference.

Macnair, Offg. J. C.—The decision of the learned District Judge is to a great extent based on the opinion that a judgment not inter partes can be used as evidence in this case: he thinks that the fact of admitting former judgments in evidence generally means that they have the force of res judicata. In *Ram-dhan v. Purushottam* (1), *Wadegaonkar*,

(1) *A. I. R. 1926 Nag. 103=22 N. L. R. 49.*

A. J. C., considered the question whether the defendant had any title to certain property. In a previous suit, not inter partes, it had been held that the sale deed on which the defendant based his title was bogus and fraudulent and that under it the defendant had acquired no title. The learned Judge stated:

"It is no doubt true that the defendant was no party to that suit, but the judgment given in that suit though not conclusive is clearly admissible under S. 13, Evidence Act, and is a very good and cogent piece of evidence in proof of the fact that the defendant had no right to the property sold by him to the plaintiff. Under that section, judgments not inter partes pronounced by a Court of competent jurisdiction in a suit in which the right in dispute had been asserted and either recognized or denied are clearly admissible."

In my opinion the correctness of this statement is at least doubtful. I need at present only refer to the discussion of the law in Woodroffe and Ameer Ali's *Law of Evidence*, 8th Edn., pp. 184 to 187. I cite two extracts:

"But the opinion given in favour of A in the first suit is not relevant to prove that the judgment should also be in his favour in the subsequent suit",

and again:

"The dissentient Judge thought that because the plaintiff produced this prior favourable decision it, therefore, rendered the case of the plaintiff in the subsequent suit more probable. No decision of the Privy Council has ever sanctioned such a use of a judgment."

I consider that the point should be considered by a Bench: I state the question for decision thus: A judgment was not in rem, nor relating to matters of public nature, nor between the parties to a subsequent suit. Is the fact that the Court by that judgment decided a

point in a particular way relevant for the purpose of the decision of the same point in the subsequent suit?

Opinion

Macnair, Offg. J. C.—The question referred for the decision of the Full Bench is thus stated :

"Where a judgment was not in rem, nor relating to matters of public nature, nor between the parties to subsequent suit is the fact that the Court by that judgment decided a point in a particular way relevant for the purpose of the decision of the same point in the subsequent suit?"

Section 43, Evidence Act, read with Illustration (a) appears to necessitate an answer in the negative to this question. I quote the section and Illustration :

"Judgments, orders and decrees, other than those mentioned in Ss. 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some provisions of this Act."

"(a) A and B separately sue C for libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither."

"A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C."

A Court had decided that the matter alleged to constitute a libel upon A was untrue. This was irrelevant for the purpose of deciding in a suit brought by B against C whether or not the statement about A were true : this question was relevant in the subsequent suit under the provisions of S. 2 (2), Evidence Act.

Again it is surely a fundamental principle of law that the opinion of any person, however eminent, regarding the validity of a claim is irrelevant for the purpose of a decision whether or not that claim is valid. A judgment is a judicial opinion rendered on the claims of the parties. The fact that the case has been heard and finally decided may render the question *res judicata* in a subsequent suit : but if it does not, surely this fundamental principle must apply.

It was contended before the Bench that the question has been answered in the affirmative by their Lordships of the Privy Council, but an examination of the rulings to which reference is made shows that this is not the case. In *Bitto Kunwar v. Kesho Prasad Misr*, (2), their Lordships of the Privy Council stated that a decision in a previous suit

(2) [1897] 19 All. 277 = 24 I. A. 10 = 7 Sar. 121 (P.C.).

though that suit was not between the same parties was admissible as evidence in a subsequent suit. They have not stated the grounds upon which the previous decision was applicable. In Woodroffe and Ameer Ali's Law of Evidence, 8th Edn. p. 182, the facts of the case have been examined. It appears that the decision was held to be admissible as showing the character of the possession of one Bacha Tewari after the decision was pronounced. It was not, therefore, held that the decision was directly relevant for the purpose of the decision on the same point in a subsequent suit. In *Ram Ranjan Chakerbati v. Ram Narain Singh* (3), their Lordships of the Privy Council stated that a previous judgment though not between the same parties might be used as evidence showing the rent paid for the possession at and prior to the date of the judgment (p. 542). Now the facts of the previous suit are given in some detail at p. 541, and it is clear that there was no dispute and consequently no decision regarding the amount of rent paid. The decision in this case then has no application to the question I am considering. In *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (4) their Lordships at p. 198, considered for that purpose certain police orders were admissible as evidence. They state that these orders were evidences of the following facts :

"Who the parties to the dispute were ; what the land in dispute was ; and who was declared entitled to retain possession."

It is sufficient to note that they are not stated to be evidence of the fact : Who was entitled to retain possession.

Their Lordships of the Privy Council have recently given a clear pronouncement on the point we are considering. In *Gopika Raman Roy v. Atal Singh* (5), it is stated that the Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case.

It is urged that many High Courts of India have decided the question under consideration in the affirmative. If this is the case the pronouncement in *Gopika*

(3) [1895] 22 Cal. 533 = 22 I. A. 60 = 6 Sar. 530 (P.C.).

(4) [1902] 29 Cal. 187 = 29 I. A. 24 = 8 Sar. 224 (P.C.).

(5) A. I. R. 1929 P. C. 99 = 53 Cal. 1003 = 56 I. A. 119 (P.C.).

Raman Roy v. Atal Singh (5) shows that the decisions are incorrect. I remark however, that in the rulings brought to the notice of the Bench either there is doubt whether there is decision of the question or the references to this question are in the nature of obiter dicta. Such is their nature in *Baleshwar Bagarti v. Bhagirathi Dass* (6) at 716 and *Secy. of State v. Ahmad Badsha Sahib* (7) at 801 of 44 *Mad.* In the Madras case the question whether the decision in the previous suit was evidence was not referred to the Full Bench.

In *Inder Singh v. Fateh Singh* (8), at 546, the question was emphatically answered in the negative.

The question was referred to this Full Bench because it was answered in the affirmative by Wadegaonkar, A. J. C., in *Ramdhan v. Purushottam* (1). The point was not discussed very fully and I respectfully disagree with the opinion therein expressed.

I answer the question referred to the Full Bench in the negative.

Jackson, A. J. C.—I agree.

Subhedar, A. J. C.—I also agree.

V.S./R.K. *Reference answered in negative.*

(6) [1903] 35 Cal. 701=7 C. L. J. 563=12 C. W. N. 657.

(7) A.I.R. 1921 Mad. 248=44 Mad. 778 (F.B.).

(8) [1920] 1 Lah. 540=59 I. C. 734.

A. I. R. 1930 Nagpur 3

JACKSON, A. J. C.

Govind—Appellant.

v.

Jankibai and another—Respondents.

Second Appeal No. 273-B of 1928, Decided on 4th October 1929, against decree of Addl. Dist. Judge, Khamgaon, D/- 28th July 1928 in Civil Appeal No. 11 of 1928.

(a) Civil P. C., S. 11—Suit by one of two reversioners for possession of his share of property sold by Hindu widow—Other reversioner *K* made co-defendant with vendee, who (*K*) admitted plaintiff's claim—Suit decreed on finding that sale was not for legal necessity—In suit brought by *K* for possession of other half, finding in previous suit regarding legal necessity is binding on vendee though *K* was not contesting defendant in that suit.

One of the two reversioners brought a suit to obtain possession of $\frac{1}{2}$ of the property sold by a Hindu widow making the other reversioner *K* a co-defendant with the vendee. *K* was not a

contesting defendant to the suit. The suit was decreed on the finding that the sale was not for legal necessity. Subsequently *K* sued the same vendee to obtain possession of the other half of the property and it was contended that the finding regarding legal necessity in the previous suit was not binding on the vendee inasmuch as *K* was not a contesting defendant in that suit.

Held: that though *K* was not a contesting defendant, there was an issue between *K* and the vendee viz., whether the sale was binding on the reversioners and *K* was equally interested in the issue with the plaintiff in the previous suit and as it was necessary to decide that issue in order to grant relief to the plaintiff the decision operates as res judicata in the subsequent suit: *A. I. R. 1925 Cal. 431, Appr.*; *A. I. R. 1925 Lah. 89, Dist.*; *A. I. R. 1922 All. 19* and *A. I. R. 1924 Nag. 429, Rel. on.* [P 4 C 1]

(b) Civil P. C., O. 2, R. 2—Sale of two properties by Hindu widow by different sales—Suit by reversioner for possession of one property—Another suit for possession of the other property is not barred under O. 2, R. 2.

The cause of action is made up of all the facts which entitle the plaintiff to sue. If a Hindu widow sells two properties by different sales a suit by a reversioner after her death, for possession of one of the properties is not barred even though he fails to include that claim for possession in an earlier suit brought by him for possession of the other property as the cause of action is not simply the death of the widow but includes in each case the sales and the sales being different the causes of action in which the sales are included are also different: 8 *Mad. 520, Rel. on.*; *A.I.R. 1922 Nag. 246, not Appl.* [P 4 C 2]

C. B. Parakh—for Appellant.

V. N. Bapat and *S. T. Bhawe*—for Respondents.

Judgment.—This appeal arises from a suit for possession of a half share of Survey No. 71 of Mouza Jahagirpur in the Malkapur Taluq. The field belonged to one Vinayakrao who died about 1896. He left a widow Mt. Umabai and three daughters, Mt. Yamubai, Yeshodabai (defendant 2) and the plaintiff's mother Mt. Anubai alias Ambai. On the death of Vinayakrao his widow succeeded to the property and she sold the field to defendant 1 by two registered sale deeds, dated 14th April 1898 and 19th January 1900. One of her daughters predeceased Mt. Umabai and when the latter died in 1913 her heirs were the mother of the plaintiff and Mt. Yashodabai, defendant 2. In Civil Suit No. 74 of 1921 in the Court of the Munsif, Malkapur, Yashodabai sued for possession of one half of the field. The present plaintiff, who was then a minor, did not join in the suit and was made a co-defendant

with defendant 1 in the present case. The latter pleaded that the sales were for legal necessity and were binding on the reversioners, but his plea was unsuccessful and Yashodabai's claim was decreed. The present plaintiff now sues for the other half share in the field and it has been held that the finding in the previous suit operates as *res judicata* and that defendant 1 cannot now plead legal necessity for the sales. This finding is contested on the ground that there was no controversy between the two defendants in Civil Suit No. 74 of 1921. *Khair Muhammad v. Umar Din* (1), which has been cited on behalf of the appellant, does not relate to a question of *res judicata* arising between co-defendants. In *Muhammad Ahmad v. Zahur Ahmad* (2), which has been followed in *Laxman v. Janoo* (3) it has been held that a decision as between co-defendants cannot be *res judicata* under the provisions of S. 11, Civil P. C., unless it was necessary to decide an issue between them in order to grant relief to the plaintiff. It is urged that the present plaintiff was not a contesting defendant in Civil Suit No. 74 of 1921 as she admitted Yashodabai's claim; but that does not alter the fact that there was an issue between her and defendant 1, which it was necessary to decide in order to grant relief to the plaintiff, that issue being whether the sales were binding on the reversioners—an issue in which the present plaintiff was equally interested with Yashodabai and which she raised by admitting Yashodabai's claim. This appears to be the view taken in *Haladhur Das v. Nagendra Nath* (4); and my decision is that the finding is correct, that the decision in Civil Suit No. 74 of 1921 operates as *res judicata*.

It is next argued that the present suit is barred under O. 2, R. 2, because in Civil Suit No. 78 of 1923 the present plaintiff, in suing to obtain possession of a house sold to defendant 1 by Umabai, failed to include her claim for a half share in the field. It is argued that the cause of action is the same for the two suits, namely, the death of the plaintiff's mother. That, however, merely shows

the date on which the cause of action arose and is not in itself the cause of action. The cause of action is made up of all the facts which entitle the plaintiff to sue and those facts include in each of the two cases I am considering the sales by Umabai to defendant 1. These sales were different and the causes of action in which they are included must also necessarily be different. In *Pittapur Raja v. Suriya Rau* (5) it was held that the causes of action were different in two suits in which the plaintiff first sued for possession of an estate in land, of which he had been wrongfully dispossessed by the defendant, and afterwards sued for his share of personal property, being entitled to both under a will. It was said :

"It is not the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action."

These remarks will show why the ruling in *Budhmal v. Mt. Zunkari* (6), on which the appellant relies, does not apply to the present case. In that case the defendant, on the strength of a succession certificate entitling her to collect debts due to her deceased father-in-law, sued on a bond and obtained a decree against one of the debtors. The plaintiff claiming to be the heirs of the defendant's father-in-law sued for his estate and obtained a decree, but omitted to sue for the bond on which the defendant had obtained a decree, though they knew of its existence. Their suit to have the decree transferred to them was held to be barred under O. 2, R. 2, because it was, in effect, founded on the same cause of action as the previous suit, namely, the one wrongful act of the defendant, by which she came into possession of her deceased father-in-law's estate. I hold that the present suit is not barred under O. 2, R. 2. The appeal is dismissed with costs.

P.N./R.K.

Appeal dismissed.

(1) A. I. R. 1925 Lah. 421.

(2) A. I. R. 1922 All. 19=44 All. 334.

(3) A. I. R. 1924 Nag. 429=20 N. L. R. 157.

(4) A. I. R. 1925 Cal. 431=51 Cal. 997.

(5) [1885] 8 Mad. 520=12 I. A. 116 (P.C.).

(6) A. I. R. 1922 Nag. 216=18 N. L. R. 116.

A. I. R. 1930 Nagpur 5

MOHIUDDIN, A. J. C.

Haridas and others—Appellants.

v.

Mofatlal and others—Respondents.

Misc. Appeal No. 24-B of 1927, Decided on 24th September 1929, against order of First Sub-Judge, First Class, Khamgaon, D/- 5th April 1927.

Civil P. C., O. 21, R. 90—Auction purchaser is necessary party in Court making inquiry into application under O. 21, R. 90 and also to appeal against that order.

An application under O. 21, R. 90 was dismissed. An appeal was preferred and the decree-holder and the judgment-debtor were made respondents to the appeal but the auction purchaser was not made a party.

Held: that the auction purchaser being a person likely to be affected by the application under O. 21, R. 90, and as such entitled to notice of the application was a necessary party in the Court making the inquiry into the application and also to an appeal against the order and as he was not made a party the appeal must be dismissed; 39 Cal. 687, *not Appl.* [P 5 C 2]

G. R. Deo—for Appellants.

Fida Hussain—for Respondents.

Order.—The appellants are not legal representatives of Indar Singh, who had filed an application in the Court of First Sub-Judge, First Class, Khamgaon for setting aside the sale of the property which was sold in execution of the decree obtained by Mofatlal Manilal against Shamshere Ali. The learned Subordinate Judge held that no fraud or irregularity as contemplated in O. 21, R. 90, Sch. 1, Civil P. C. was established and dismissed the application. This appeal was filed on 16th June 1927, but the auction purchaser Inayat Ali was not made a party to it. Applications were filed on 20th November 1928 and 22nd November 1928 asking this Court to add the auction-purchaser as a respondent and the applications were rejected on 5th April 1929.

The question for consideration now is whether the sale which was confirmed on 5th April 1927 in favour of the auction purchaser can now be set aside in this appeal, in which appeal the auction purchaser is not a party. The learned advocate for the appellants argues that in this appeal the auction purchaser is not a necessary party because he is represented by the decree-holder and the judgment-debtor who are respondents in this appeal and he cites

Sunderabai v. Shrikisan (1) in support of his contention. That decision does not support the point urged, and clearly lays down that :

“whether an auction purchaser is a representative of the decree-holder or judgment-debtor depends upon the nature of the conflicting interests or questions raised and who the contesting party is, and varies according to the facts involved in each case.”

It is not possible to hold in this case that the auction purchaser is not a necessary party, because the respondents in this appeal are his representatives.

It is further contended that the auction purchaser is not, in any case, a necessary party, and reliance is placed on a decision of the Calcutta High Court in *Surendra Mohini Debi v. Laharam Chattopadhyaya* (2) in which Brett and Carnduff, JJ. observed as follows :

“So far as this Court is concerned, no authority has been produced before us to support the contention that the auction purchaser is a necessary party to an application under S. 311, old Civil P. C., and the reasons given in the decisions of the Allahabad Court, to which we have referred, do not appear to us to be based on sound or sufficient grounds.”

The above decision is no longer applicable in view of the changes introduced in Act 5 of 1908. The proviso under sub-Ss. (1) and (2), R. 92, O. 21, Sch. 1, Civil P. C. runs as follows :

“Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.”

Auction purchaser is certainly one of the persons likely to be affected by the application made under O. 21, R. 90 and is a person who must have notice of the application. If he is a necessary party in the Court which makes the enquiry, he is also a necessary party in the appeal, filed against that order. The defect is fatal and must result in the dismissal of the appeal, in which a necessary party has not been joined as a party. The appeal therefore fails and is dismissed with costs. Pleader's fees Rs. 50.

P.N./R.K.

Appeal dismissed.

(1) A. I. R. 1924 Nag. 328=20 N. L. R. 170.

(2) [1912] 39 Cal. 687=14 I. C. 67=16 C. W. N. 570.

A. I. R. 1930 Nagpur 6

MACNAIR, OFFG. J. C. AND
JACKSON, A. J. C.

Commissioner of Income-tax—Applicant.

v.

Kikabhai—Non-Applicant.

Misc. Judicial Case No. 58 of 1928,
Decided on 10th September 1929.(a) Contract Act, S. 239—S. 239 does not
require profits to be shared at any particular
time.The definition of "partnership" in S. 239
does not require the profits to be shared at any
particular time. Partners can leave their pro-
fits in the business. The real test is whether
each could withdraw his share, if he so
desired. [P 6 C 1, 2](b) Income-tax Act, S. 2 (14)—Certificate
given in good faith — Persons constituting
firm—Members intending to divide profits—
Firm is entitled to be registered.The certificate to be given in the form
prescribed in the Income-tax Rules is not that
the profits will be divided or credited within
some fixed period. Thus where a certificate is
given in good faith and the persons constitute
a firm and intend to divide the assets when-
ever it may be necessary or convenient for
them to do so, that firm is entitled to be
registered. [P 6 C 2]

D. N. Choudhry—for Applicant.

M. B. Niyogi—for Non-Applicant.

Order.—Under S. 66 (1), Income-tax
Act, the Commissioner of Income-tax has
submitted the following point of law for
decision :

"Whether the three Shia Bohra brothers of
Raipur, i.e., Kikabhai, Ibrahimji and Taher-
bhai, who have inherited the property and
business of their father Abdulali, who are
living, messing and carrying on business jointly,
who keep no accounts of the income made
during the year, who keep no separate ledgers
in their books of accounts for themselves,
who have no intention to do so in future and
who have no intention to divide their profits,
could be declared "a registered firm" under
S. 2 (14), Income-tax Act."

The three brothers do business under
the name of A. Ahmadjibhai. They live
together with their mother and each
month Rs. 530 is withdrawn from the
shop, of which each of the brothers takes
Rs. 50, for personal expenses and the
mother Rs. 80 for her personal expenses
and Rs. 300, for household expenses. The
rest of the profits are left in the business.
It seems to us that the three brothers
can be held to constitute a firm within
the meaning of S. 239, Contract Act,
because they do intend eventually to
share among them the profits of the shop.
The definition of "partnership" in that

section does not require the profits to be
shared at any particular time. Partners
can leave their profits in the business,
and the real test is whether each could
withdraw his share, if he so desired. In
the present case, it would appear that
the arrangement between the brothers
is such that one of them could not
withdraw only his share of the profits;
but each could withdraw from the busi-
ness and demand his share of the assets
including the accumulated profits.

The Commissioner of Income-tax con-
tends, however, that not every firm is
entitled to be registered under S. 2 (14),
Income-tax Act. A firm desiring regis-
tration must furnish prescribed parti-
culars in the prescribed manner to the
Income-tax Officer. In the form pres-
cribed in the Indian Income-tax Rules a
certificate has to be given that the pro-
fits for the year last ended have been or
will be actually divided or credited in
accordance with the shares shown in the
partnership deed. In the present case,
the certificate given is that the profits of
the year ending Diwali 1926 will be
actually divided or credited. The certifi-
cate is in order, but the Commissioner
alleges that it is incorrect, because the
brothers have no intention to divide or
credit the profits. The certificate to be
given is not that the profits will be
divided or credited within some fixed
period; and it seems to us that when a
certificate in the prescribed form is given
in good faith, if the applicants do consti-
tute a firm, that firm is entitled to be
registered.

In the present case we are satisfied
that the certificate was given in good
faith. There is no doubt as to the facts.
The brothers have each got a one-third
share in the shop that they own and
that is not denied. They intend to
divide the assets whenever it may be
necessary or convenient for them to do
so, and on the division being made, each
will necessarily get a share of the pro-
fits made during each and every year
that they carried on business in partner-
ship. We consider that the three brothers
carrying on business under the name of
A. Ahmadjibhai are entitled to become a
registered firm under S. 2 (14), Income-
tax Act.

P.N./R.K.

Order accordingly.

A. I. R. 1930 Nagpur 7

JACKSON, A. J. C.

Punji—Appellant.

v.

Govind and others—Respondents.

Second Appeal No. 260-B of 1928, Decided on 26th September 1929, against decree of Addl. Dist. Judge, Buldana, D/- 22nd October 1928.

Hindu Law—Joint family — Family property—Even property acquired by one of two joint brothers by his own exertions and thrown into common stock is joint family property if brothers do not intend to treat it as joint property only.

Whether property is joint family property does not merely depend upon whether it is acquired with joint family funds or whether there is a nucleus of the joint family property. Even property acquired by one of two joint brothers by his own exertions and thrown into common stock is to be regarded as joint family property, if the brothers do not intend to treat it as joint property only, and their male issue necessarily acquires a right in it by birth: *A. I. R. 1926 Bom. 408, Rel. on.* [P 7 C 2]

V. N. Herlekar and N. R. Phatak—for Appellant.

T. L. Sheode—for Respondents.

Judgment.—The appellant in this case was defendant 1 in the trial Court. She is in possession of Survey No. 13 of mouza Jambhor in the Mehkar Taluk. This field had been given to her for maintenance by Gopal, the father of the plaintiff, by Ex. 1 D 1. The appellant has been found to have been the concubine of Gopal and the grant to have been made in consideration of her past and future cohabitation with Gopalrao. The grant has consequently been held to be void because it was made for an immoral consideration and the plaintiff's claim to possession has been decreed.

In appeal it is argued, in the first place, that the field is not ancestral property, that the plaintiff-respondent did not take any interest in it by birth and that he is not entitled to question the grant made by his father. The argument is based on S. 186 of Mulla's Hindu Law which deals with the character of property jointly acquired by members of a joint Hindu family, and, in particular, on this sentence:

"If it is the joint property of the joint acquirers, it would pass by survivorship but the male issue of the acquirers do not take any interest in it by birth."

The facts, as found by the lower appellate Court and accepted by the appellant are that Yadorao, the uncle of

Govind, and Gopal were joint, that the field in question which was acquired by Yadorao was thrown into the common stock and treated as joint family property. It is urged that on these facts the pronouncement in Mulla's Hindu Law applies to the case; but clearly it does not, as it has not been held that the field is joint property and not joint family property. That does not depend on whether it was acquired with joint family funds or whether there was a nucleus of joint family property, as has been argued for the appellant. In Mayne's Hindu Law, 9th Edn. para. 277, it is laid down, in respect of property jointly acquired, that, if several brothers acquired a fortune by their own exertions without any assistance from ancestral property, the property acquired would, in the absence of any indication of an intention to the contrary, be owned by them as joint family property; and in that case their male issue would necessarily acquire a right in it by birth, for under the Mitakshara system there can be no joint family property in respect of which the male issue of the joint owners do not take a share by birth. It is added that if there is satisfactory evidence of an intention to treat the property not as joint family property but joint property only, it will be given effect to; but it is also said that the presumption is in favour of its being regarded as joint family property. That statement of the law receives support from a recent decision, *Haridas v. Dev Kuvarbai* (1) and justifies me in accepting, on the facts found by the lower appellate Court, the finding that the plaintiff obtained an interest by birth in the field now in dispute, as it has not been held that Yadorao and Gopal intended to treat the field as joint property only.

It is, however, argued that the appellant, as concubine of the deceased Gopal, is entitled to maintenance on the strength of the decision in *Ningareddi v. Lakshmawa* (2), as she was in Gopal's keeping until his death. This is a claim made for the first time in this Court. I do not propose to consider it, as all the facts necessary to know in connexion with it have not been proved. That, as has been pointed out on behalf of the plaintiff-respondent, the connexion bet-

(1) *A. I. R. 1926 Bom. 408=50 Bom. 443.*

(2) [1903] 26 Bom. 163=3 Bom. L R. 647.

ween the appellant and Gopal was an adulterous one, as the appellant's husband died on 17th June 1909, that is, a little more than a year after the grant for maintenance was made in favour of the appellant, is not sufficient ground for holding that she cannot get maintenance; but before holding that she can, I should require the nature and duration of her connexion with the deceased Gopal to be shown. The appellant must seek maintenance in a separate suit. I dismiss the appeal with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1930 Nagpur 8**

SUBHEDAR, A. J. C.

Gajadhar—Defendant—Appellant.

v.

Seth Meghraj—Plaintiff—Respondent.

Second Appeal No. 347 of 1928, Decided on 28th August 1929, against decree of Dist. Judge, Jubbulpore, D/- 24th February 1928.

(a) C. P. Tenancy Act S. 89—Surrender made by four out of five brothers, in discharge of debt binding on all — Value of surrendered holding not more than amount of debt—Surrender is valid and binding even on fifth.

Every act done by one joint tenant for the benefit of himself and his companion binds the other, but not those acts which prejudice the other. Thus where surrender is made by four brothers who are joint tenants with the fifth and who are in sole charge and management of the holding in consideration of a debt which is binding on all the tenants and where the value of the surrendered holding is not more than the amount of debt, such surrender made in discharge of the debts is not prejudicial to the fifth tenant and is valid and binding even on him: *Right v. Cuthell*, 7 R. R. 752, Rel. on. 8 N. L. R. 29, Ref. [P 9 C 1, P 10 C 1]

(b) Practice—Plaintiff failing to prove all facts alleged is entitled to relief if pleading of defendant and finding of Court show him entitled to it—Evidence Act S. 101—Onus immaterial.

A plaintiff, who fails to prove all the facts alleged by him, may yet obtain the whole or any part of the relief claimed by him if the facts pleaded by the defendant and found by the Court, show him to be entitled to it: 4 N. L. R. 86, *Foll.* [P 9 C 2]

A. Razak—for Appellant.

M. B. Kinkhede and N. G. Bose—for Respondent.

Judgment.—This second appeal arises a very nice question of law. The facts of the case may shortly be stated as under:

One Nanheylal was a tenant holding lands in the villages of Rukwara in the Narsinghpur District and Chandana in the Saugor District. He had five sons, 1 Bansidhar, 2 Rajaram, 3 Jankiprasad, 4 Choteylal and 5 Gajadhar. The plaintiff's case was that even during the lifetime of Nanheylal, Gajadhar had separated from his father and brothers in 1913 and got for his share the fields in the Saugor District and that he lived and enjoyed these fields as his separate property while the fields in the Narsinghpur District remained with the father and the other sons as their separate property, although until the death of Nanheylal in 1918 all the fields in both the districts were recorded in the revenue papers as the holding of Nanheylal.

The plaintiff alleged that on 11th June 1925 the four brothers other than Gajadhar who were the real tenants of the fields in the village of Rukwara, of which he is the landlord, surrendered them to him in consideration of the debt of Rs. 3,587-11-6, but that in the current settlement which was announced in 1926 these fields came to be recorded as the occupancy holding of all the five sons of Nanheylal. The plaintiffs, therefore, brought the suit, out of which this second appeal arises, in the Court of the Subordinate, Judge First Class, Narsinghpur, for a declaration that the settlement entry was wrong and that the fields should be recorded as his khudkast by virtue of the aforesaid surrender. All the five sons of Nanheylal were made defendants to the suit.

The claim was contested by the defendants on various grounds the principal ones being that there was no partition between them as alleged by the plaintiff and that the surrender by four out of the five tenants in respect of the entire holding was void. The Subordinate Judge held that there was no partition between the defendants, that all of them were the tenants of the fields in dispute, that the surrender by four brothers operated only upon their $\frac{4}{5}$ share, and that $\frac{1}{5}$ share of the defendant Gajadhar in the holding was not affected thereby. It was accordingly declared that the fields to the extent of $\frac{4}{5}$ th share were the khudkast of the plaintiff and to the extent of $\frac{1}{5}$ th share they were the occupancy holding of the defendant Gajadhar.

Against this decree the plaintiff preferred an appeal to the District Judge, Jubbulpore, contending that the finding as to partition should have been in his favour, that it should have been held that the defendant Gajadhar had abandoned the holding and was not a tenant thereof at the date of the surrender, and that therefore the surrender operated upon the entire holding. Gajadhar, who was the sole respondent to the appeal, filed cross-objections contending that the surrender by four out of the five tenants was void even to the extent of their undefined shares in the holding and that therefore he alone was the sole tenant of the holding. On plaintiff's appeal the learned District Judge held that the partition set up by the plaintiff was not proved, but that for the convenience of management Gajadhar was put in sole charge of the fields in the Saugor District while the rest of the members of the joint family remained in charge of the Rukwara fields. It was also held that on the death of Nanheylal all the five brothers became joint tenants of all the fields situate in both the districts and that at the date of surrender Gajadhar defendant was a joint tenant of the surrendered fields.

On the principle of law laid down in *Nilkanth v. Bhagwant* (1), *Sumer v. Premchand* (2) and *Shersingh v. Kalusingh* (3) the learned District Judge upheld the first contention of the respondent Gajadhar and rightly held that the surrender by four out of the five tenants of the entire holding could not operate even upon their undefined share in the holding, and that the sole remaining joint tenant Gajadhar was entitled to remain in possession of the entire holding, but it allowed the plaintiff's appeal on ground that the surrendering tenants, or at any rate the eldest of them being the manager of the joint family in charge of the cultivation of the Rukwara fields, could validly make the surrender for the antecedent debts of the family which must be held binding even on Gajadhar, and also on the principle underlying S. 41, T. P. Act, that the surrendering brothers were the ostensible tenants of the holding being in sole charge of the

surrendered fields and that the surrender was, therefore, valid.

Against this decree Gajadhar has filed the present second appeal. Mr. Razak, who appeared for the appellant, argued that the lower appellate Court was wrong in allowing the plaintiff's claim on an entirely new case which was never set up by the plaintiff either in the pleadings or grounds of appeal before that Court. The respondent's learned advocate on the other hand justifies the action taken by the lower appellate Court on the ground that that Court had ample powers to pass the decree in plaintiff's favour on the facts pleaded by the appellant himself and the findings arrived at by the Court. In *Loola v. Pyare* (4) at p. 60 this Court has remarked that

"the tendency now is not to dismiss suits on purely technical grounds," and in *Gama v. Lahario* (5) it was held, that a plaintiff, who fails to prove all the facts alleged by him, may yet obtain the whole or any part of the relief claimed by him, if the facts pleaded by the defendant, and found by the Court, show him to be entitled to it.

It is clear from the admissions of Gajadhar himself as contained in his pleadings and the findings of the two lower Courts that in spite of the fact that he succeeded to the holding in dispute, along with his four brothers, upon the death of his father, he never actually took any part in its cultivation, but that it was solely managed by his brothers on his behalf. Even in the village papers (Exs. P-9, 10 and 11) his name did not appear as a joint tenant and his brothers were alone recorded as tenants. But since no partition as alleged by the plaintiff was proved it was held by the lower Courts that the tenant of the appellant existed at the date when the holding was surrendered in the plaintiff's favour by the appellant's four brothers. In other words the appellant and his four brothers were held to be joint tenants of the holding.

On the facts so found the simple question for determination was if the surrender made by his four brothers, who were joint tenants with the appellant but were in sole charge and management of the holding, could operate as a

(1) [1913] 13 N. L. R. 175=42 I. C. 270.

(2) [1914] 14 N. L. R. 62=44 I. C. 845.

(3) A. I. R. 1925 Nag. 124=22 N. L. R. 17.

(4) [1916] 12 N. L. R. 57=33 I. C. 497.

(5) [1903] 4 N. L. R. 86.

valid surrender binding upon the appellant. An affirmative answer to this question is furnished by the following quotation of law from the case of *Right v. Cuthell* (6) (at p. 754) cited with approval by this Court in *Bapu v. Temsa* (7) (at p. 31):—

"Every act done by one joint tenant for the benefit of himself and his companion binds the other, but not those acts which prejudice the other."

It is, therefore, clear that if the surrender in question was made by the appellant's brothers in their capacity as joint tenants in the ordinary course of management of the joint holding which did not prejudice the appellant, then the surrender must be held binding upon him. Both the Courts below have definitely found on issue 4 that all the defendants including the appellant were liable to pay to the plaintiff Rs. 3,587-11-6, and therefore the surrender in question having been made in discharge of these debts could not be termed as an act prejudicial to the appellant, as it is not alleged that the value of the surrendered holding was more than the said amount. I, therefore, uphold the decision of the lower appellate Court, though on different grounds that the surrender was binding upon the appellant. In the light of this finding it is not necessary to consider if S. 41, T. P. Act, also governed the present case. The result is that this second appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

(6) 7 R. R. 752=2 Marsh 83=5 Esp. 149=5 East 491.

(7) [1912] 8 N. L. R. 29=13 I. C. 932.

A. I. R. 1930 Nagpur 10

SUBHEDAR, A. J. C.

Kashibai—Applicant.

v.

Shrikumar—Non-Applicant.

Civil Revn. No. 55-B of 1929, Decided on 29th April 1929, from order of First Class Sub-Judge, Akola, D/- 17th December 1928, in Civil Suit No. 17 of 1928.

Civil P. C., S. 115—Preliminary decree personally against *A* declaring him *P*'s partner and for rendition of accounts—*A* dying while proceedings pending—*P* seeking to substitute *A*'s brother and son alleging that *A* entered into business with him as manager of Hindu family—No allegation that *A*'s brother had given *A* consent to enter

business—Court substituted son and not brother—Order refusing to substitute is revisable—Court's order held proper—Civil P. C., O. 22 R. 3—Hindu Law.

A preliminary decree was passed against *A* personally declaring him to be a partner with *P* and for rendition of partnership accounts. During continuance of further proceedings *A* died and *P* prayed to substitute the son and the brother of *A* as legal representatives on the ground that *A* entered into the partnership as manager of the joint Hindu family consisting of himself, his brother and son. There was no allegation that the brother had given his consent to *A* for carrying on the new business with *P*. The Court holding that *A* could not even if he entered the business as manager make other members partners with *P*, substituted only the son of *A* on the ground that trade debts of the father are binding on son.

Held: that the order refusing to substitute brother could be revised. [P 11 C 1]

Held further: that the Court was correct in refusing to substitute the brother as legal representative: 15 N. L. R. 21, *Rel. on*; 46 Cal. 962, *Ref.* [P 11 C 2]

M. R. Bobde—for Applicant.

W. R. Puranik—for Non-Applicant.

Order.—In the case out of which this application for revision arises a preliminary decree for dissolution of partnership and rendition of accounts was passed by the First Class Subordinate Judge No. 1, Akola, personally against the original defendant Ambadas. This decree was confirmed by this Court in First Appeal No. 41-B of 1924 on 15th April 1925. By the decree it was declared that the defendant was a partner of the plaintiff, that the share of each partner was equal, and that the defendant who was the managing partner should render accounts of the partnership.

Further proceedings continued but on 7th December 1927 the plaintiff informed the Court of the death of the defendant Ambadas and named (1) Shrikumar, a minor son of the deceased and (2) Mr. Manohar Mahajan, the brother of the deceased as the legal representatives of the deceased defendant. The plaintiff prayed for substitution of both the son and the brother of the deceased defendant on the ground that all of them formed a joint Hindu family, and that because the deceased Ambadas entered into the partnership with the plaintiff as manager of this joint family each one of the members became plaintiff's partners, and that therefore the partnership business in suit was a concern of this joint family. The non-applicants denied these

contentions and asserted that the deceased defendant was plaintiff's partner in his own individual capacity and that the partnership business was not a joint family concern.

In an elaborate judgment the lower Court held that the partnership business, which is the subject matter of the suit, was a personal affair of the deceased Ambadas as opposed to the concern of the joint family consisting of the deceased, his son and his brother, and that the deceased Ambadas by entering into the partnership even as a manager could not in law make the other members partners of the plaintiff. On the theory that the father's trade debts are binding upon him, the minor son of the deceased defendant was alone substituted in place of the deceased for the purposes of continuing further proceedings in the suit. On the findings arrived at the lower Court refused to substitute the non-applicant No. 2 also in place of the deceased defendant as his legal representative.

Against the above order the plaintiff has filed the present application for revision. A preliminary objection has been taken by the non-applicant's advocate that no revision lies under S. 115, Civil P. C., against the order sought to be revised. It is, however, contended for the applicant, on the authority of *Hindley v. Joynarain* (1) (at 972-973), that since the lower Court has taken an erroneous view of the law applicable to the facts of the case and refused to decide issues 1 and 2 it acted illegally in the exercise of its jurisdiction within the meaning of S. 115, Cl. (c), Civil P. C. this Court is competent to revise the order. In the case of *Amolaksao v. Govindrao* (2) this Court had interfered with the order of the lower Court in the matter of substitution under S. 115, Civil P. C., and on the peculiar facts of the present case I am inclined to overrule the preliminary objection raised by the non-applicant.

On the merits of the case, however, I see no reason to differ from the findings of fact and law arrived at by the lower Court. On the face of the decree it was passed personally against the deceased Ambadas. If the plaintiff

wanted to treat all the coparceners of the joint family as partners she should have impleaded all of them as party defendants. Even in the proceedings for substitution the plaintiff did not allege that Mr. Manohar Mahajan, the non-applicant No. 2, had expressly or impliedly given his consent to the deceased Ambadas to carry on this new partnership business with the plaintiff. It is, therefore, clear on the authorities cited in the lower Court's judgment that the non-applicant No. 2 could not be substituted as a legal representative of the deceased defendant against whom a purely personal preliminary decree was passed for the purpose of continuing the proceedings relating to the final decree in the suit. The application for revision, therefore, fails and is dismissed with costs. Pleader's fee Rs. 25.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 11

SUBHEDAR, A. J. C.

Ganpat—Appellant.

v.

Ramchandra—Respondent.

Second Appeal No. 227-B of 1928, Decided on 5th July 1929, from decree of Dist. Judge, Akola, D/- 22nd June 1928, in Civil Appeal No. 6 of 1928.

(a) Civil P. C., S. 100—Objection that property was not attachable not taken at early stage—Finding without considering delay arrived on other evidence—Finding held good and binding in second appeal.

The objection that a house being occupied by a person as an agriculturist was not liable to be attached was not raised at the earliest possible opportunity. The Court did not take into consideration that the delay threw a deal of doubt on the genuineness of the objection but found on other evidence on record that the house was so occupied.

Held : that the finding of fact based on other evidence on record is still good and binding on High Court in second appeal : *A.I.R. 1924 Nag. 91, Rel. on.* [P 12 C 1]

(b) Civil P. C., S. 60 (1)—Objection that house being occupied by agriculturist as agriculturist can be entertained though it is not raised at earlier stage of execution proceedings.

The proviso to S. 60 (1) is mandatory and the Courts have no jurisdiction to attach and sell any of the properties specified therein. There being no prescribed period of time within which an objection that a house being occupied by an agriculturist as an agriculturist is not liable to be attached, has to be preferred, the Court can entertain it and decide it on merits in spite of the fact that it is not urged at an earlier

(1) [1919] 46 Cal. 932=54 I. C. 439=24 C. W. N. 288.

(2) [1919] 15 N. L. R. 21=40 I. C. 34.

period of the execution proceedings : *A. I. R.*
1925 Nag. 320, Dist. [P 12 C 2]

M. R. Bobde—for Appellant.

A. R. Chorghade—for Respondent.

Judgment.—This second appeal arises out of proceedings in execution of a decree in which the appellant decree-holder had attached a house situate at mouza Boralal in the Basim Taluq belonging to the respondent judgment-debtor. On an objection by the latter that the house in question was occupied by him as an agriculturist it has been released from attachment. Both the Courts below have concurred in finding that the respondent judgment-debtor was an agriculturist and that the house attached was used by him as an agriculturist. They have also held that the respondent judgment-debtor was competent to raise the objection in spite of the fact that he did not raise it at the time when he had made an application for setting aside its first sale.

The first contention raised was that the evidence on record does not warrant the finding that the respondent was an agriculturist and used the house as such, because the witnesses, who speak on the point, do not do so on personal knowledge. I, however, find that the witnesses are very definite in their statements and if the appellant wanted to challenge their testimony as hearsay he should have done so in cross-examination.

It was next urged that in arriving at the finding that the judgment-debtor was an agriculturist and occupied the house as such, the lower appellate Court has not taken the most important factor into consideration, viz., that the judgment-debtor did not prefer an objection under S. 60 (1) (c), Civil P. C., at the earliest possible opportunity, and which circumstance threw a good deal of doubt on the genuineness of the objection. The record however, does not show that this circumstance was not present to the mind of the lower appellate Court when it arrived at the findings of fact. But even assuming that the lower appellate Court failed to take it into consideration still on the principle enunciated in *Tukaram v. Chintaman* (1), the findings of fact based on other evidence on record are still good and valid findings binding on this Court in second appeal.

The last point urged was that the

(1) *A. I. R.* 1924 Nag. 91=20 N. L. R. 17.

objection under S. 60 (1) (c) not having been preferred at the time when the judgment-debtor moved for setting aside the first sale on grounds of irregularities the judgment-debtor was barred by the principles of *res judicata* in urging the same at a later stage of the execution proceedings. Reliance was placed in support of this argument on the case of *Mt. Rukhamabai v. Ramchandra* (2). But since the facts and circumstances of that case are easily distinguishable from those of the present case the law propounded therein does not apply here. The proviso to S. 60 (1) is mandatory and the Courts have no jurisdiction to attach and sell any of the several properties specified therein. There being no prescribed period of time within which an objection of the present nature has to be preferred the Courts below were right in entertaining it and deciding it on its merits in spite of the fact that it was not urged at an earlier period of the execution proceedings. The appeal fails and is dismissed with costs. Pleader's fee Rs. 25.

P.N./R.K.

Appeal dismissed.

(2) *A. I. R.* 1925 Nag. 320=21 N. L. R. 23.

A. I. R. 1930 Nagpur 12

SUBHEDAR, A. J. C.

Wamanrao—Appellant.

v.

Bhagwan Prasad—Respondent.

First Appeal No. 157 of 1928, Decided on 22nd March 1929, from decree of Addl. Dist. Judge, Narsingpur, D/- 4th October 1928, in Civil Suit No. 34 of 1924.

Civil P. C., O. 34, R. 3 (21)—Preliminary decree for foreclosure — Application for extension by judgment-debtor for reason that as prior mortgagee had sued on his mortgage he was unable to raise loan—No evidence of bona fide efforts to secure loan — Good cause entitling applicant to extension held not shown.

A judgment-debtor, against whom a preliminary decree for foreclosure was passed, applied for extension of time for the reason that on account of a prior mortgagee having filed a suit on his mortgage he was unable to secure a loan to pay off the decretal debt. There was no evidence to show that he had made bona fide efforts to secure the loan.

Held : that the reason assigned could not be called good cause and the applicant was not entitled to extension : 10 N. L. R. 150 and *A. I. R.* 1928 P. C. 137, *Rel. on.* [P 13 C 2]

D. T. Mangalmurti—for Appellant.

T. J. Kedar—for Respondent.

Judgment.—The facts necessary for the disposal of this appeal are shortly these. On 6th November 1925 the usual preliminary decree for foreclosure was passed by the Additional District Judge, Narsinghpur, against the appellant mortgagor fixing 6th May 1926 as the date for payment of the decretal amount of Rs. 14,935. In the proceedings relating to the final decree, which were started by the respondent mortgagee on 10th July 1926, the appellant prayed for and was allowed an extension of time for payment till 30th November 1926, subject to payment of interest at 6 per cent per annum on the decretal amount from 6th July 1926 to 30th November 1926. No further steps were taken by the appellant either for payment or for applying for further extension of time until the respondent filed his second application, on 5th March 1928, for making the preliminary decree final. For seven months notices could not be served on the appellant mortgagor of this application. Ultimately on 27th October 1928 he appeared in the lower Court and submitted through his pleader an application for the grant for retrospective extension of time till 30th April 1929, the reasons assigned being that on account of one Anupurnabai a prior mortgagee having filed a suit on her mortgage the appellant was unable to secure a loan with which to pay off the present decretal debt, and that there were successive failure of crops for the last three years.

The respondent naturally opposed the prayer for any further extension of time being granted to the appellant. The lower Court framed the necessary issue :

“Whether it would be proper and equitable to grant extension of time to the defendant ”

and as the parties did not wish to adduce evidence, passed an order refusing further extension and made the conditional decree for foreclosure final. Against this order and decree the present appeal is filed. The only argument advanced in support of the appeal is that until the final disposal of the prior mortgagee's suit an appeal against which is now pending in this Court the decree nisi in the present case should not be made absolute, because it was on account of the pendency of this large claim that the appellant could not secure a loan to pay off the respondent's decree.

The other reason assigned in the lower Court about successive failures of crops was not put forward in this Court.

There is nothing on the record of this case to show that the appellant made any bona fide efforts to secure loans for payment to the respondent, and in the absence of such evidence it is impossible for this Court to hold that the refusal of the lower Court for further extension was either illegal or inequitable. In *Balkrishan v. Atmaram* (1) this Court has very clearly laid down that in every case, before extending time for the payment of money in satisfaction of a foreclosure decree, the Court has to be satisfied, in the exercise of a reasonable discretion, that there is good cause for allowing the extension, that this good cause is not to be assumed either from non-payment or deferred payment, and that it must be alleged and judicially proved. In a very recent case from this Court which went up to the Privy Council, their Lordships also affirmed the principle that extension of time can only be granted for good cause shown under O. 34, R. 3 (2), Civil P. C. and not otherwise : *Moti Lal v. Ujjar Singh* (2). Bearing in mind the principles laid down above it is manifest that the reason assigned for the grant of extension of time in the present case cannot be called good cause within the meaning of O. 34, R. 3 (2), Civil P. C. For the foregoing reasons this appeal fails and is dismissed with cost.

P.N./R.K. *Appeal dismissed.*

(1) [1914] 10 N. L. R. 150=26 I. C. 701.

(2) A. I. R. 1928 P. C. 137=24 N. L. R. 182=55 Cal. 821=55 I. A. 207.

* A. I. R. 1930 Nagpur 13

STAPLES AND SUBHEDAR, A. J. Cs.

Miralal—Defendant—Appellant.

v.

V. M. *Jakatdar*—Plaintiff—Respondent.

First Appeal No. 100 of 1927, Decided on 22nd August 1929, from decree of Addl. Dist. Judge, Bhandara, D/- 29th April 1927, in Civil Suit No. 2 of 1926.

* **Registration Act, S. 17 (1) (b) and S. 17 (2) (11)—Receipt passed by mortgagee in favour of mortgagor — Former agreeing to relinquish his claim to interest due under mortgage — Interest more than Rs. 100—Agreement is not covered by S. 17 (2) (11) but falls under S. 17 (1) (b).**

A mortgagee in a receipt passed by him in favour of the mortgagor agreed to relinquish

his claim to interest due under the mortgage, the interest amounting to more than Rs. 100.

Held : that the agreement was not covered by S. 2 (11).

Held further : that the agreement purported to limit or extinguish interest in immovable property within the meaning of S. 17 (1) (b) and as such required to be compulsorily registered : 35 *All.* 202 and 24 *M. L. J.* 179, *Foll.*; 35 *All.* 48 (P.C.) and 26 *Cal.* 707 (P.C.), *Ref.*

[P 17 C 1]

G. P. Dick and A. N. Chorghade—for Appellant.

V. V. Jakatdar and P. A. Pandit—for Respondent.

Judgment.—The facts giving rise to this and the other two First Appeals Nos. 101 and 102 of 1927 are these. On 21st December 1912 in consideration of a cash loan of Rs. 16,000 the defendant had executed a mortgage by conditional sale in favour of one Bhika Patel. The mortgage debt was to carry interest at 0-11-6 per cent per mensem, and was repayable in 12 years by annual instalments of Rs. 1,333 each in the next 11 years and the last instalment for the 12th year was of Rs. 1,337. Together with each annual instalment the interest on the entire amount at the above rate was also agreed to be paid and defaulted instalments were to carry compound interest at the rate of Rs. 1-8-0 per cent per mensem. The whole amount was exigible on failure to pay any two instalments. Repayments were agreed to be taken in the first instance towards interest due and the balance if any towards the principal.

On 3rd December 1915 the defendant again borrowed Rs. 16,000 from the said Bhika Patel and executed two separate mortgages by conditional sale in his favour, one for Rs. 10,000 and the other for Rs. 6,000. The debts due on both these mortgages were repayable in 16 years by annual instalments of Rs. 625 and Rs. 375 respectively. The mortgage debt in each case was to carry interest at Rs. 1-6-0 per cent per mensem and was payable in respect of the entire principal together with each annual instalment. The whole amount due on each bond was exigible on failure to pay any two instalments, and defaulted instalments were to carry to compound interest at the rate of Rs. 2 per cent per mensem. As in the case of the first mortgage repayments were to be appropriated first towards interest due in res-

pect of both these mortgages and the balance towards the principals.

After Bhika Patel's death his three sons Balaram, Raoji and Tikaram assigned their mortgagee rights under all the three aforesaid mortgages to the plaintiff on 30th April 1924 for a cash consideration of Rs. 27,025 by a registered deed of transfer and the defendant mortgagor was duly given notice of this assignment. The plaintiff brought three separate suits in the Court of the Additional District Judge, Bhandara, to enforce the aforesaid mortgages. Suit No. 2 of 1926 was on the first mortgage of Rs. 16,000 in which the plaintiff claimed Rs. 58,869-10-0, Suit No. 5 of 1926 was on the mortgage of Rs. 6,000 in which the claim was for Rs. 27,817-12-6, while Suit No. 9 of 1926 was on the mortgage of Rs. 10,000 in which the claim was for Rs. 43,632-11-6. One repayment of Rs. 2,925 made to the original mortgagee was credited towards the mortgage of Rs. 10,000.

Practically the defence in all the three suits was the same. The defendant admitted the execution and receipt of consideration of all the three mortgages as also the execution of the deed of assignment in plaintiff's favour. He, however, pleaded that the transfer in plaintiff's favour was void under S. 23, Contract Act, because it was a champertous transaction. It was also alleged that on 9th January 1924 Balaram as the manager of the joint family consisting of himself and his brothers having received Rs. 2,975 had agreed with the defendant to receive Rs. 29,075 more towards full discharge of all the mortgages provided the payment of this sum was made within three months, and that Balaram again promised to wait for another year and to accept payment of the amount due with interest at 8-annas per cent per mensem.

It was also pleaded that after the defendant received the notice of the assignment he offered to pay to the plaintiff Rs. 29,075 as per aforesaid agreement of 9th January 1924 with Balaram, but the plaintiff declined to receive it and claimed the amount as per terms of the mortgage deeds. The defendant further denied his liability to pay the exorbitant interest claimed by the plaintiff on the ground that it was penal.

A fair idea of the further pleadings of the parties would be gathered from a perusal of the following issues which were settled for trial in all the three cases:

"1. Whether there was agreement between Balaram and defendant that the three mortgages will be completely discharged if defendant paid Rs. 29,075 within one year from 9th January 1924? If so, what is its effect on the present suit?

(a) Whether Balaram is the karta of the joint family and as such whether he had any authority to enter into any agreement as alleged by the defendant?

(b) Whether the plaintiff knew of the above agreement and when?

(c) Whether the receipt dated 9th January 1924 requires registration and without this whether it is inadmissible in evidence?

(d) Whether the agreement dated 9th January 1924 is valid and binding on the parties to the suit?

(e) Whether the plaintiff was the legal adviser of Balaram and the defendant?

(f) Whether the plaintiff was instrumental in bringing about the above agreement?

2. Can the defendant give oral evidence of this agreement contradicting the terms of the receipt filed by him?

3. Was plaintiff aware of this agreement and if so does it prevent the plaintiff from bringing the present suit?

4. Did defendant offer to pay Rs. 29,075 to plaintiff on 7th May 1924 and if so what will be its effect?

5. Did Balaram and his brother assign the rights to plaintiff by a deed dated 30th April 1924?

(b) Is the transaction champertous?

6. Is there any novation of contract as pleaded by defendant and

(b) If so, does it prevent the plaintiff from suing separately on each bond?

7. Is the interest charged exorbitant and can it be relieved against on that account? What interest should be allowed to plaintiff?

8. Can the Court reopen the previous accounts and reduce the amount of capital mentioned in the mortgage deed for the reasons alleged by defendant in para. 5 of his written statement?

The findings of the lower Court on the several issues may be summarized as under:

On Issue 1, that there was no valid agreement by Balaram as pleaded.

On Issue 1 (a), that Balaram was not the karta of the family.

On Issue 1 (b), that the plaintiff had no knowledge of the alleged agreement.

On Issue 1 (c), that the receipt was not admissible in evidence for want of registration.

On Issue 1 (e), that the plaintiff was Balaram's legal adviser.

On Issue 1 (f), that the plaintiff was not instrumental in bringing about the agreement.

On Issue 2, that the defendant could not give oral evidence to contradict the terms of the mortgage deeds.

On Issue 3, that the plaintiff was not aware of the alleged agreement.

On Issue 4, that the defendant did not offer Rs. 29,075 to the plaintiff.

On Issue 5, that Balaram and his brothers made the assignment.

On Issue 5 (b), that the transaction was not champertous.

On Issue 6, that there was no novation of the contract and that the plaintiff was entitled to maintain separate suits.

On Issue 7, that the interest charged was penal and therefore compound interest at the enhanced rate for the first two years only and thereafter simple interest at 12-annas per cent per mensem until the date fixed for payment, should be allowed.

On Issue 8, that the Court could not reduce the capital amount.

In accordance with the above findings the lower Court passed preliminary decrees for foreclosure in each case under O. 34, R. 2, Civil P. C., declaring the following amounts inclusive of interest and costs as payable on or before 29th October 1927:

| | |
|------------------|----------------|
| In Suit No. 2/26 | Rs. 44,380-8-9 |
| " 5/26 | " 15,092-3-0 |
| " 9/26 | " 24,477-14-6 |

Against the aforesaid three decrees three separate appeals have been filed in this Court and bear Nos. 100, 102 and 101 respectively. As the grounds taken and argued in all the appeals are identical this judgment will govern disposal of all the appeals.

Although each memorandum of the appeal contains as many as seven grounds, only one point was pressed in the course of arguments. It was that the agreement embodied in the receipt (Ex. D-3) should have been given effect to and decrees to the extent of Rs. 29,075 only should have been passed in respect of all the three mortgages.

In order to appreciate this argument it is necessary to reproduce the receipt, Ex. D-3, of which the following is the official translation:

"Receipt passed in favour of Miralal son of Chaitram, Palliwar Brahmin, malguzar, resident of Sali, by Balaram patil son of Bhiku patil, malguzar of mouza Bamhani, taluka Yetkheda, praggana Kamtha, tahsil Gondia, district Bhandara to the following effect: Bonds

have been executed by you in my favour. I have, this day, duly received Rs. 2,000, two thousand as payment towards the same, at Gondia. The balance due to me is Rs. 30,000 thirty thousand, which has been agreed to be received from you as principal only. Of this I will pay Rs. 10,000 ten thousand on 31st January 1924 and the balance of Rs. 20,000 twenty thousand within three months from this date. If I fail to pay the amount as stipulated, this receipt (agreement) shall be treated as null and void. The sum of rupees two thousand received this day will be credited towards the registered bond. Dated 9-1-24. By the pen of Kodu son of Ganu Gowari, resident of Tumbar, now at Gondia. Balaram patil, by the pen of self."

The learned Government Advocate, who appeared for the appellant, argued that the agreement to receive Rs. 30,000 superseded the contracts embodied in all the three mortgages in suit and that the plaintiff as the assignee of the original mortgagees was bound by this new agreement, in spite of the fact that Ex. D-3 is not registered. It was contended that this receipt was not inadmissible in evidence under S. 92, Evidence Act, because that section only prohibits reception of evidence of an "oral agreement" and not of an agreement which is reduced to writing. It was also argued that the receipt in question did not also come within the purview of S. 17 (1) (b) or (c), Registration Act and was therefore admissible in evidence in spite of the fact that it was not registered.

The real questions for determination therefore are: (1) what is the nature of the agreement embodied in the receipt (Ex. D-3), and (2) whether the document can be received in evidence in proof of the said agreement.

The answer to the first question is furnished by the learned advocate for the appellant himself when he unequivocally stated that the document Ex. D-3, contains an agreement superseding the agreements embodied in the three mortgage deeds in suit, whereby the mortgagee agrees to receive only the principal amounts secured by the several mortgages and impliedly undertakes to forgo his claim with regard to interest chargeable under the said deeds. This indeed is the true intent of the agreement embodied in the receipt (Ex. D-3).

We, however, do not agree with the learned advocate for the appellant that the new agreement is an unconditional

contract and not a contingent one as defined in S. 31, Contract Act. The words "If I fail to pay the amount as stipulated," i. e., Rs. 10,000 on 31st January 1924 and the balance of Rs. 20,000 within three months :

"this receipt (i. e. the agreement) shall be treated as null and void," are very clear and cannot be open to any construction other than that if the amount is not paid within the time stipulated the agreement will be unenforceable. Since it is admitted that the appellant did not pay up the amount of Rs. 30,000 to the mortgagees before the 9th April 1924 the agreement by its very terms became null and void and therefore unenforceable against the mortgagees. On this short ground alone the present appeals are untenable and should be dismissed.

On the second question it is clear that the receipt (Ex. D-3) is not admissible in evidence under S. 49 (c), Registration Act, since it was not exempt from being compulsorily registrable under S. 17 (2) (11) which runs as follows:

"Nothing in clauses (b) and (c), sub-S. (1) applies to:

(11) any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage."

In *Abdullah Khan v. Basharat Hussain* (1) the question arose with reference to an agreement, embodied in a "rukka" come to between the mortgagee and the mortgagor as to the mode in which the profits of the property which was usufructually mortgaged were to be dealt with and their Lordships of the Privy Council held that the document embodying such an agreement was inadmissible in evidence by reasons of the provisions of the Registration Act. In *Tukaram v. Deputy Commissioner, Barabanki* (2), an agreement by a mortgagor, contained in letters, to pay a higher rate of interest was held by the Judicial Committee to be inadmissible in evidence for want of registration.

The exact point involved in the present cases was, however, considered and decided by a Bench of the Allahabad High Court in the case of *Gobardhan*

(1) [1913] 35 All. 48-17 I. C. 737=10 I. A. 31 (P.C.).

(2) [1899] 26 Cal. 707=26 I. A. 97=3 C. W. N. 573 (P.C.).

Sahi v. Jadunath Rai (3), where an agreement executed by a mortgagee after the date of the mortgage, whereby he relinquished a certain part of the principal and all interest past and future on the mortgage in lieu of certain services to be rendered by the mortgagor to the mortgagee, was held to be inadmissible in evidence for want of registration. The reasons for the decision appear at p. 203 of the report in the following words :

"The document is clearly an agreement to forgo in part the plaintiffs' rights as against the mortgaged property in consideration of services rendered. It cannot in any sense be said to be a receipt for the payment of money not extinguishing the mortgage in whole or in part. It clearly does extinguish the mortgage to the extent of a considerable portion of the principal and the whole of the interest."

This Allahabad ruling was followed by the Madras High Court in *Lakshmana Setty v. D. Chenchuramayya* (4). In that case the agreement between the parties was expressed in these words :

"Now if you will pay Rs. 3,000, towards the debt due by you on the two documents we shall receive the money and return the documents."

On the date of the agreement more than Rs. 3,000 was due and the balance which the mortgagee agreed to relinquish under the agreement amounted to more than Rs. 100. It was held that such an agreement was not covered by the exception of Cl. (xi), sub-S. 2, S. 17, Registration Act, but came within the purview of Cl. (b), sub-S. (1) of the said section.

It is not denied in the present cases that Ex. D-3 does "extinguish the claim for interest due under the three mortgages in suit and there is not the slightest doubt that the amount so relinquished amounted to more than Rs. 100 on the date of the agreement. It cannot equally be denied that the interest so due was a charge upon the mortgaged properties. It follows therefore that the agreement in question purported to "limit or extinguish interest in immovable property" within the meaning of S. 17 (1) (b), Registration Act, and required to be compulsorily registered.

Following the principles laid down in the cases cited above, we have no hesitation in holding that the receipt (Ex. D-3) cannot be admitted in evidence and therefore the agreement embodied therein remains unproved. It is conceded

(3) [1913] 35 All. 202=19 I. C. 449=11 A. L. J. 253.

(4) [1918] 24 M. L. J. 79=7 M. L. W. 229=44 I. C. 132=(1918) M. W. N. 262.

that the agreement in question cannot be proved by oral evidence by virtue of the prohibition in that behalf contained in S. 92, Evidence Act. The result is that all the three appeals fail and are dismissed with costs. Since only one common argument on a single point was addressed on behalf of the appellant a sum of Rs. 500 only shall, under the circumstances, be allowed as pleader's fees in respect of all the appeals. The time for redemption in all the three cases will be extended to 1st December 1929.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 17

STAPLES, A. J. C.

Bapuji and another—Appellants.

v.

Tansa—Respondent.

Second Appeal No. 697 of 1928, Decided on 22nd July 1929, against order of Dist. Judge, Wardha, D/- 20th September 1928, in Civil Appeal No. 134 of 1928.

(a) Civil P. C., S. 47—Compromise decree in money suit—Decree creating charge on house not subject of suit—Decree is capable of execution—Separate suit is not necessary—Civil P. C., O. 23, R. 3.

In a simple money suit a compromise decree was passed. The parties agreed that in case of default the amount would be recovered by sale of the house specified in the decree and other property belonging to the judgment-debtor. Even though the house and the other property were not the subject of the suit, the decree did create a charge on the house.

Held: that the decree was capable of execution and that it was not necessary to bring a separate suit to enforce it: *A. I. R. 1925 Mad. 1101 Rel. on.*; 35 Cal. 837 and *A. I. R. 1919 P.C. 79, Dist.* [P 18 C 2]

(b) Registration Act, S. 17 (2) (vi)—Decree of Court need not be registered—S. 29 (2) is not obligatory.

Under S. 17 the provisions as regards registration do not apply to any decree or order of a Court. S. 29 (2) is only a permissive section and, though no doubt a copy of a decree may be presented for registration, there is no obligation to do so: 35 Cal. 837 and *A. I. R. 1919 P.C. 79, Rel. on.* [P 19 C 1]

(c) Civil P. C., O. 34, R. 15—R. 15 does not apply to charge created by final decree.

When the charge is created by a decree, which is in its terms final, the provisions of O. 34, R. 15 will not apply. [P 19 C 1, 2]

(d) Provincial Insolvency Act, S. 28 (b)—Subsequent insolvency proceedings do not invalidate decree passed before such proceedings—Creditor secured by decree need not prove in insolvency.

Where a decree is passed before the insolvency proceedings, subsequent insolvency pro-

ceedings do not invalidate the decree. Moreover, where by the terms of the decree a party to a money suit is a secured creditor, it is not necessary for him to prove insolvency: 1 *All. 227, Rel. on.; A.I.R. 1927 P.C. 108, Dist.*

[P 19 C 2]

D. N. Choudhary—for Appellants.

S. B. Gokhale—for Respondent.

Judgment.—In this appeal it is contended that the compromise decree was incapable of execution as it stands. The facts have been related in the judgment of the lower appellate Court and need only be briefly repeated. A civil suit was brought in 1923, Civil Suit No. 26 of 1923, by the respondent against the appellants on a simple money bond and the matter was settled out of Court and a decree was passed in terms of the compromise on 15th January 1924. The decree is as follows:

"It is ordered and decreed in terms of the compromise that defendants 1 and 2 do pay plaintiff Rs. 2,300 and Rs. 270 for costs and Rs. 642-8-0 for sawai total Rs. 3,212-8-0 by 13 instalments, viz., Rs. 250, 1st February 1924 and the annual instalments Rs. 250 from 15th December 1924 to 15th December 1935, the last instalment being Rs. 212-8-0."

"In case of default of any instalment, compound interest Rs. 2 per cent per mensem will be charged on the amount of the defaulted instalment and in default of any three instalments the whole amount should be paid at once with compound interest Rs. 2 per cent per mensem. If the defendants fail to pay the amount with interest, the claim should be realized by sale of the house specified on the reverse and other property belonging to the defendants. The decretal amount should be the first charge on the house."

The appellants made a default and an application for execution was filed by the respondent on 18th January 1928. An objection under S. 47, Civil P. C., was made by the appellants on 19th June but it was dismissed by the Sub-Judge on 23rd June. The grounds stated in the objection were that the house which was made the subject of the charge was outside the scope of the suit, that the decree directing the decretal amount to be a charge on the house could not be operative as it required registration under S. 17, Registration Act, and was void for want of registration, that the appellants were agriculturists and a house was necessary for their requirements and was, therefore, exempt from attachment under S. 60, Civil P. C., and finally, that the appellants having been adjudged insolvents in the Court of the 1st Sub-Judge, Arvi, their property vested in the insolvency Court and could not be

attached without the leave of the Court. The Sub-Judge, however, found that the decree did not require registration, that the charge created by the compromise decree on the property formed an integral part of the suit and could be enforced in execution and that S. 60, Civil P. C., does not apply after a charge has been created by a judgment-debtor. The application was dismissed. No reference was made, as far as I can see, in the order to the ground relating to insolvency. An appeal was preferred to the District Judge, and the grounds given in the appeal were as regards registration and insolvency and a new ground was put in that the decree as it stood, did not create a charge and that such a decree could not be executed unless it has been made a final sale decree. All these contentions were found against the appellants. In second appeal the same grounds are now put forward.

The first contention is that the decree, as it stands, is not capable of execution but a suit should be brought to enforce it. I do not, however, see much force in this contention. The compromise decree is clear in its terms and on the face of it it is meant to be a decree capable of execution. It is true that the decree creates a charge upon property that was not the subject of the suit, viz., a house; but I do not think that on account of that reason it will be incapable of execution. The learned counsel for the appellant relied on *Govind Chandra Pal v. Dwarka Nath Pal* (1) and *Hemanta Kumari Debi v. Midnapur Zamindari Co.* (2). I do not think the first case will help the appellant in any way. In the second case it is true that at p. 496 there is an observation as follows:

"It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of the contents."

But that question did not really fall to be decided in the case. Apart from that also, the suit out of which that appeal arose was a suit for possession of certain lands and there had been a compromise according to which certain other lands were to be affected. It is possible, then that the compromise decree could

(1) [1908] 35 Cal. 837=7 C.L.J. 492=12 C.W. N. 849.

(2) A. I. R. 1919 P. C. 79=47 Cal. 485=46 I. A. 210 (P.C.).

not be executed as it stood with regard to the lands that were not originally the subject of the suit, but the present case is on a somewhat different footing. The suit was not for possession of lands but was a simple money suit. It was compromised on terms as stated above and it was also expressly agreed that in case of default the amount would be recovered by sale of the house specified in the decree and other property belonging to the defendants. I see no reason for holding, then, that this decree is incapable of execution although, admittedly, the house and the other property of the defendants were not the subject of the suit. All that the decree does is to create a charge on the house. Even had the decree been a simple money decree it is not disputed that it could be executed by attachment and sale of any property belonging to the defendants, and the fact that a charge has been created on a certain definite property, viz., the house, only puts the decree-holder in a somewhat stronger position. I have been referred by the learned counsel for the respondent to *Ramswami Naidu v. Subbaraya Tever* (3), which seems to be a case directly in point, and on the strength of that case I would hold that the decree as it stands is capable of execution and that it is not necessary to bring a separate suit to enforce it.

The contention about registration need not be seriously considered. The charge on the immovable property is created by a decree, and it is quite clear, I think, that under S. 17. Registration Act, the provisions as regards registration do not apply to any decree or order of a Court. The learned counsel for the appellant refers to S. 29, Cl. (2), Registration Act, but that is only a permissive section and, though no doubt a copy of a decree may be presented for registration, there is no obligation to do so. The two rulings, in fact, cited by the learned counsel for the appellants, viz. *Govinda Chandra Pal v. Dwarka Nath Pal* (1) and *Hemanta Kumari Debi v. Midnapur Zamindari Co.* (2) are clear authorities for the view that in such a case the decree need not be registered.

Nor is there any force in the contention that an application for a final decree should be made under O. 34, R. 15, Civil P. C. The decree is in its terms

definite and final and is not in any sense a preliminary decree. O. 34, R. 15, therefore, would not apply. I would again point out that in O. 34, R. 15, it is clearly stated that the provisions so far as may be applied to a charge, but where the charge is created by a decree, which is in its terms final, the provisions, I hold, will not apply.

The last ground upon which considerable stress was laid by the appellants was that, as they have been declared insolvents their property vested in the receiver and that the receiver should have been made a party to the execution proceedings. Reliance was placed upon *Kala Chand Banerjee v. Jagannath Marwadi* (4), in this connexion. It may be noted, however, that that case relates to the question of a mortgage and not of a decree. In the present case the decree was passed before the insolvency proceedings and subsequent insolvency proceedings, therefore, will not invalidate the decree. By the terms of the decree the respondent was a secured creditor and it was not necessary for him to prove in insolvency. This is the view taken by the lower appellate Court in para. 6 of its judgment, and the Judge has relied on *Sheoraj v. Goursahai* (5). I am of opinion, then that the case is governed by S. 28, Cl. (6), Provincial Insolvency Act. It may also be noted that the receiver made no application to be made a party to the proceedings and if the property really vested in him he was the proper person to contest the execution proceedings and to file the present appeal. In fact, if the appellant's contention is correct, he himself has no locus standi, and he would not be competent to make the present appeal. I am of opinion that the view taken by the lower appellate Court is correct and that there was no necessity of joining the receiver as a party, and in the present case there is, as a matter of fact, no equity of redemption, the decree, as already held, being in its terms final.

The appeal, therefore, fails on all grounds and is dismissed, the decree of the lower appellate Court being confirmed. Costs of the appeal will be borne by the appellants. Other costs

(4) A. I. R. 1927 P. C. 108=54 Cal. 595=54 I. A. 190 (P.C.).

(5) [1899] 21 All. 227=(1899) A.W.N. 45.

(3) A. I. R. 1925 Mad. 1101.

will be borne as ordered by the lower appellate Court. I fix pleader's fees at Rs. 30.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 20

STAPLES AND MOHIUDDIN, A. J. Cs.

Amdu and others—Appellants.

v.

Pessi—Respondent.

First Appeal No. 114 of 1928, Decided on 13th August 1929, from judgment of Dist. Judge, Bhandara, D/- 2nd April 1928, in Civil Suit No. 3 of 1925.

(a) **Suits Valuation Act, S. 9—Rules framed under, by Civil Circular II-8, R. 1—Scope.**

The value prescribed in R. 1 is prescribed not only for purposes of jurisdiction but also for the purposes of court-fees: 15 N. L. R. 24 and A. I. R. 1927 Nag. 255, Rel. on. [P 20 C 2]

(b) **Suits Valuation Act, S. 9—Rules framed under by Civil Circular No. II-8, R. 1 (proviso)—Person claiming declaration that he is adopted son of a coparcener defendant—Value stated of suit for purposes of jurisdiction as value of share of the coparcener—Share estimated at Rs. 25,000—Case falls under R. 1 (proviso).**

Where a person seeks a declaration that he is the adopted son of a coparcener (defendant) and states in his plaint that the value of the suit for purposes of jurisdiction is the value of the share of the defendant in joint property and the share is estimated by him to be Rs. 25,000, the suit for declaration that adoption is valid affects a title to property and the case falls under R. 1 (proviso), and ad valorem court-fees on Rupees 25,000 must be paid. [P 21 C 1]

*M. B. Kinkhede, Y. V. Jakatdar, N. G. Bose and V. M. Jakatdar—*for Appellants.

*Abdur Rahim Khan—*for Respondent.

Judgment.—The plaintiffs-appellants have filed this appeal on a court-fee stamp of Rs. 38-12. They have paid a court-fee of Rs. 10 for the following declaration which they claim in para. 16 of the plaint:

"That it be declared that plaintiff 5 is the adopted son of the defendant."

The learned advocate for the appellants contended that for the purposes of court-fee payable in this case, the appellants' case come under Sch. 2, Art. 17 (3) of the Court-fees Act, and therefore a court-fee of Rs. 10 was only payable and has been correctly paid. In this connexion our attention has been drawn to the following rule, contained in Civil Circular II-8, which was framed by the Judicial Commissioner, with the previous sanction of the Chief Commissioner, under S. 9, Suits Valuation Act, 1887:

"Under S. 9, Suits Valuation Act 1887, and under the same section of the said Act, as applied to Berar, the Judicial Commissioner, with the previous sanction of the Chief Commissioner directs that suits of the following classes shall for the purposes of the Court-fees Act 1870, the Suits Valuation Act 1887, the Central Provinces Court Act 1904, and the Berar Courts Law 1905, be treated as if the subject-matter of such suits were of the value of Rs. 400:

(1) Suits for the restitution of conjugal rights, for declaration of the validity of a marriage, or for a divorce;

(2) Suits for the custody or guardianship of a minor;

(3) Suits for a declaration that an adoption is valid or invalid.

Provided that if a suit for a declaration that an adoption is valid or invalid affects a title to property, then the value of the property, if it exceeds Rs. 400, shall be deemed to be the value of the subject-matter of the suit."

Section 9, Suits Valuation Act, 1887, runs as follows:

"When the subject-matter of suits of any class, other than suits mentioned in the Court-fees Act 1870, S. 7, para. 5 and 6 and 10, Cl. (d) is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may with the previous sanction of the Local Government, direct that suit of the class shall, for the purposes of the Court-fees Act 1870, and of this Act, and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf."

This section empowers this Court in certain classes of suits which in the opinion of this Court do not admit of being satisfactorily valued, to treat them as if their subject-matter were of such value as this Court thinks fit to specify in this behalf. This section excludes a particular class of suits only and this Court has no power to prescribe any particular value for them. This Court could exercise its power in respect of other classes of suits which do not admit of being satisfactorily valued, and has in Civil Circular II-8, prescribed a particular value for three classes of suits, mentioned in R. 1 of the said circular on the ground that these suits do not admit of being satisfactorily valued. The rule as it stands has the force of law. This value has been prescribed not only for purposes of jurisdiction but also for the purposes of court-fees. This is clear from these words which appear in S. 9, Suits Valuation Act:

"for the purposes of the Court Fees Act . . . be treated as if their subject-matter were of such value, as the High Court thinks fit to specify in this behalf."

This view was accepted by Batten, A. J. C. in *Ganpat Rao v. Mt. Laxmi*

Bai (1) and by Hallifax, A. J. C. in *Harikar Rao v. Salu Bai* (2). The appellants in this appeal claim along with other reliefs a declaration that the appellant 5 is the adopted son of Fazal. In para. 11 of the plaint, the appellants stated the following:

"He is also denying that defendant 5 is his adopted son."

They thus clearly want a declaration that the adoption of Abdul Ghaffar by Fazal is valid. In para. 15 of the plaint they stated as follows:

"That the value of this suit for the purposes of jurisdiction is as follows:

Value of the share of the defendant in the joint property in regard to which declaration is claimed is Rs. 25,000."

This suit for a declaration that an adoption is valid, affects a title to property, whose value has been estimated by the appellants at Rs. 25,000. This case clearly falls under proviso to R. 1, of the Civil Circular II-8, and an ad valorem court-fee on Rs. 25,000 must be paid, on the memorandum of appeal. The appellants have not paid the proper court-fee in this appeal and they are allowed to make up the deficiency in court-fee stamp within 30 days, from the passing of this order. In case of non-compliance with this order, the appeal, regarding the validity of the adoption of Abdul Ghaffur by Fazal, shall not be accepted as a valid appeal and will be liable to be dismissed.

P.N./R.K. *Order accordingly.*

(1) [1919] 15 N. L. R. 24=43 I. C. 64.

(2) A. I. R. 1927 Nag. 256.

A. I. R. 1930 Nagpur 21

JACKSON, A. J. C.

Dayaram Kunbi—Appellant.

v.

Motiram and another—Respondents.

Second Appeal No. 259-B of 1928, Decided on 25th September 1929, from decree of 1st Addl. Dist. Judge, Akola, D/- 15th August 1928, in Civil Appeal No. 111 of 1928.

Hindu Law — Debts — Son's liability — Mother executing mortgage in satisfaction of debt due by minor's father—Her acts bind minor whether or not she acted as guardian.

If a mother, who is a guardian of her minor, executes a mortgage in consideration of money paid by the mortgagee in satisfaction of the debts due by the minor's father on a promissory note, such action of the mother binds the son whether the mother purported to act as guardian or not: 1 N. L. R. 66, *Appl.*; 27 *Bom.* 390, *Dist.* [P 22 C1]

G. R. Deo—for Appellant.

V. V. Kelkar—for Respondents.

Judgment.—This appeal arises from a suit on a mortgage executed by Ganga-bai, the mother of the appellant. It has been held binding on the appellant to the extent of Rs. 300 said to have been paid by the mortgagee in satisfaction of a debt due by the appellant's father on a promissory note dated 14th March 1917. (Ex. P. 4). It is urged on the authority of *Chitnavis v. Nathu Sao* (1), that a Hindu is under no obligation to pay the debts of his deceased father of which the recovery is barred by time and the debt on the promissory note was barred when the mortgage was executed on 15th July 1920. The finding of the lower appellate Court is that the payment made by the mortgagee was in satisfaction of the promissory note for Rs. 300 (Ex. P-3) executed by the mortgagee himself on 12th February 1920 when he took hawala of the debt due on the promissory note dated 14th March 1917. The recovery of this latter debt was not barred by time on 12th February 1920 and there was no question of making the appellant liable for a time barred debt when the mortgage deed was executed.

I do not propose in second appeal to consider the correctness of the findings arrived at by the two lower Courts as to the facts and I accept the findings that the mortgagee did take hawala of the debt due on the promissory note of 14th March 1917 and did eventually pay. It has been asserted that the drawee of the promissory note brought a suit upon it and obtained a decree, but as the trial Court has pointed out, the plaint in this suit shows that the promissory note of 14th March 1917 was not one of those sued on.

The mother of the appellant has executed the mortgage deed not in her capacity as guardian of the appellant and it is urged that her action cannot bind the appellant. In this connexion it is sufficient to refer to the decision in *Seth Ghasiram v. Mt. Binia* (2) where it is laid down that a minor is bound by the act of his guardian done bona fide and for his benefit in the management of his estate even though his name does not appear in the transaction. *Nathu Piraji*

(1) A. I. R. 1925 Nag. 2=20 N. L. R. 106.

(2) [1905] 1 N. L. R. 66.

v. *Balwantrao* (3) can be distinguished and I see no reason for not applying the ruling of this Court in the present case. The appellant was liable for his father's debt and it was a prudent action on his mother's part to satisfy it to the extent to which the mortgage deed was executed for that purpose, it must be held binding on the appellant, I may remark that for the purpose of this finding it is not necessary to bring in oral evidence to prove that the mother acted as guardian; she was guardian and she did an act which binds the minor, whether she purported to act as guardian or not. I dismiss the appeal with costs.

P.N./R.K.

Appeal dismissed.

(3) [1900] 27 Bom. 390=5 Bom. L. R. 301.

A. I. R. 1930 Nagpur 22

SUBHEDAR, A. J. C.

Ratansi Asa Shop Akola—Plaintiff—Appellant.

v.

Sha Kuwarji and another—Defendants—Respondents.

Second Appeal No. 41-B of 1928, Decided on 20th September 1929, from decree of Dist. Judge, Akola, D/- 15th October 1927, in Civil Appeal No. 76 of 1927.

Transfer of Property Act, S. 6 (e)—Forward delivery contract of cotton seeds not in existence—Non-delivery on agreed date—Right of purchaser to claim damages after breach of contract is mere right to sue.

If in a case of a forward delivery contract of cotton seeds that were not in existence on the date on which the contract was made, the seller makes no delivery on the agreed date the contract is broken and the purchaser is merely entitled to claim damages for the breach of the contract from the seller, and the right of the purchaser to claim damages for breach of contract after the breach has occurred is a mere right to sue: 22 M. L. J. 207; A. I. R. 1923 Bom. 403; 26 Cal. 345; A. I. R. 1921 Cal. 795; A. I. R. 1925 Lah. 548 and A. I. R. 1923 Nag. 67, *Rel on*; A. I. R. 1926 Nag. 396, *Dist.* and *held widely stated*. [P 22 C 1, 2]

M. R. Bobde—for Appellant.*A. S. Athalay and G. G. Hatwalne*—for Respondents.

Judgment.—The facts giving rise to this second appeal are briefly these. Under a document styled as kabala "Cotton seed forward delivery contract" (Ex. P-1) date 20th July 1923 defendant 1 had contracted to sell to defendant 2, 300 khandis of cotton seeds of the current year's crops at Rs. 27 per khandi

to be delivered on 21st January 1924. No delivery having been made on due date the plaintiff states that defendant 2 suffered damages to the extent of the difference between the prices agreed upon and prevailing at the date of delivery, viz. at Rs. 6-10 per khandi. The total claim arising out of the breach of the contract thus amounted to Rs. 1,987-8. The cause of action for the suit is stated in para. 1 of the plaintiff to have accrued on 21st January 1924, which is evidently the date on which the contract was broken.

About 28th January 1924 defendant 2 was indebted to the plaintiff to the extent of Rs. 1800 and on a demand being made by the plaintiff, defendant 2 asked the plaintiff to recover the same from defendant 3 to whom defendant 2 had, on 28th January 1924, already assigned all his rights under the said kabala (Ex. P-1). Defendant 3 gave his consent to this arrangement and agreed to pay the plaintiff the amount due to him from defendant 2.

Instead of paying cash to the plaintiff in respect of this havala defendant 3 in his turn, on 20th December 1926, assigned to the plaintiff all the rights under the kabala, Ex. P-1, which had been transferred to him by defendant 2. On the basis of the aforesaid assignments the plaintiff, therefore, brought the present suit, out of which this second appeal arises, to recover from the defendants the amount of Rs. 1,987-8 and Rs. 705-9 interest by way of damages for breach of the original contract dated 20th July 1923.

Defendant 1 raised a preliminary legal objection to the maintainability of the suit on the ground that, assuming that the several assignments were made, they were void under S. 6 (e), Transfer of Property Act, and the plaintiff had no right to maintain the present suit. The case proceeded ex parte against defendants 2 and 3. The plaintiff in reply contended that the suit was maintainable because the transfers in question were of an actionable claim under S. 130, Transfer of Property Act.

The trial Court held that the assignments in question being of a mere right to sue for damages for breach of contract after the breach, the plaintiff's claim was misconceived and it accordingly dismissed the suit. On appeal by the

plaintiff the District Judge, Akola, maintained the finding of the trial Court that the assignments not being maintained thereon as against defendant 1 but it remanded the case to be retried with regard to the plaintiff's right, if any, aliunde the assignment, to recover anything from defendants 2 and 3. Against the dismissal of his suit against defendant 1 the plaintiff has filed the present appeal and has also joined defendant 2 as a party respondent. Defendant 2 has also filed an application in this Court on 7th August 1929 praying that he should be transferred to the category of a co-plaintiff.

It was contended by Mr. Bobde, the learned advocate for the appellant, that the right under Ex. P-1 was to receive specific property, viz. cotton seeds and therefore its transfer was not a mere right to sue within the meaning of the phrase in S. 6 (e), Transfer of Property Act. It was argued that under Ex. P-1 the purchaser defendant 2 was entitled to call for goods sold and simply because he or his assignee, the plaintiff, did not claim the goods in specie but laid a claim for damages, it could not be held that the several assignments of such a right were not transfers of actionable claims under S. 103 *ibid*.

There is not much substance in this argument. Admittedly Ex. P-1 was a forward delivery contract of cotton seeds that were not in existence on the date on which the contract was made. But goods answering a particular description were agreed to be delivered by defendant 1 to defendant 2 by a definite date which in the present case was 21st January 1924. The seller admittedly made no delivery on the agreed date and the result was that the contract was broken by the seller merely entitling the purchaser to claim damages for the breach of the contract from the seller.

It is indeed incorrect to say that the purchaser could in law sustain a claim for delivery of the goods in specie because such a claim for specific performance of the contract would be unenforceable under S. 21 (a), Specific Relief Act. All that the purchaser was entitled to claim was to file a suit for recovery of damages under S. 73, Contract Act. This then was the only legal right left to defendant 2 after 21st January 1924 when the breach of the contract

occurred. Defendant 2 assigned his rights under the contract (Ex. P-1) to defendant 3 on 28th January 1924 and the latter in his turn transferred the same to the plaintiff on 20th December 1926. The rights so assigned were therefore nothing more nor less than the right of the purchaser to claim damages for breach of contract after the breach had occurred. Such a right to claim damages has been held in a series of cases by most of the High Courts as "a mere right to sue" a transfer of which is prohibited by S. 6 (e), Transfer of Property Act: *Gopala Aiyar v. Ramaswamy Sastrigal* (1), *Hirachand Amichand v. Namechand Fulchand* (2), *Abu Mahomed v. S. C. Chunder* (3), *Jewan Ram v. Ratan Chand* (4), *Jai Chand v. Narain Das* (A. I. R. 1925 Lah. 548) and *Mt. Nakhela v. Cokaya*, A. I. R. 1923 Nag. 67. The case of *Lachhmi Narayan v. Dharamchand* (5) relied on by the appellant's counsel is easily distinguishable from the present one on facts. The right of a cosharer to claim his share of profits from the lambardar which was held to be transferable in that suit clearly stands on a different footing from the right to claim unliquidated damages arising out of the breach of a "forward delivery contract" like the one in the present suit. With due deference to the learned Judge I think the definition of "a mere right to sue" attempted to be given by him in para. 5 of the judgment in the above cases has been too widely stated and was not at all necessary for the actual decision of that case.

Agreeing with the two lower Courts, I therefore hold that on the basis of the assignment in his favour the plaintiff-appellant cannot maintain the present suit for damages against defendant-respondent 1. This second appeal, therefore, fails and is dismissed with costs. On the application of defendant 2 presented by him to this Court I pass no orders because the contending respondent's pleader says he has to urge a lot of objections on facts and law against the maintainability of the said appli-

(1) [1912] 22 M. L. J. 207=10 I. C. 320=10 M. L. T. 496.

(2) A. I. R. 1923 Bom. 403=47 Bom. 719.

(3) [1909] 36 Cal. 345=1 I. C. 827=13 C. W. N. 384.

(4) A. I. R. 1921 Cal. 795.

(5) A. I. R. 1926 Nag. 396=22 N. L. R. 108

cation which for obvious reasons cannot be conveniently disposed of here. I, therefore, direct that the application be forwarded to the Court of first instance for disposal according to law. Defendant 1 will be retained on the record of the case until disposal of the said application.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 24 (1)

SUBHEDAR, A. J. C.

Keyarsosp—Appellant.

v.

Garbad—Respondent.

Second Appeal No. 332 of 1927, Decided on 30th July 1929, from decree of Dist. Judge, Nimar, D/- 22nd April 1927, in Civil Appeal No. 112 of 1926.

Evidence Act, S. 159—Memorandum by witness.

Memoranda kept by a witness can be used in evidence not by itself but as corroborating a witness or refreshing his memory : 10 N. L. R. 44 at p. 47, *Rel. on.* [P 24 C 2]

M. R. Bobde—for Appellant.*W. R. Puranik*—for Respondent.

Judgment.—This is plaintiff's appeal. The plaintiff had brought the suit out of which this second appeal arises to recover from the defendant Rs. 500 for principal and Rs. 180 interest due upon a loan of Rs. 500 taken by the defendant on 30th September 1922 repayable on 31st December 1922 by delivery of cotton or cash. The defendant admitted the loan but stated that he took it from one Jairam who was at that time in plaintiff's service and that he had discharged the debt by delivering to Jairam the requisite quantity of cotton in two instalments on 28th November 1922 and 2nd December 1922.

The three main issues upon the pleadings of the parties which were settled for trial were these:

(1) Whether the amount was borrowed from the plaintiff and not Jairam, as alleged?

(2) Whether the defendant has repaid cotton to Jairam as alleged?

(3) Does that discharge him as alleged?

The trial Court held the first issue in plaintiff's favour and the second against the defendant and decreed the plaintiff's claim. On appeal the District Judge, Khandwa, upon a critical review of the oral and documentary evidence on record found the second issue in defendant's favour and dismissed the plaintiff's claim

because it was admitted by the plaintiff in the pleadings that if repayments to Jairam were held proved they would go to discharge plaintiff's claim.

The plaintiff has, therefore, filed the present appeal and it is contended on his behalf that the finding of the lower appellate Court on the second issue being based upon inadmissible and false evidence was not a legal finding binding upon the appellant in second appeal, and that therefore, the trial Court's finding that the alleged repayments were not proved should be restored. The attack was made with reference to the admissibility of Ex. D-1 only and it was urged that since it was not admittedly a regularly kept book of account, it could not be used in evidence. The learned District Judge has, however, clearly called it memoranda kept by the witness Jairam and surely it could thus be used in evidence not by itself but as corroborating Jairam or refreshing his memory: see observations at p. 47 in *Mukundram v. Dayaram* (1).

It was next urged that there was no admission by the plaintiff in the pleadings that if the repayments to Jairam were proved they would operate as a discharge of the debt in suit. But on 2nd December 1925 Mr. Mujumdar, pleader for the plaintiff, made the following unequivocal statement on this point:

"If it is proved that the delivery is made to Jairam it is admitted that the plaintiff would have no remedy against this defendant in this suit."

The second appeal, therefore, fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

(1) [1914] 10 N. L. R. 44=23 I. C. 893.

A. I. R. 1930 Nagpur 24 (2)

MACNAIR, A. J. C.

Abdul Latif—Appellant.

v.

Mansingh Rao and others—Respondents.

First Appeal No. 46-B of 1924, Decided on 8th August 1927, from decree of First Class Sub-Judge, Buldana, D/- 29th February 1924.

(a) **Berar Inam Rules, R. 5—Quit-rent fixed at settlement—Inam becomes hereditary—Right of reversion of Government is taken away.**

Rule 5 distinguishes very clearly a quit-rent imposed at the time of confirmation from quit-rent on which the inam was held prior to

and continues to be held after confirmation. When, therefore, at the time of settlement a quit-rent is imposed under R. 5, a freehold estate is given to the inamdar, quit rent being imposed in return for Government giving up its rights of reversion. There is no provision in R. 5 for continuing an inam hereditarily but at the same time imposing a quit rent.

[P 26 C 1]

(b) Berar Inam Rules, R. 5 (5)—Benefits of R. 5 (2) explained.

Benefits of R. 5 (2) mentioned in R. 5 (5) mean the benefits of R. 5 (3). [P 25 C 2]

M. Y. Shareef—for Appellant.

A. V. Khare and *V. Bose*—for Respondents.

Judgment.—The main point raised in this appeal is whether by the Sanad of 1872 Syed Ghulam Mohiuddin was granted an estate which he had power to alienate. The recommendation of the Resident and the reasons therefor are clear from the entries in Ex. P-5, and it is not contested that the Viceroy and Governor General in Council approved and confirmed the recommendation of the Resident. Mouza Khamkhed was received within the jurisdiction of the assigned territory under the re-adjustment treaty of 1860 A. D. It was attached pending institution of any claim. No claimant put himself forward, but an old religious recluse was discovered to be the owner of the village. His claim was supported by a sanad which showed that his ancestor had held another village for expenses to be incurred in feeding travelling fakirs and had been given mouza Khamkhed in exchange. The investigating officer proposed that the claim of the son of this recluse should be upheld under R. 4 of the inam rules, provided that the validity of the sanad was proved: if the validity was not proved, he considered that on the score of long possession the claimant should be given a life-estate in the village.

Rule 4 of the rules for the settlement of jagir and inam claims refers to inams given for religious and charitable objects, and states that these should be continued to the present holders and their successors so long as the service continued to be performed according to the conditions of the grant. The commissioner agreed that the sanad required confirmation by the Nizam's Government. But he stated:

"In any case I would uphold it, if upheld at all under R. 5, not under R. 4. The original object of the grant may have been the feeding of mendicants, but this object is scarcely of the

palpable solid character which we can endow in perpetuity on condition of service, and I myself believe that these lucky claimants could readily agree to pay a quit-rent of one-fourth."

The Resident's recommendation is:

"I concur with the Commissioner, and would uphold under inam R. 5, subject to a quit-rent at quarter assessment rates."

Now R. 5 of the inam rules refers to personal or subsistence grants. Cl. 2 states that in the case of such grants, if the present incumbent is a descendant of the original grantee, the inam will be continued to him hereditarily subject to certain conditions: the conditions with which I am concerned are that alienation was prohibited and the inam escheated to Government on the failure of proper heirs. But, as Cl. 3 states, an option will be given to the inamdar to convert his restricted tenure into a freehold one, with full powers of alienation by consenting to the payment of an annual quit-rent of one-eighth, one-fourth or one-half of the estimated assessment: the rate of quit-rent to be charged depended on the likelihood of the inamdar having heirs at the time of his death; and it is remarked that this quit-rent represented a compromise for the right of reversion possessed by Government.

Clause 5, R. 5 is as follows:

"If the present incumbent is not a descendant of the original grantee, but either in his own person, or in succession to others acquired the inam fairly by adoption, or in alienation by gift, purchase, or otherwise, his claim being admitted, he will be allowed the benefits of Cl. 2, R. 5, but without the option of refusal; and in commutation of the rights of Government, a quit-rent will be imposed on the inam varying from one-eighth to one-half of the estimated assessment of the land according to his position in respect of heirs, as laid down in Cl. 3 of the rule."

This clause is not well-expressed, but it appears clear that by "the benefits of Cl. 2" is meant "the benefits of Cl. 3"; for the quit-rent is in commutation of the rights of Government, so that the inam granted must be an estate which does not escheat to Government in any probable contingency, i. e., a freehold estate with full powers of alienation. It is to be observed, then, that when a personal or subsistence grant is confirmed to the holder, the holder can in all cases obtain a freehold estate by consenting at the time of confirmation to the payment of an annual quit-rent; and in some cases he has not the option of retaining a limited estate according to the

actual tenure of the grant. Now, the inam in the case of Khamkhed was not exactly a personal or subsistence grant. But the Commissioner proposed to treat it as such grants were treated. There is no provision in R. 5 for continuing an inam hereditarily, but at the same time imposing a quit-rent. When at the time of settlement a quit-rent is imposed under R. 5, a freehold estate is given to the inamdar, the quit-rent being imposed in return for Government giving up its rights of reversion. R. 5 distinguishes very clearly a quit-rent imposed at the time of confirmation from a quit-rent on which the inam was held prior to and continues to be held after confirmation.

It is obvious, then, that what the Commissioner proposed was that a quit-rent should be imposed and a freehold estate granted. It is urged that if R. 5 were strictly followed, the quit-rent should only have been one-eighth. But it is clear that the Commissioner did not think it necessary to propose more liberal terms. He remarks that that the lucky claimants would readily agree to pay a quit-rent of one-fourth. I agree with the trial Court, then, that Syed Gulam Mohiuddin was given a freehold estate with full powers of alienation, subject to the payment of a quit-rent. The appeal fails and is dismissed with costs on the appellant.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 26

SUBHEDAR, A. J. C.

Bhagona—Defendant—Appellant.

v.

Guman—Plaintiff—Respondent.

Second Appeal No. 213 of 1927, Decided on 6th March 1929, from decree of Dist. Judge, Narsinghpur, D/- 19th November 1926, in Civil Appeal No. 46 of 1926.

Adverse possession—Tenant leaving holding in charge of malguzar by unregistered usufructuary mortgage which is compulsorily registrable—If malguzar leases holding in contravention of any rights which tenant may have had, his and lessee's possession is adverse to tenant.

Where the tenant leaves the holding in charge of the malguzar by a usufructuary mortgage not evidenced by a registered deed though the registration of the mortgage is compulsory and the malguzar leases the lands in contravention of the rights which the tenant

may have had, the possession of the malguzar and the lessee is adverse to the tenant. [P 27 C 1]

S. K. Ghosh—for Appellant.

N. G. Bose—for Respondent.

Judgment.—In the suit out of which this second appeal arises, the plaintiff-respondent had sued for correction of the settlement entry in respect of occupancy field No. 208/2, area 16'47, of mouza Bandhi in the Godarwara Tahsil of the Narsinghpur District and for possession of the said field and mesne profits thereof. The plaintiff's story was that Kodu, the father of defendants 1, 2 and 3 had in Sambat 1957, given the field to the wife of defendant 4, who was then the malguzarin of the village, in satisfaction of a debt of Rs. 260, and that thereafter he got the field from the malguzarin on Rs. 20 rent after paying Rs. 260 as premium. It was alleged that the present malguzar, defendant 4, refused to accept the rent and fraudulently got the field recorded at the current settlement in the name of defendants 1 to 3.

Defendant 4 did not put in appearance, but the remaining defendants contested the claim. Their defence was that in Sambat 1957 their father borrowed Rs. 260 from the then malguzarin and had placed the field in her possession on condition that whenever the debt was paid off the field would be returned to him. It was, therefore, contended that the malguzarin could not create the plaintiff as the tenant of the field, and that they having repaid the debt to defendant 4 recently, the latter had restored the field to them.

The first Court accepted the defence and dismissed the plaintiff's suit. But on appeal by the plaintiff the lower appellate Court held that the plaintiff had been validly accepted as a tenant for over 20 years and was wrongfully ousted by the defendants from the field. The first Court's decree was accordingly reversed and the plaintiff's claim decreed. The lower appellate Court also directed an enquiry into the question of mesne profits under O. 20, 12 (c), Civil P. C. Defendants 1 to 3 have, therefore, preferred this second appeal on grounds which are absolutely untenable.

It has been argued that the transaction between the appellant's father and malguzarin in the nature of a usufructuary mortgage was a perfectly valid

one though it was not evidenced by a registered deed, and that the lower appellate Court's view to the contrary was wrong. It is difficult to appreciate this contention. The law requires usufructuary mortgages to be in a particular form and registration of such deeds is also compulsory, in the absence of which the transaction cannot be proved. I, therefore, agree with the learned District Judge in his finding that when the tenant left the holding in charge of the malguzarin with undefined rights and when the latter leased the land to the plaintiff in contravention of any rights which Kodu may have had, the possession of the malguzarin and the plaintiff was adverse and the right of Kodu and his sons to recover possession of the land was long barred by time. The appeal fails and is dismissed with all costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1930 Nagpur 27**

JACKSON, A. J. C.

Gondu—Defendant 1—Appellant.

v.

Tulsiram and others—Plaintiff and Defendants 2 and 3—Respondents.

Second Appeal No. 541 of 1928, Decided on 20th September 1929, from decree of Dist. Judge, Wardha, D/- 16th July 1928, in Civil Appeal No. 86 of 1927.

(a) Civil P. C., O. 26, R. 1—Remand order for examining expert in handwriting—It is not obligatory on the part of trial Court to examine witness before it—It has discretion and can issue commission.

If an appellate Court remands a case for giving an opportunity to examine an expert in handwriting as regards the genuineness of the signature, it is not compulsory on the part of the trial Court to examine the expert before it. It has discretion in the matter and can issue a commission, but it will not do this simply for the reason that the expert resides beyond its jurisdiction as it is possible to obtain the appearance of a handwriting expert in any Court by payment of the necessary fees.

[P 27 C 2, P 28 C 1]

(b) Evidence Act, S. 73—Scope.

The Court has power to compare the alleged genuine signature with admittedly genuine signature to come to a conclusion from it.

[P 28 C 1]

(c) Practice—Mortgage purporting to be in favour of three—Mortgagor's pleading and Court's finding being that only two were real mortgagees and as such each entitled to $\frac{1}{2}$ of money due—Fact that guardian of one of these who is minor is ready to give the third cannot deprive minor of his $\frac{1}{3}$.

Where names of three brothers appear as mortgagees in the deed but where the pleadings of the mortgagor and the finding of the Court are that only two of them are real mortgagees and as such each entitled to $\frac{1}{2}$ of the amount found due on the mortgage, one of the two who is a minor cannot be deprived of his $\frac{1}{2}$ even though the guardian of the minor is prepared to give $\frac{1}{3}$ rd to the third mortgagee. [P 28 C 2]

M. B. Kinkhede and V. Kelkar—for Appellant.

D. N. Khare—for Respondent 1.

Judgment—Gondu, defendant 1, on 6th May 1918 executed a mortgage deed in favour of three brothers, Balaji, defendant 2, Barku, plaintiff 1 and Motiram, the father of Tulsiram, plaintiff 2. The suit was brought by Barku and Tulsiram on the allegation that the mortgagor had made payments to Balaji which Balaji was not sharing with the other mortgagees and that Balaji had finally accepted satisfaction of the whole debt by execution by the mortgagor of a new mortgage deed in favour of Balaji and his son Vistari, defendant 3. A decree for half the amount due on the mortgage has been passed in favour of Tulsiram alone.

It was contended on behalf of the defendants that the payments were not made to Balaji alone but to him and Motiram, and receipts have been put in purporting to be signed by both. It has been found by both the lower Courts that the signatures which purport to be those of Motiram are not genuine. The appellate Court remanded the case to give an opportunity to the defence to examine an expert in handwriting as regards these signatures. An application was made for examination of an expert at Delhi on commission. The plaintiff objected on the ground that they could not afford to go to Delhi to cross-examine the expert. The trial Court took the view that the remanding order allowed it no discretion in the matter and that the expert had to be called and examined before it. The defendants refused to call him and asserted their absolute right (which they do not possess) to a commission. The trial Court rejected the application for a commission and the lower appellate Court has upheld the decision, though not apparently on the ground that the trial Court had no discretion in the matter. I am of opinion that the trial Court had discretion and could, if it wished, have issued a commission. If

am not, however, satisfied that it ought to have done this. The plea that the expert resides beyond the Court's jurisdiction has no force: it is possible to obtain the appearance of a handwriting expert in any Court by a payment of the necessary fees. If for any reason the expert had been unable to appear, then a case might be made out for issuing a commission; but that was not the case here. It is pleaded that the plaintiffs did not need to go to Delhi for cross-examination of the expert as the examination could have been conducted by interrogatories and cross-interrogatories. This again is not a valid plea. It is obvious that examination of a witness before the Court trying the case is much more satisfactory than an examination on commission; and wherever possible the witness should be called and examined before the trying Court. I decline now to remand the case for the issue of a commission.

The lower appellate Court, by comparison of the signatures on the receipts purporting to have been signed by Balaji and Motiram with admittedly genuine signatures of Motiram, has come to the conclusion that the former are not genuine. It has been objected that the lower appellate Court was not entitled to compare the signatures and come to this decision. Reference has been made to S. 73, Evidence Act, but that section is clearly against the objection, as it permits the Court to require any person present to write any words or figures:

"for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such persons."

It is clear that the Court has power to make comparison and come to a conclusion from it. I cannot, in second appeal, consider whether that conclusion is correct or not. I must take it that the signatures are not genuine.

If it is contended on behalf of the defendants that Barku, plaintiff 1, was not really a mortgagee and that the mortgagees were only Motiram and Balaji. That contention had been accepted by the trial Court, Barku filed no cross-objection in the appeal by Gondu to the lower appellate Court and the finding that he is not interested in

the mortgage stands. Tulsiram filed a cross-objection in which he claimed that a decree should have been passed for two-thirds of the amount found due, and not only for a half, in favour of himself and Barku jointly. It is now contended that Tulsiram claims only a one-third share in the mortgage and should only be given that share. I cannot agree. On the defendants' case Motiram and Balaji had each a half share in the mortgage and the fact that the guardian of Tulsiram, who is a minor, was prepared to allow a one-third share to Barku, who appears in the deed as a mortgagee, cannot deprive Tulsiram of the half share to which he is entitled by the defendants' pleadings and the findings of the Courts.

It has been urged that, even though the payments have been made to Balaji, they bind the other mortgagees as they formed a joint family of which Balaji was the manager. It is said that this is admitted in the pleadings of the plaintiffs on 10th March 1927. What the plaintiffs then pleaded was that the brothers were joint with their uncle Ganpati and their stepbrother Devaji; Ganpati separated from the rest in 1917 and the brothers separated in 1918 and that till separation Balaji was the manager. It is to be noted, however, that the payments claimed to have been made by the mortgagor begin from Baisakh Badi 11 1328 Fasli (26th April 1919) so that there is no admission that the payments were made to the manager of the joint family. On the above findings I dismiss the appeal with costs,

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 28

KINKHEDE, A. J. C.

Chhaganlal—Appellant.

v.

Govind Ram and others—Respondents.

First Appeal No. 116 of 1927, Decided on 28th October 1927, against decree of Addl. Dist. Judge, Khandwa, D/- 21st February 1927.

(a) Civil P. C., O. 41, R. 10—Making of order for security of costs of appeal is discretionary with Court—Court will not generally make order calling upon appellant to furnish security where highly penal consequences will be entailed upon him.

There is in the statute no provision which goes to the length of casting on the Court in every case the obligation, as a matter of law, to

make an order that security shall be given for costs of an appeal. It is a matter absolutely in the judicial discretion of the Court. It, therefore, follows that in special circumstances, the Court may direct security to be given, but the Court is not bound to do so. Where highly penal consequences will be entailed upon the appellant by the order, the Court would, as a general rule, not be bound to make order for security of costs. [P 29 C 2]

(b) Civil P. C., O. 44, R. 1—Granting of leave to appeal in forma pauperis involves that the case is fit to be placed outside the purview of O. 41, R. 10—Civil P. C., O. 41, R. 10.

Judges must be presumed to be conscious of their own powers and the limitations subject to which they can exercise them. Therefore once the leave to appeal in forma pauperis is granted it could be legitimately inferred that there was prima facie ground for holding that the case fell within the proviso to O. 44, R. 1. Under such circumstances it could fairly be laid down that both propriety and consistency of law and procedure, demand that if a Court considers any particular case to be fit for granting the leave, the granting of the leave involves the consequence, if not expressly, at least, by necessary implication that prima facie, that case is fit to be placed outside the purview of O. 41, R. 10: 42 Bom. 5; 3 Mad. 66 and 17; M. L. J. 583; 43 Mad. 902, Cons: Other case law Referred. [P 31 C 1]

K. A. Potey—for Appellant.

W. R. Puranik—for Respondents.

Judgment.—This is an application by respondents for calling upon the appellant to furnish security for their costs of appeal and of the original suit under O. 41, R. 10, Civil P. C. In view of the affidavit which supports the application I was on the point of passing a conditional order demanding the security from the appellant. But as in the meantime, the appellant came and raised the point that as he was allowed to appeal as a pauper, he could not be called upon to furnish security, I stayed my hands and gave the parties a date to argue the question whether security could be demanded from a pauper appellant. The appellant relies on *Nusseeroodeen Biswas v. Ujjul Biswas* (1), *Mt. Hafizan v. Abdul Karim* (2), *Khemraj Shrikrishnadas v. Kisanlala Surajmal* (3), and *Nazim v. Abdul Hamid* (4), in support of his contention that a security cannot be demanded. The respondents on the other hand rely on *B. F. Saldanha v. Henry Hart* (5), in support of their application for security.

(1) [1870] 17 W. R. 68.

(2) [1908] 12 C. W. N. 163=7 C. L. J. 312.

(3) [1918] 42 Bom. 5=42 I. C. 67=19 Bom. L. R. 771.

(4) A. I. R. 1922 Lah. 87=3 Lah. 30.

(5) [1920] 42 Mad. 902=12 M. L. W. 333=58 I. C. 794=(1920) M. W. N. 534.

I have considered all the cases cited also amongst others the cases of *Seshayyangnr v. Jainulavadin* (6), and *Srinivasa Sastrigal v. Subramania Aiyer* (7), on which the view taken in *B. F. Saldanha v. Henry Hart* (5) is based. In addition to them I have also looked up the cases of *Jogendra v. Funindro* (8), *Maneckji Limji Mancherji v. Goolbai* (9), *Ramsing v. Balubai* (10), *Lakshmi Chand v. Gatto Bai* (11), *Jiwan Ali Beg v. Basa Mal* (12), *Konammal v. Annadana Jadayya Goundan*, A. I. R. 1923 Mad. 204 and *Ma Saw v. Maung Shwe Gon*, A. I. R. 1923 Rang. 244 and several others herein-after referred to, with a view to satisfy myself as to the principle which underlies the provision for demanding security.

It appears that the English law on the point is divergent. Some English cases make it obligatory on a Court to demand security on the ground of poverty, while others treat it as purely discretionary. Leaving this divergence in the English law to itself, let me turn to the Indian Statute. It appears that in enacting the provisions of O. 41, R. 10, and of the corresponding sections of the old Civil Procedure Codes of 1877 and 1882, the legislature did not lay down any hard and fast rule in regard to this matter. It could, therefore be reasonably stated that there is in the Indian statute no provision which goes to the length of casting on the Court in every case the obligation, as a matter of law, to make order that security shall be given for costs of an appeal. It is a matter absolutely in the judicial discretion of the Court. It, therefore, follows that in special circumstances, the Court may direct security to be given, but the Court is not bound to do so. Where highly penal consequences will be entailed upon the appellant by the order, the Court would, I think, as a general rule, not be bound to make order for security of costs.

It is on this principle that it has been held in Indian Courts that mere poverty is no ground for requiring an appellant to give security for the costs of the

(6) [1881] 3 Mad. 66.

(7) [1907] 17 M. L. J. 582.

(8) [1871] 18 W. R. 102.

(9) [1878] 3 Bom. 241.

(10) [1903] 5 Bom. L. R. 661.

(11) [1885] 7 All. 542=(1885) A. W. N. 127.

(12) [1886] 8 All. 203=(1886) A. W. N. 310 (F.B.).

appeal: *Maneckji Limji Mancherji v. Goolbai* (9) and *Lakhmi Chand v. Gatto Bai* (11). But the Full Bench of the Allahabad High Court in *Jiwan Ali Beg v. Basa Mal* (12), has laid down the salutary rule in very guarded terms that the mere fact of poverty of the appellant standing by itself and without reference to any general facts of the case, ought not to be considered sufficient alone to warrant his being required to furnish security for costs. There are cases in which it has been held that a Court will as a general rule demand security for costs from a poor or insolvent appellant if it is proved to the satisfaction of the Court that the appellant is not the real litigant but a mere puppet in the hands of the others who are able to furnish security *Jogendra v. Funindro* (8), *Khajah Assenoollajoo v. Solomon* (13) and *Bomanji v. Nusserwanji* (14). In the last mentioned case, where the following dictum of Bowen, L. J., in *Cowell v. Taylor* (15) (at p. 38) was relied upon:

"that, in order to prevent abuse, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security,"

a security was demanded from a father an undischarged insolvent, who was suing as a co-plaintiff with his minor daughter for damages for the defendant's breach of his promise to marry her, on the ground that the suit was really the father's suit, and that he was seeking to make money out of his daughter's engagement. This view of law may even be justifiable on the ground that every Court has inherent jurisdiction to prevent abuse of its process or power, as once held in *Harinath v. Ram Kumar* (16), or may not be so justified as recently held in *Bhairabendra Narain v. Udai Narain* (17), at pp. 864 to 866 of 50 Cal., on the ground that inherent jurisdiction cannot be invoked in matters for which the Code does actually provide. But it goes to show that the Court's discretion in this matter is to be regulated by statutory provision as applied to the circumstances of each case, if not by an appeal to its inherent powers.

Now if we turn to the specific provisions of O. 33, Civil P. C., it will be seen that they are enacted with the object of enabling a person who may be too poor to pay even the initial institution fee payable to the Crown, to bring and prosecute suits without such payment: *Jotindra v. Dwarka* (18) at p. 115. They lay down certain conditions, and restrict the Court's power to grant leave to a person to sue as a pauper, and also safeguard the interests of the Crown by further reserving to the Court the power to even dispauper the person, on proof of facts showing that he has abused the privilege or concession. If leave were applied for to prefer an appeal in forma pauperis the applicant has to satisfy the requirements of O. 44, R. 1, Civil P. C., which imposes some additional conditions and limitations subject to which the leave can be granted.

In the case of *Ambaji v. Hanmantrao* (19), where a pauper plaintiff was ordered by the trial Court to pay the defendant in cash the costs occasioned by an amendment of the plaint, and his suit was dismissed in default of such payment, it was held that the order was wholly improper. The principle underlying this decision appears to be that once a person is held to be a pauper, in the sense that he is not possessed of sufficient means to pay even the fee prescribed by the law, prima facie there is no ground for the Court, unless he is actually dispaupered, to expect him to make any cash payment of costs occasioned by an amendment of the plaint. If I may add with propriety, I may say, that by a parity of reasoning, the Court will still less be justified in ordering such person to find security for the costs of the suit or appeal. At this stage I may consider the ratio decidendi of the case *Khemraj Shrikrishnadas v. Kisanlala Surajmal* (3). It was based on a view taken in an English case *Wille v. St. John* (20), in which the Master of the Rolls had ruled that the grant of permission to appeal in forma pauperis rendered a previous order to give security for costs no longer operative. The Judges of the Bombay High Court deduced the further conclusion

(18) [1887] 14 Cal. 533.

(14) [1903] 27 Bom. 100=5 Bom. L. R. 113.

(15) [1885] 31 Ch. D. 34=55 L. J. Ch. 92=34 W. R. 24=53 L. T. 483.

(16) [1914] 18 C. W. N. 119=20 I. C. 703=19 C. L. J. 59.

(17) A. I. R. 1924 Cal. 251=50 Cal. 853.

(18) [1893] 20 Cal. 111.

(19) A.I.R. 1922 Bom. 385=47 Bom. 104.

(20) [1910] 1 Ch. 701=79 L. J. Ch. 403=26 T.L.R. 405=54 S.J. 457=102 L. T. 617.

that the provisions of O. 44, Civil P. C. by their very nature exclude the application of O. 41, R. 10, to pauper appellant. Much could be said in support of the correctness of this conclusion in view of the proviso to R. 1, O. 44. This proviso is mandatory and is a necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers : *Rajendra v. Gopal* (21). That proviso casts upon the Court a duty to see before it grants leave to appeal as a pauper that the judgment and decree appealed against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. Thus it is a sufficient safeguard against any frivolous or vexatious appeals which involve no question of law, but challenge findings of facts merely, being allowed to be preferred in forma pauperis.

Judges must be presumed to be conscious of their own powers and the limitations subject to which they can exercise them. Therefore once the leave to appeal in forma pauperis is granted, it could be legitimately inferred that there was prima facie ground for holding that the case fell within the proviso of R. 1 of the said order. Under such circumstances, it could fairly be laid down that both propriety and consistency of law and procedure, demand that if a Court considers any particular case to be fit for granting the leave, the granting of the leave involves the consequence, if not expressly, at least, by necessary implication, that, prima facie, that case is fit to be placed outside the purview of R. 10, O. 41, Civil P. C. For otherwise, the leave once granted though not expressly withdrawn, would be rendered practically nugatory, by the inconsistent action of the Court in subsequently asking the very appellant to whom it granted the leave to appeal as a pauper, to furnish security for costs. It ought to be the duty of every Judge to see that the machinery of the Court is not so availed of by one party to a suit or appeal or other proceeding, as to place his opponent on the horns of a dilemma and even to land him in a difficult and inconsistent position.

Although the cases of *Seshayyanger v. Jainulavadin* (6) and *Srinivasa Sastrigal v. Subramania Aiyer* (7) affirm the Court's

(21) A. I. R. 1925 Pat. 442—4 Pat. 67.

jurisdiction to demand security for costs from an appellant permitted to appeal in forma pauperis, they do not go the length of laying down the unqualified proposition that a security for costs must necessarily be demanded from him as I will presently show. As a matter of fact, in both those cases, applications for security for costs were disallowed. In *Seshayyanger v. Jainulavadin* (6), the Judges observed at p. 67 :

" * * * seeing that a suitor should not be allowed to appeal in forma pauperis unless there is prima facie ground for believing that there are substantial grounds of appeal, and that it would ordinarily defeat the intention of the law if a pauper were called on to find security, we hold that very special grounds should be shown to induce the Court to call on him to find security ; and that if it were shown that the paupers were mere creatures in the hands of persons well able to find security, the order would not be improper."

In support of this proposition they relied on *Jogendra v. Funindra* (8), already cited. The same view was taken in *Shrinivasa Sastrigal v. Subramania Aiyer* (7), where it was laid down that though a Court has jurisdiction to demand such security, yet an order will not be made except under very special circumstances. In the case of *B. F. Saldanha v. Henry Hart* (5), there is absolutely no discussion to show how the view taken by the Bombay High Court is erroneous. This later Madras High Court case simply confirms the view all along taken by that Court and does nothing more. The report is also so very brief that it is not possible to know from it, that the order demanding security was passed in that case even in the absence of special circumstances. There is, therefore, no ground to infer that *B. F. Saldanha v. Henry Hart* (5), lays down unqualified proposition that a security for costs could or should necessarily be demanded from a pauper appellant.

The Lahore High Court in *Nizim v. Abdul Hamid* (4), interfered under Cl. (c) and not Cls. (a) and (b) of S. 115, Civil P. C., with an order demanding security from a pauper appellant, on the ground that in passing such an order, the Court below had acted in the exercise of its jurisdiction illegally and with material irregularity. In this state of the case-law of Indian Courts on this point, I must remark that the different High Courts without disagreeing as to the principle underlying such an order, differ

only as to their stand-point of viewing at the question ; some look at it from the point of view of the impropriety, and some of the illegality, of the order, while others consider it from that of the absence of special circumstances justifying the order, but none have gone the length of holding that the order is ultra vires or void for want of jurisdiction. Looking at the case from whatever point of view, I can confidently say that no satisfactory reasons have been made out for directing the pauper appellant in this case to furnish security for the respondents' costs of this appeal or of the original suit.

P.N./R.K.

Order accordingly.

A. I. R. 1930 Nagpur 32

JACKSON, A. J. C.

Chogalal—Defendant—Appellant.

v.

Malkarjunappa — Plaintiff—Respondent.

Second Appeal No. 157-B of 1928, Decided on 20th September 1929 against decree of Dist. Judge, Amraoti, D/- 17th February 1928 in Civil Appeal No. 108 of 1927.

Transfer of Property Act, S. 55 (4) (b)—Scope.

Section 55 (4) (b), in giving the vendor a charge upon the property sold for the unpaid purchase money with interest thereon, gives the interest by way of damages : [P 32 C 2]

M. B. Niyogi—for Appellant.*M. B. Kinkhede*—for Respondent.

Judgment.—The father of Malkarjunappa, the plaintiff, had mortgaged for Rs. 5,000 on 25th September 1914 a house and other property with one Tanba. On 7th July 1920 Malkarjunappa sold the house to Chogalal, the defendant, for Rs. 4,000 and received Rs. 300 in cash, Chogalal undertaking to pay the balance of Rs. 3,700 to Tanba towards satisfaction of the mortgage debt. Chogalal did not make the payment to Tanba in spite of notices given to him by Malkarjunappa until 14th October 1925 when he paid Rs. 4,865, that is Rs. 3,700 with interest at 6 per cent per annum. Malkarjunappa has now sued him to recover interest at the rate of 2 per cent per mensem and has been given a decree allowing him interest at the rate of 1 per cent per mensem.

It has been argued on behalf of the

appellant-defendant that the suit is not one by an unpaid vendor but merely a suit for damages. Reliance is placed upon *Abdulla Beary v. Mammali Beary* (1), in which it has been laid down (at p. 450) that a promise to pay a stranger is a mere covenant, the breach of which must be compensated in damages, and that there is no occasion for the statutory charge in favour of the unpaid vendor to arise. That decision has been expressly overruled in *Sivasubramania Ayyar v. Subramania Ayyar* (2), where it is held that, though a purchaser undertakes to pay a part of the consideration to a stranger, S. 55, sub-S. 4, Cl. (b), T. P. Act, still applies. For purposes of the present case, it seems to me immaterial which view is correct. S. 55, sub-S. 4, Cl. (b), in giving the vendor a charge upon the property sold for the unpaid purchase money with interest thereon, seems to me to give the interest by way of damages ; and in the present case, the unpaid balance having been paid, the vendor is now only entitled to claim interest from the purchaser. The purchaser has, in fact, accepted his liability to pay interest by paying it at the rate of 6 per cent per annum when he made his payment of Rs. 4,865 on 14th October 1925, and it is merely the rate of interest that is in dispute. The question is whether interest at 6 per cent per annum gives the vendor reasonable compensation for the delay in payment.

It is urged that, by reason of the operation of the rule of damdupat, the vendor has suffered no loss. The calculations on which this argument is based is set out in para. 2 of the lower appellate Court's judgment. I do not consider that the amount the vendor had eventually to pay to his mortgagee is the only matter to be considered ; but having regard to the circumstances of this case, I feel that the purchaser has sufficiently compensated his vendor by including interest at 6 per cent in the payment he eventually made. I allow the appeal. The suit will be dismissed with costs in all three Courts.

P.N./R.K.

Appeal allowed.

(1) [1910] 23 Mad. 446=5 I. C. 87=7 M. L. T. 376.

(2) [1916] 39 Mad. 997=31 M. L. J. 580=4 M. L. W. 415=37 I. C. 429=(1916) 2 M. W. N. 306 (F.B.).

* A. I. R. 1930 Nagpur 33

STAPLES, A. J. C.

Nanhe—Applicant.

v.

Municipal Committee, Jubbulpore—
Non-Applicant.

Criminal Revn. No. 167 of 1929, Decided on 19th August 1929, from order of Sess. Judge, Jubbulpore, D/- 6th March 1929, in Criminal Revision No. 10 of 1929.

(a) C. P. Municipal Act, S. 218—Police officer authorized to make complaints by committee—Police officer making complaint and not committee is complainant.

Where a police officer is authorized under S. 218 by the Municipal Committee to make complaints with regard to offences under the Municipal Act, that police officer making the complaint and not the committee is to be regarded as complainant. [P 33, C 2]

(b) C. P. Municipal Act, S. 218(2)—Committee delegating authority to public servant by virtue of his office—Such public servant acts in his capacity as public servant when making complaint and his personal attendance in Court for examination is not necessary—Criminal P. C., S. 200, proviso (aa).

As a Municipal Committee is empowered to delegate its authority of making complaint under S. 218 (2), when such authority is delegated to a public servant by virtue of his office and not by name, he acts in his capacity as a public servant when making a complaint within the meaning of S. 200, proviso (aa), Criminal P. C., and his personal attendance for examination is not necessary. [P 34, C 1]

(c) Penal Code, S. 21—Scope.

A corporation such as a Municipal Committee, is not a public servant though the members forming the corporation are public servants. [P 34, C 2]

(d) C. P. Police Act, S. 23—Scope.

The Municipal Committee is a competent authority within the meaning of S. 23. [P 34, C 1]

J. Sen—for Applicant.

N. G. Bose and G. P. Dick—for Non-Applicant.

Order.—The applicant Nanhe has applied for revision against the order of the Sessions Judge, Jubbulpore, dismissing the applicant's application for revision against an order of the Honorary Magistrate, Jubbulpore. A complaint was filed against the applicant in the Court of the Honorary Magistrate, Jubbulpore, under section 178 (5) of the Municipal Act. The complaint was on a printed form and was signed by a police officer, City Superintendent Sant Singh. Upon the complaint being received the Magistrates ordered process to issue against the applicant. The case

was adjourned on several hearings, but at the hearing of the 22nd December 1928, the pleader for the applicant asked that Sant Singh, the City Superintendent, must attend in person. The Court, however, held that his appearance was not necessary as Ss. 200 (aa) and 247, proviso, Criminal P. C. gave ample authority that his presence might be dispensed with. The case was then fixed for evidence on 22nd January. In the meantime the applicant made an application for revision to the Sessions Judge, contending that the provisions of S. 200, Criminal P. C., were imperative and that Sant Singh ought to have been examined and that, if he did not appear, the case should have been dismissed under S. 247 of the Code. It was further contended that Sant Singh was not a public servant for the purposes of the Municipal Act and that when he filed a complaint under the Municipal Act he did not act in the discharge of his official duties.

The Sessions Judge held that, as the City Superintendent had been authorized under S. 218, Municipal Act, by the Municipal Committee to make complaints with regard to offences under sections of the Municipal Act, the Municipal Committee was really the complainant. He further held that a Municipal Committee was a corporate body composed of Municipal Commissioners and that under S. 21, I. P. C., a Municipal Commissioner is a public servant. From this the Sessions Judge reasoned that it could be held that the Municipal Committee which was composed of public servants is itself as a corporate body, a public servant. The Sessions Judge therefore gave his opinion that the Municipal Committee was a public servant and that therefore the agent who was appointed to represent them in filing a complaint in Court need not be examined as provided under S. 200 (aa), Criminal P. C.

Before me it was admitted by the Standing Counsel, who appeared for the Crown, that the view taken by Mr. Woodward, that the complainant was the Municipal Committee, was wrong and that the complaint was really by Sant Singh the City Superintendent. It, is, however, contended that Sant Singh was a public servant and therefore his

examination was not necessary. The learned counsel for the applicant contended that Santsingh was only a public servant as a police officer and in discharge of his duties under the Police Act, but that he was not a public servant when making a complaint under the Municipal Act, nor could the making of such a complaint be said to be in the discharge of his official duties. I am clearly of opinion that this view is wrong and that as a Municipal Committee is empowered to delegate its authority of making complaints under S. 218 (2), Municipal Act, when such authority is delegated to a public servant by virtue of his office and not by name, he acts in his capacity as a public servant when making a complaint within the meaning of S. 200, proviso (aa), Criminal P. C. It is further clear that a police officer is a public servant under clause 8, S. 21, I. P. C., and one of the duties mentioned in that clause is to give information of offences. I would further point out that under S. 23, Police Act, it is the duty of every police officer to obey and execute all orders lawfully issued to him by any competent authority and therefore a police officer is bound by that section to make complaints when authorized to do so by a Municipal Committee under S. 218, Municipal Act, as the Municipal Committee must be held to be a competent authority within the meaning of S. 23, Police Act.

I am of opinion, then, that the view taken by the Bench of Honorary Magistrates is correct that the complaint was by Santsingh, but that Santsingh was a public servant and was acting in the discharge of his official duties in making the complaint and that therefore his personal attendance of examination was not necessary under S. 200 (aa), Criminal P. C., nor was the complaint liable to be dismissed according to the proviso of S. 247 of the Code. I would only add that, in my opinion, the view taken by the Sessions Judge, that the complaint was by the Municipal Committee and not by Santsingh, is incorrect and that also the view propounded by him that a Municipal Committee is a public servant, is incorrect. A corporation such as a Municipal Committee, is not a public servant though the members forming the corporation are public servants. I therefore dismiss the application for

revision and send the case back to the Honorary Magistrate for decision according to law.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 34

JACKSON, A. J. C.

Govind--Appellant.

v.

Sonba--Respondent.

Second Appeal No. 175-B of 1928, Decided on 16th October 1929, from order of Dist. Judge, Amraoti, D/- 30th April 1928, in Misc. Appeal No. 1 of 1928.

(a) Provincial Insolvency Act, S. 39—Insolvent permitted to mortgage his property to petitioning creditor—Mortgage effect—On date of hearing parties absent—Order filing proceedings in default is not order annulling adjudication.

An insolvent was given permission to mortgage his property to the petitioning creditor and he did so, but thereafter none of the parties appeared on the day fixed for hearing and the Court passed an order "Parties absent. It is said that the case is settled out of Court. Property be released. Proceedings filed.

Held: that the order did not amount to an order annulling the order of adjudication.

[P 35, C 1]

(b) Provincial Insolvency Act, S. 53—Though transfer by transferees of insolvent cannot be impeached in insolvency proceedings it cannot be said that it cannot be impeached at all.

Section 53 applies only to transfers by the insolvent and not to transfers by transferees of the insolvent. Thus though a mortgage by the vendee of the person adjudged insolvent cannot be impeached in insolvency proceedings, it cannot be said that it cannot be impeached at all.

[P 35, C 1]

D. T. Mangalmurti—for Appellant.

T. L. Sheode—for Respondent.

Judgment.—In this case one Sonba sold his property on 31st January 1916 to Sheoram. On 1st May 1916 Narayan Baliram Ganorkar applied for adjudication of Sonba as an insolvent. He was adjudged insolvent on 1st December 1917 but prior to that, on 16th January 1917, Sheoram had mortgaged the property to one Baliram. On 6th December 1923 Baliram having foreclosed his mortgage obtained possession of the property. On 9th April 1925 Narayan applied to have the sale by Sonba to Sheoram annulled. Not only that, he also applied to have the mortgage to Sheoram and the foreclosure decree obtained by him annulled as well. His application has been rejected by both the lower Courts, and rightly, as far as the mort-

gage to Sheoram and the decree obtained by him are concerned.

Of the points arising in this appeal I shall first deal with one raised on behalf of the mortgagee, who argues that Sonba is no longer an insolvent. It appears that during the insolvency proceedings Sonba applied to the Court for permission to mortgage his property to the petitioning creditor in full satisfaction of the latter's claim and that the Court gave its consent. It is argued that there was thus a composition which terminated the insolvency proceedings, which can only be reopened if the Court re-adjudges Sonba to be an insolvent under S. 40 of the Act. I cannot, however, hold that the insolvency proceedings terminated; Sonba was given permission to mortgage his property to the petitioning creditor and he did so, but thereafter none of the parties appeared before the Court on the next day fixed for hearing, 9th July 1921, on which the Court recorded the following order:

"Parties absent. It is said that the case is settled out of Court. Property be released. Proceedings filed."

This does not amount to an order annulling the order of adjudication under S. 39, Provl. Insol. Act, which requires the Court to embody the terms of a composition in an order and annul the order of adjudication. That being my view, it is still open to the petitioning creditor to apply to have the sale in favour of Sheoram annulled.

Both the lower Courts have rightly held that S. 53, Provl. Insol. Act, applies only to the transfers by the insolvent and not to transfers by transferees of the insolvent. Having come to the conclusion that the mortgage by Sheoram to Baliram cannot be impeached in insolvency proceedings, the lower Courts have erroneously jumped to the conclusion that it cannot be impeached at all and that it would be futile to annul the sale by Sonba to Sheoram. In consequence, the validity of that sale has not been really enquired into and I cannot uphold the decision rejecting the application in respect of it. The orders of the lower Courts are set aside and the case must go back to the first Court for a fresh decision. Costs of this appeal will be costs in the proceedings. I fix Rs. 15 as pleader's fee.

P.N./R.K.

Case remanded.

A. I. R. 1930 Nagpur 35

MOHIUDDIN AND MACNAIR, A. J. Cs.

Mt. Sarjabai—Plaintiff—Appellant.

v.

Gangaram and others—Defendants—Respondents.

Second Appeal No. 633 of 1921, Decided on 3rd December 1928, from a decree of Dist. Judge, Bhandara, D/- 23rd September 1921, in Civil Appeal No. 5 of 1921.

(a) **Practice**—Court must in appeal consider plea of law even though not raised in first Court.

Per *Hallifax, A. J. C.*—There is no justification for a refusal to consider a plea of law that the parties being Gonds are not governed by the Hindu law, in appeal in the fact that it is not raised in the first Court. It is the business of the Court to discover the law applicable to the facts laid before it even without the aid of suggestions made to it by the parties in the form of pleas. [P 37 C 1]

(b) **Hindu Law—Applicability**—Gonds—Hindu Law cannot be applied to Gond family unless it is shown that it has adopted rules of Hindu Law.

Per *Hallifax, A. J. C.*—Before the Hindu Law can be applied to a Gond family, it is for the parties to plead and prove that they have adopted some or all of the rules of that system of law: *A. I. R. 1923 Nag. 317, Foll.*

[P 37 C 1]

(c) **Impartible Estate—Dispute whether property is impartible or not**—Onus lies on party alleging existence of custom different from ordinary law of inheritance by which estate is descendible to single member and as such impartible—Evidence Act, S. 101.

Where there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom: *A. I. R. 1928 P. C. 10, Foll.*

[P 39 C 1]

(d) **Hindu Law—Succession—Zamindari of Sadak Arjuni, Bhandara District**—Joint family law applies.

The law governing the descent of the zamindari of Sadak Arjuni, Bhandara District, is that which governs the estate held by a joint Hindu family. [P 40 C 1]

(e) **Presumption—Zamindari estate.**

There can be no presumption that the estate because it is admittedly a zamindari is governed by the rules of primogeniture. [P 40 C 1]

C. B. Parakah—for Appellant.

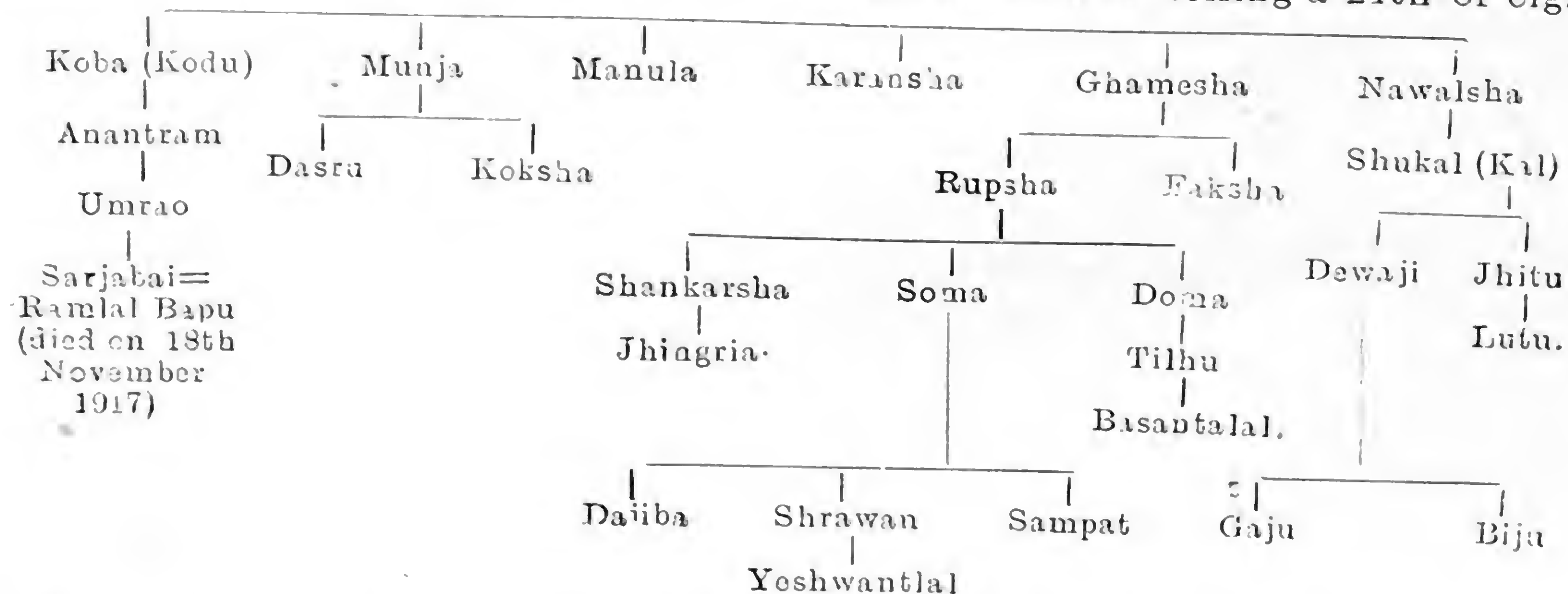
G. P. Dick—for Respondents.

Order of Reference.

Hallifax, A. J. C.—The suit out of which this appeal has arisen relates to

the Zamindari of Sadak Arjuni in the Bhandara District and so much as we need to know of the genealogy of the Raj Gond family to one or more of whom it belongs is set out in the following table:

waji, and Jhitu as holding a one-twelfth or one anna four pie share each, though it is difficult to imagine how that came about. To establish their claim to a share Dewaji and Jhitu chose the indirect method of selling a 24th or eight



The estate, which consists of ten villages and is of some antiquity, has been held and managed all along by the head of the family whether as sole owner or on behalf of other cosharers. Umrao Bapu died before his father and the successive holders of the estate after Talwarsha were Koba, Mukasi, Anant-rana and Ramlal Bapu. The members of the family who survived Ramlal Bapu on his death on 18th November 1917, were his widow Sarjabai and his father's second cousins, Shankarsha and Soma, sons of Rupsha, and Dewaji and Jhitu sons of Shukal with Yeswantlal grandson of Soma, Gaju and Biju sons of Dewaji, and Lutu son of Jhitu.

Now whatever the personal law governing the family may be, it is clear that we are concerned only with the two sons of Rupsha and the two sons of Shukal, even if it were a joint Hindu family, as it was held to be in the lower appellate Court, the shares of the others would be included in the shares of those four, who would also adequately represent them. Sarjabai claims to be the sole owner of the estate and her claim is supported by Shankarsha and Soma, who were the second branch of the family till Ramlal Bapu died and are now the senior branch. It is contested by Dewaji and Jhitu and their sons, who are now the junior of the two branches that are left.

The records at present show Sarjabai as holding a two-thirds share in the zamindari and Shankarsha, Soma, De-

pie share in each of eight of the 10 villages of Ganu Kohli and Atmaram Kohli by a sale deed executed on 8th March 1918, for a consideration of Rs. 2,000.

The plaint in the suit was presented on 13th May 1919, by Sarjabai. She prayed for a declaration that, as the whole zamindari belonged to her and was impartible and inalienable, the sale deed of March 1918, was void, and for restoration of possession to her of the eight pie shares it purported to sell. Who is at present in possession of these shares is uncertain, but it appears that they have not yet been handed over to the purchasers. It has been held in the Courts below that the zamindari is an ordinary partible estate, held by a joint Hindu family consisting of the parties to this case other than the two Kohli defendants, and the suit and the appeal have been dismissed.

The last of the reliefs claimed in the plaint is an offer to repay the Rs. 2,000 paid by the purchasers to the other defendants if it be held that the sale cannot be set aside without it. This offer has been treated in both the Courts below as a claim to pre-emption, which was naturally rejected in the first Court, and in the lower appellate Court was withdrawn though it was never really there to withdraw. It was nothing more than an offer, the more creditable to the plaintiff from its uncommonness, to deal fairly and equitably with the

purchasers in the event of the sale being set aside.

The first and most obvious mistake in the judgment of the learned District Judge lies in regarding this Raj Gond family as governed by the Hindu Law of the Mitakshara, and in considering further that two Hindus are proved to be still joint by the fact that one is the son of the other's second cousin and there has never been an actual division of the family estate, though they have lived in different villages and have not actually enjoyed any property jointly for many years if not for generations. As to the personal law governing the family, at the very end of the judgment it is said :

"The plea now taken in the additional grounds of appeal that the parties were not governed by the Hindu Law being Gonds was not raised in the lower Court. It does not also seem to have any relevancy in this claim."

As will be shown later, the question whether the Hindu Law does or does not apply, has not a great bearing on the case, but it certainly had a very great bearing on what the learned Judge regarded as the case. There is also no justification for a refusal to consider a plea of law of that kind in appeal in the fact that it was not raised in the first Court. On the contrary, it is the business of the Court to discover the law applicable to the facts laid before it by the parties, even without the aid of suggestions made to it by the parties in the form of pleas.

But it is quite clear that the family is not governed by the Hindu Law at all on the principles explained by a Bench of this Court in *Vithoba v. Lal Singh* (1). It is a Gond family, and before the Hindu Law could be applied to it, it was for the parties to plead, if they wished, and prove, if they could, that it had adopted some or all of the rules of that system of law.

Now there is nothing in the plaint that even suggests that Hindu Law governs the family or the case. The only references to that law in any part of the case except the judgments, are to be found in the following two passages in the written statement filed by the contesting defendants on 1st September 1919.

1. "The numerous and important estates in the Bhandara District are held free of special

conditions and are prima facie liable to the ordinary rules of Hindu Law so far as transfer and succession are concerned. 2. Although plaintiff is a 10 annas, 8 pies recorded co-sharer in the zamindari, she has only a right of maintenance in the zamindari, and she cannot be a co-sharer of the zamindari under the Hindu Law so as to acquire a right of suit against defendants 1 and 2."

The first passage refers only to the nature of the estate, not to the family. It is clear also that the word Hindu was used through carelessness for the word general or ordinary, at least one of the estates mentioned is held by a Mussalman family and there may be others held by families that are not Hindu. The second passage states a fact which is evident that the family or the estate does not follow the rules of Hindu Law at all.

But the result is the same whether we apply the Hindu Law, or any other law as Dewaji and Jhitu would still have a share in it represented by more than eight pies, if it is partible. Under the Hindu Law, as it is quite obvious that they were not joint with Ramlal Bapu, each of them would be owner of the one anna, four pies share recorded in his name. Otherwise, under S. 41, Succession Act, which is the provision of the law really governing the case, even if the whole estate belonged to Ramlal Bapu, each of them and of the two sons of Rupsha would inherit two annas on his death, his widow getting the other eight annas, if Dewaji and Jhitu were already owners of a two annas, eight pies share between them, that would be increased to four annas on the death of Ramlal Bapu, as each of them would inherit one-eighth of his one-third share.

The answer to the question of the personal law by which the parties are governed is required, therefore, only as a possible part of the evidence showing that the estate is impartible or not. The only possible answer to it is, of course, that it is the general law, and the rules of justice, equity and good conscience. There remains then only the question whether the estate is impartible or not. The finding of the learned District Judge that it is not is certainly not based on correct reasoning, whether it is correct itself or not. It has been found that

"under the Native Governments the zamindari was viewed more as an office than as a property and if only one heir has succeeded to

(1) A. I. R. 1923 Nag. 317 = 19 N. L. R. 101.

it on the death of the previous holders, the reason evidently is that the inheritance has viewed correctly as a position conferred by the paramount authority and involving powers and privileges continuable only with the consent of the Government."

That is a finding that up to the First Settlement in 1866 the estate was impartible, though it is further held that it was the impartible property of all the members of a joint Hindu family. Apart from the incorrect statements that the family was a joint family and a Hindu family, which are said to be admitted facts, the character of impartibility is held to have been lost by the grant of proprietary right by the British Government in 1866.

That is directly contrary to the ruling of the Privy Council in *Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (2), the overlooking of which is the less excusable from the fact that it was explained in the officially published judgment of this Court in *Rampershad Tiwari v. Anandilal* (3). The same view of the law, that in such case the estate granted by the British Government was of the same nature as that existing under the Maratha Government, was re-affirmed by their Lordships in the recent case of *Martand Rao v. Malhar Rao* (4), which is known as the *Amgaon Zemindari* case.

But the finding in respect of the nature of the estate will bind the whole family and apply to the whole zamindari, that is to say will affect, almost if not quite directly, property worth a great deal more than Rs. 10,000. It is desirable, therefore, that it should be heard by a Bench : and the record will be forwarded to the Judicial Commissioner with a recommendation that this should be done.

Judgment.—This second appeal came up for hearing before Hallifax, Additional Judicial Commissioner, who in an order dated 31st March 1928, recommended that it should be heard by a Bench. This recommendation was accepted and we have heard the appeal. The suit out of which this second appeal has arisen relates to the zamindari of Sadak Arjuni in the Bhandara District. The zamindari forms part of an ancestral

estate, inherited from Phagna Mokashi, which was divided into two estates, one Dunda zamindari and the other Sadak Arjuni. From Phagna Mokashi the original estate descended to his son Gangji and from Gangji came to his two sons Gangaram and Modji. On the death of Modji there was a division of the two estates between Talwarshah (son of Modji) and Gangaram. The estate Dunda zamindari went to Gangaram and the estate in dispute was taken by Talwarsha. Talwarsha had six sons, one of whom Koba alias Kodu held the office of zamindari while the others received maintenance. Kodu had one son Anantram Bapu, who succeeded to the office of zamindari. Anantram had one son Umrao who predeceased him leaving one son Ramlal Bapu. Ramlal succeeded to Anantram. The plaintiff is the widow of Ramlal; defendants 3 to 7 are the descendants of Nawalsha, another of the six sons of Talwarsha.

On 8th March 1918, defendants 3 to 7 conveyed a 8 pies share in each of eighth villages of the Sadak Arjuni zamindari to defendants 1 and 2. The claim with which we have to deal in this appeal was that the alienation of 8 pies share should be set aside and that possession of the share thus conveyed should be given to the plaintiff, Ramlal Bapu's widow. The ground on which the claim was based was that the zamindari was impartible and inalienable. The suit was dismissed. The main finding of the lower appellate Court is that defendants 3 to 7 were cosharers in the estate and had the ordinary right of a cosharer with regard to the transfer of the shares. This finding as, pointed out by Hallifax, Additional Judicial Commissioner, in his order dated 31st March 1928, may be vitiated by the assumption that Hindu Law applied to the case which referred to the estate of a Gond family.

In *Martand Rao v. Malhar Rao* (4) their Lordships of the Privy Council laid down the principles on which a claim of this nature should be decided. They were considering the question whether the Amgaon estate situated in the same district as the estate of Sadak Arjuni was impartible and descendible to a single person. They considered that the following propositions of law may all be taken as well settled:

(2) [1900] 27 Cal. 515=27 I. A. 39=4 C.W.N. 582=7 Sar. 653 (P. C.)

(3) [1900] 13 C. P. L. R. 81.

(4) A. I. R. 1928 P.C. 10 = 55 Cal. 403 = 24 N. L. R. 25 = 55 I. A. 45 (P. C.)

"(a) When there is a dispute with respect to an estate being impartible or otherwise, the onus lies on the party who alleges the existence of a custom different from the ordinary law of inheritance according to which custom the estate is to be held by a single member and, as such, not liable to partition. In order to establish that any estate is impartible, it must be proved that it is from its nature impartible and descendible to a single person, or that it is impartible and descendible by virtue of a special custom.

(b) Any such special custom modifying the ordinary law of succession must be ancient and invariable and must be established to be so by clear and unambiguous evidence. To use the words of James, L. J., in the case of *Umrithnath Chowdhury v. Goureenath Chowdhury* (5): The custom must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back.

(c) That if an impartible estate existed as such from before the advent of British rule, any settlement or re-grant thereof by the British Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue the estate with its previous incidents of impartibility and succession by special custom."

It seems clear that had not the parties in this appeal been Gonds, the application of these principles would have led on the evidence to a conclusion similar to that reached by their Lordships of the Privy Council, namely, that the plaintiff had not discharged the onus of proof, that the Sadak Arjuni estate was impartible and descendible to a single person either from its nature or by virtue of a special custom. But it is urged before us that the propositions of law referred to Hindu estates where the descent by primogeniture is opposed to the ordinary law of inheritance. It is difficult to say what the ordinary law of inheritance among Gonds is. In *Vithoba v. Lal Singh* (1) it was held by a Bench of this Court that a Gond is not a Hindu and is not governed by the Hindu Law, but there is no doubt that many Gond families have adopted much of the Hindu Law and the question which we have to decide is whether in this particular family, property was held jointly devolving upon the surviving co-sharers on the death of one co-sharer or formed an impartible estate descending to a single person.

Now, there is very strong *prima facie*

proof that the estate does not descend by primogeniture. In 1863 Anantram, one of the plaintiff's predecessor-in-title made a deposition, copy of which forms Ex. P-2. He was asked:

"Is there any co-sharer?" He answered:

"I separately note it down in the genealogical table from which the state of things will be known."

The genealogical table makes no mention of the division of the original estate into two zamindaries. Apart from this it shows the sharers in the family estate exactly in the way in which they would have held shares had the estate been joint family property. Neither branch was seriously prejudiced by the record of the co-sharers as holding a fractional share in the whole estate instead of holding a fraction twice as great in one estate or the other. But the admission of Anant Ram that there were co-sharers was strongly against his interest on the hypothesis that the plaintiff is correct in saying that Anantram was the sole owner of one of the estates. This deposition was followed by a record of the proprietors in the manner indicated in the genealogical table and junior members of the family were recorded as co-sharers in the records for a period of 60 years.

It appears to us, then, that, (1) the statement of Anantram, predecessor-in-title of the plaintiff, and (2) the Record-of-Rights during a period of 60 years furnished *prima facie* proof that the estate devolved upon the members of the joint family in accordance with the law among Hindus and did not descend through Anantram to the plaintiff. The principles laid down by their Lordships of the Privy Council indicate the nature of the evidence which would be necessary to rebut this *prima facie* proof. There is no rebutting evidence of any weight, when Talwarshah died leaving six sons the name of the eldest son Koba was recorded as zamindar, but that does not show that the remaining brothers had not the rights as co-sharers. The manager of the family would be considered as a zamindar, especially as it was customary to invest the zamindar with certain powers. There was no need for the record to show whether the zamindar was the sole owner or the manager of the zamindari. It appears that the original estate was divided between two

(5) [1863] 13 M. L. A. 542=15 W. R. 10=2 Sutherland 331=2 Str. 613 (P.C.).

branches of the family after the death of Modji and there does seem some difficulty in holding that, although the original estate was not impartible, the estates into which it was carved were. In most cases the recorded zamindar at his death, left a single direct descendant. We hold, therefore, that the law governing the descent of the estate was that which governs the descent of an estate held by Hindu joint family.

It is next pleaded before us that the lower Court has come to a finding that the zamindari was impartible up to the year 1866 and that the defendants' ancestors might all along have been co-sharers without any right to partition the property or to dispose of their shares. It was not apparently suggested in argument before the Privy Council that an estate might belong to co-sharers and still be impartible and we find it difficult to conceive such an estate. If the judgment of the lower appellate Court is read as a whole, there is no finding that the estate was impartible up to 1866. The Judge states:

"Partibility before 1866 was prevented by pressure of the sovereign power."

The only meaning this can have is that partition before 1866 was prevented by the pressure of the sovereign power. The Judge apparently intends merely to give an explanation of the fact that the estate was not partitioned. The sovereign power, which desired that there should be a substantial landholder to whom civil and criminal powers could suitably be given, would have disapproved of the partition, so sharers were dissuaded from getting partition which might have led to confiscation of the estate. If the Judge means that the estate was impartible for any reason up to 1866, we need only say that the finding is based on no evidence whatever and we disagree with it. The admission that the defendants' ancestors were co-sharers and the entry of their names as co-sharers in the records justify the interference that they had a right to ask for a partition and to transfer their shares to others.

The remaining arguments by the appellant require little discussion. There can be no presumption that the estate, because it is admittedly a zamindari, is governed by the rule of primogeniture. The fact that the defendants did not for many years claim partition is no proof

that they had no right to a partition, their status was duly recorded in records and the parcels of land which they occupied may have been sufficient for their maintenance. The appeal, therefore, fails and is dismissed. Costs on appellant.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 40

STAPLES, A. J. C.

Raghoba—Appellant.

v.

Anandabai and others—Respondents.

Second Appeal No. 356 of 1928, Decided on 21st August 1929, from a decree of Addl. Dist. Judge, Wardha, D/- 23rd February 1928, in Civil Appeal No. 119 of 1927.

(a) **Easements Act, S. 18—Customary easement cannot be in favour of individual.**

There cannot be a customary easement in favour of an individual and so easement acquired under and by virtue of local customs can only be in favour of class and community. [P 41 C 2]

(b) **Wazibularz—Scope.**

If there is a customary easement in favour of a landlord or tenants, it will certainly be recorded in wazibularz. [P 41 C 2]

(c) **Civil P. C., O. 18, R. 18—Finding based mainly on personal obstructions is wrong.**

It is an incorrect procedure to base a finding mainly based on Judge's own observation at the time of personal inspection as he cannot be cross-examined on the point. [P 41 C 1]

*M. R. Bobde—*for Appellant.

*M. B. Niyogi—*for Respondents.

Judgment.—A suit was brought by respondent 1, Anandabai, against the appellant and the other respondents for an injunction restraining them from preventing her taking her cattle to her fields along a way, which was shown in the map filed with the plaint, along the boundary of the respondents' field. The suit was dismissed by the trial Court, but on an appeal the Additional District Judge held that Anandabai had a right of way as an easement along the path claimed and reversed the decree of the trial Court and passed a decree ordering the respondents to remove the obstruction and declaring that Anandabai was entitled to go and return from her fields along a passago six cubits in width, as shown in the map attached to the plaint. One of the defendants only, Raghoba, has now appealed.

The only document filed was a jama-bandi for the village which shows the fields in possession of the parties.

Anandabai is admittedly the malguzar of the village, whilst the appellant and the other respondents are tenants of that village. The fields in possession of the parties are shown in the map which was filed with the plaint. Anandabai's case was that she had been using the way openly and as a right for a long period of years. The respondents denied her right of way or the fact that she had been using the way and pleaded that she went by another way, also shown in the map, to her fields. Oral evidence was adduced by both parties and the case had to be decided on that evidence. The finding being now one of fact on oral evidence, it is doubtful whether there can be any interference in second appeal.

It has not been shown that the point at issue between the parties has been misunderstood by the Judge of the lower appellate Court or that the evidence has been misinterpreted in any way ; on the contrary, I am of opinion that the issue between the parties was clear and was rightly understood by the Judge of the lower appellate Court and that he has given a finding upon that issue after considering the evidence on record. I would only add that the finding of the trial Court has been based mainly upon the Judge's own observation at the time of his personal inspection. Such a procedure is wrong, as the Judge could not be examined as a witness or cross-examined. Further, I would point out that it was admitted that the way was obstructed in August 1926 whilst the inspection note was not made until November 1927, i. e. after a lapse of about 15 months. If the way, then, had not been used for some 15 months, it might have easily become overgrown as noticed by the Judge at the time of his inspection.

Another argument put forward by the learned counsel for the appellant was that, even if the way had been acquired by prescription, it had not been shown that it had been continuously used up to two years before the institution of the suit, as required by S. 15, Easements Act, and it was pleaded that, at any rate, there was a cessation of user. I would point out, however, that no such plea was raised in the trial Court and in order that such a plea might be raised it would have to be admitted that there was a user prior to the period of two years. Clearly, if there was no user at

all, it could not have been exercised within two years before the suit. Nor is there any evidence adduced by the defendant to show that there was any cessation of user. On the other hand Parashram (P. W. No. 1) has clearly deposed that the defendant obstructed the use of the way since 2nd August 1926. The suit was brought on 23rd November 1926, i. e., a little over three months after the obstruction. That evidence has not been contradicted, nor has the obstruction, as far as I can see, even been denied. I hold, then, that there has been clearly no cessation of user and that if the right was enjoyed, as it has been held by the lower appellate Court to have been enjoyed, it was enjoyed within two years of the institution of the suit.

The learned counsel for the appellant was, I think, aware that there was not much chance of success as the case stood but he contended that the case should be remanded as there had been a mistake by the lower appellate Court in holding that there was a customary easement. It is true that there appears to have been some confusion in the mind of the Additional District Judge in this matter, and it is also, of course, clear that no customary easement was pleaded nor can there be a customary easement in favour of an individual. In this connexion I have been referred to the law relating to Easements in British India by Peacock, at p. 206 of the third edition, and to *Dina v. Bhasod* (1). In p. 8 of his judgment the Additional District Judge has written :

"Easements are capable of being acquired under and by virtue of a custom. See S. 18, Easement Act, 1882. No period is prescribed for the establishment of a local custom."

Such a custom, however, could only be in favour of a class or community, and if there was a custom in favour of the landlord or tenants it would certainly be recorded in the *wajibularz*. On the other hand, I would refer to para. 10 of the judgment where it has been clearly held that the plaintiff had a right of way to her field for the purpose mentioned along the road shown in the map and that the said way had been used by her openly and as of right without obstruction and peacefully for more than twenty years. That is a clear

(1) A. I. R. 1926 Nag. 372.

finding of easement by prescription according to S. 15, Easement Act, and although the Judge has made a mistake about customary easement he has corrected that mistake and given a clear finding that the easement had been acquired by long and continuous use. There is no ground therefore for a remand.

The decree of the lower appellate Court is therefore confirmed and the appeal is dismissed. Costs of the appeal will be borne by the appellant. Other costs will be borne as ordered by the lower appellate Court.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1930 Nagpur 42**

JACKSON, A. J. C.

Kasam—Defendant—Applicant.

v.

Narayan and others — Plaintiff and Defendants—Non-Applicants.

Civil Revn. No. 45-B of 1929, Decided on 5th November 1929, from order of Small Cause Court Judge, Amraoti, D/- 21st December 1928, in Small Cause Suit No. 535 of 1928.

Principal and Agent—Money borrowed by agent on behalf of principal — Agent not authorized but lender believing that he was — Money borrowed devoted in paying legal debts of principal — Principal is liable to lender—Contract Act, S. 237.

Where money is borrowed on behalf a principal by an agent, the lender believing that the agent had authority, though it turns out that his act was not authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal: *Bannatyne v. Maciver*, 1 K. B. 103, *Foll.*

[P 42 C 2]

Abdul Razak—for Applicant.*N. T. Mangalmurti* and *T. L. Sheode*—for Non-Applicants.

Order.—The applicant in this case was defendant 1 in the lower Court. He purchased the shop of Karim Haji Isa at Amraoti. Defendants 2, 3 and 4, the owners of this shop, were placed by him in charge of the winding up of the business as his agents. In the course of this winding up the plaintiff made a deposit of Rs. 1,000 with the firm and he has now sued to recover it. Defendant 1 contests the plaintiff's claim on the ground that defendants 2, 3 and 4 had

no authority from him to borrow money in the course of their winding up of the business.

Defendant 1 had certainly given no express authority to the other defendants to borrow money and it seems to me doubtful if any such authority can be implied. On behalf of defendant 1, I have been referred to Katiar's Law of Agency in British India, where it is laid down, at p. 256, that if the transaction or business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment, but that it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment. The plaintiff, however, does not necessarily fail because the power to borrow money was not given to defendants 2, 3 and 4 at all expressly or by implication. At p. 258 of the Treatise to which I have just referred the following passage will be found extracted from the judgment of Romer, L J, in *Bannatyne v. Maciver* (1):

"Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent had authority, though it turns out that his act was not authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal."

In the present case Rs. 1,000 held as a deposit on behalf of the plaintiff was devoted to the payment of a sum due from defendant 1 to the trustees from whom he had purchased the shop of Karim Haji Isa and on the principle above quoted from the judgment of Romer, L. J., it seems to me clear that defendant 1 is liable to the plaintiff. I dismiss the application with costs. I fix pleader's fee at Rs. 30. There will be one set of costs.

P.N./R.K.

Revision dismissed.

(1) [1906] 1 K. B. 103=75 L. J. K. B. 120=51 W. R. 293=94 L. T. 150.

* A. I. R. 1930 Nagpur 43

STAPLES AND SUBHEDAR, A. J. CS.

Baburao and another—Defendants—Appellants.

v.

Pandharinath — Plaintiff — Respondent.

First Appeal No. 43 of 1926, Decided on 31st August 1929, against decree of Dist. Judge, Bhandara, D/- 19th January 1926.

(a) Hindu Law—Debts — Son's liability—Mortgage by father — More than one-fifth consideration found not binding—Mortgage is binding at least to the extent of consideration found binding.

It is wrong to say that if in the case of a mortgage, by conditional sale by the father manager more than one fifth of the consideration is not held binding upon the sons, the mortgage would not be operative upon their shares in the mortgaged property even to the extent of the consideration that may be found to be binding upon them, either on the ground of its being antecedent debt, or supported by other legal necessity. [P 45 C 1]

(b) Hindu Law—Debts—Antecedent debts are binding on son whether or not for necessity.

Antecedent but not immoral debts are binding on the sons irrespective of whether income from ancestral property was or was not sufficient for the needs of the family and there was no necessity for incurring them : 15 N. L. R. 83 and A. I. R. 1924 P. C. 50, *Rel. on.* [P 46 C 1]

*(c) Hindu Law—Debts—Antecedent debts explained.

The debt does not cease to be antecedent merely because it is not ripe for payment when it is sought to be charged upon ancestral property by the father : A. I. R. 1923 All. 535, *not Foll.* ; A. I. R. 1924 P. C. 50, *Rel. on.* ; A. I. R. 1925 Nag. 2 and A. I. R. 1926 P. C. 16, *Dist.* [P 46 C 1]

(d) Hindu Law—Debts—Antecedent debts illustrated.

Debts due on a previous mortgage and incorporated in the consideration of the mortgage sued on are antecedent debts : A. I. R. 1926 Oudh 470 and 42 *Mad.* 711 (*F.B.*), *Rel. on.* [P 47 C 2]

M. B. Kinkhede, D. W. Kathaley and G. R. Deo—for Appellants.

S. B. Palsole—for Respondent.

Judgment.—This appeal arises out of a suit for foreclosure of a mortgage executed on 20th April 1920 by defendant 1 Yeshwantrao for himself and as guardian of his minor son Baburao, defendant 2, in plaintiff's favour for a consideration of Rs. 11,000, which was made up as under :

(1) One-third share of the debts due to plaintiff on a prior mortgage for Rs. 19,000, dated 7th May 1918 (Ex. P-2 executed by defendant 1 and his two brothers Jaikrishna and Sadashiva).

One-third share of the debts due to plain-

tiff in respect of four items of loans on receipts (Exs. P-6, 7, 8 and 10) taken by the aforesaid three brothers.

(3) Cash paid before the registering officer.

(1) Rs. 7,763-0-0

(2) Rs. 1,418-0-0

(3) Rs. 1,816-0-0

Total Rs. 11,000-0-0

The mortgage debt was repayable in twenty annual instalments of Rs. 550 each and interest on the entire principal at the rate of 12 per cent per mensem was to be paid along with each instalment. The defaulted instalments were to carry interest at Rs. 1-4-0 per cent per mensem at compound rate and the whole debt was exigible on failure to pay three instalments. As nothing was repaid the plaintiff filed the suit, out of which this appeal arises, in the Court of the District Judge, Bhandara, on 4th August 1924 to enforce the mortgage and to recover Rs. 16,116-6-0 as per account given in para. 9 of the plaint. Defendant 1 admitted the execution and receipt of the full consideration of the mortgage bond in suit but wanted relief in respect of the interest charged on the ground that it was penal. As he declined to act as guardian ad litem of his minor son, defendant 2, his brother Jaikrishna, i.e., the uncle of the boy, was appointed guardian ad litem and the claim on behalf of defendant 2 was denied in toto and contested on all possible grounds.

A very fair idea of the pleadings of the parties would be gathered from a perusal of the following issues that were settled for trial :

"1 (a) Whether defendant 1 executed the mortgage deed in suit and received its full consideration as shown therein ?

(b) Was the above deed attested according to law ?

2. Whether the deed in suit was executed for justifying legal necessity and is it binding on defendant 2 ?

3. Whether the plaintiff is entitled to claim simple or compound interest on defaulted instalments and if so, at what rate ?

4 (a) Whether the plaintiff is not entitled to claim any interest after the date of default of the first three instalments ?

(b) Whether interest should be allowed after that date and on what amount ?

5. To what relief is the plaintiff entitled and against which of the defendants ?"

In a well reasoned and elaborate judgment the learned District Judge recorded the following findings :

On issue 1 (a) that defendant 1 executed the mortgage sued on and received its full consideration ;

... (b) that the deed was duly attested by two witnesses according to law.

On issue 2 that out of the consideration of Rs. 11,000 legal necessity for Rs. 8,513-13-4 was made out so as to bind the interest of defendant 2 in the joint half of the mortgaged properties to that extent.

On issue 3, that the stipulation to pay compound interest at the enhanced rate of Rs. 1-4-0 per cent per mensem being penal, simple interest at that rate on defaulted instalments should be awarded to the plaintiff;

On issue 4 (4), that the plaintiff was entitled to claim interest after date of default of the third instalment;

On issue 4 (b), that simple interest should be allowed at the original rate on the principal amount after that date;

On issue 5, that the plaintiff was entitled to a decree for foreclosure against defendant 1 and his half undivided share in the mortgaged properties to the extent of Rs. 15,776-1-3, and against defendant 2 and his half undivided share in the mortgaged properties to the extent of Rs. 12,162-3-8 only."

A decree was accordingly passed in plaintiff's favour on 19th January 1926, against which both the defendants have filed the present appeal on the following grounds:

"1. In view of the finding that the deed did not provide expressly for payment of post diem interest, the lower Court acted erroneously in allowing interest after the whole amount became due on account of default in payment of the three instalments at the rate decreed and it should have allowed post diem interest at the rate of 8 As. p. m., for Rs. 100 as compensation.

2. In view of the fact that the plaintiff himself claimed simple interest at the rate of nine per cent per annum as sufficient compensation after default in payment of the three instalments, the lower Court should have held that compensation at that rate was quite sufficient so far as interest on the two defaulted instalments was concerned and it should not have granted interest at the rate of Rs. 1-4-0 per cent per month on the defaulted instalments.

3. The lower Court should have held that granting interest at the rate of Rs. 1-4-0 p. c., p. m., was not justified by legal necessity.

4. The lower Court should have held that the income from the share in malguzari villages was more than sufficient for the needs of the family and that there was no necessity to borrow on the various occasions and to execute the previous mortgage-deeds as well as the mortgage-deed sued upon and it should have held that the deed sued upon was not enforceable against the interest of the minor.

5. The lower Court should have held that the consideration and attestation of the deed sued upon was not proved against the minor appellant and no decree should have been passed against him.

6. The lower Court should have held that the existence of antecedent debt alone was not sufficient to justify the mortgage.

7. The decree passed in the case is defective."

Grounds 3, 5 and 7 were not pressed and need not be considered. Grounds 4 and 6 were taken up together and a threefold argument was advanced thereon. The first point argued by Mr. Kathalay for the appellants was that since more than 1/5th: viz., Rs. 2,486-2-8 out of Rs. 11,000 of the consideration of the mortgage-deed in suit was found by the lower Court not to be binding upon the minor defendant, because it was neither an antecedent debt nor supported by legal necessity, there could be no decree passed against the son's half share in the mortgaged property at all and the following cases were cited in support of this argument: *Hiraram v. Uderam* (1); *Chandrdeo v. Singh v. Mata Prasad* (2); *Jainarain v. Bhagwan* (3); *Sanmukh v. Jagarnath* (4); *Mamuji v. Dalpat*; *A.I.R. 1928 Nag. 37* and *Shri Krishan Das v. Nathu Ram* (5).

In the first case, after the death of the father mortgagor, the mortgage was sought to be enforced against the mortgaged joint ancestral property in the hands of the sons. The consideration of the mortgage was Rs. 3,000, but the lower Court had found that Rs. 2,407 only were binding upon the sons, because they were antecedent debts of the father and a decree for foreclosure of the entire mortgaged property was passed against the sons in default of payment of Rs. 2,407, principal and interest thereon. On an appeal by the plaintiff mortgagee to have the disallowed principal and interest included in the decree, this Court held with the trial Court that in the absence of proof, legal necessity for the amount claimed could not be presumed. The appeal was accordingly dismissed and the decree of the first Court maintained.

In the second case a mortgage by the father for consideration which was not proved to have been for antecedent debts or legal necessity, was not enforced against the sons of the mortgagor. In the third case the sale of joint ancestral property by a father for a consideration of Rs. 375 was set aside at the instance

(1) [1913] 9 N. L. R. 74=19 I. C. 861.

(2) [1909] 31 All. 176=1 I. C. 479=6 A. L. J. 263.

(3) A. I. R. 1922 All. 321=44 All. 683.

(4) A. I. R. 1924 All. 708=46 All. 531.

(5) A. I. R. 1927 P. C. 37=49 All. 149=54 I. A. 79 (P.C.).

of the other coparceners on their paying Rs. 275-3-0 to the vendee which amount was found to have have been supported by legal necessity.

In the fourth case, on a suit by the son to set aside a sale of joint family property by the father for a consideration of Rs. 1,000, it was found that the sale was supported by antecedent debts or legal necessity to the extent of Rs. 800, and the plaintiff was given a decree for restoration of the property sold on payment of Rs. 800 to the defendant. The fifth case was one in which the sale by the father was set aside to the extent of the $\frac{3}{4}$ th share of the sons in the property sold but the decree was made conditional upon the sons paying to the vendee Rs. 1,173-2-3 and interest out of the consideration of Rs. 3,999, which were held to be binding upon the sons on account of their being antecedent debts.

In the sixth case the Allahabad High Court at the instance of the sons had passed a decree in their favour for possession of the properties which were sold by their father for a consideration of Rs. 3,500 subject to their paying to the vendee of Rs. 3,000, for which legal necessity was made out. On appeal, their Lordships of the Privy Council set aside this decree by holding that under the circumstances of the particular case legal necessity for Rs. 500 should be presumed although there was no direct evidence led to establish the point. The suit was, therefore, dismissed.

None of these cases, however, lay down the proposition now contended for, viz., that if in the case of a mortgage by conditional sale by the father manager more than one-fifth of the consideration is not held binding upon the sons, the mortgage would not be operative upon their shares in the mortgaged property even to the extent of the consideration that may be found to be binding upon them, either on the ground of its being antecedent debt, or supported by other legal necessity.

On the contrary they affirm the rule of law as to adjustment of equities arising on partial necessity being established in cases of alienation of ancestral estate by the managers of joint Hindu families and which is formulated by Sir H. S. Gour in S. 131 (b) of his Hindu Code in the following words:

"Where it is only partially so justified, the alienation will be set aside upon the alienance being reimbursed the consideration found supported by legal necessity or benefit, and the cost of improvements, if any, made by him."

Even the Judicial Committee of the Privy Council have affirmed the principle in the case of *Deputy Commissioner v. Kanjan Singh* (6). We have neither been shown, nor have we been able to discover, a single case supporting the extraordinary proposition now put forward for the appellant in the present case, that in spite of the fact that legal necessity for the major portion of the consideration is established no decree at all could be passed against the interests of the minor's share in the mortgaged properties.

If we apply the principle recently enunciated by the Judicial Committee in the cases of *Shri Kishan Das v. Nathu Ram* (5) and *Niamat Rai v. Din Dyal* (7), that in cases where a considerable portion of the consideration is found to be supported by legal necessity it is to be presumed that the balance was also for legal necessity justifying the alienation, it is clear that excepting the cash the rest of the consideration of the mortgage in suit must be held binding upon the minor appellant. But we cannot interfere with the lower Court's decree in this case, because no appeal or cross-objection has been filed by the plaintiff-respondent in respect of partial disallowance of his claim against the minor appellant.

The second point pressed was that since the income from the shares in malguzari villages belonging to the defendants was more than sufficient for the needs of the family, there was no necessity or justification for incurring the several loans by the father which formed the consideration of the mortgage-deed in suit. But as these several debts have not been challenged on the ground that they were incurred for immoral purposes, and when a majority of them have formed the consideration of the present mortgage as "antecedent debts" of the father, as is amply proved in the present case, they are legally binding upon the undivided share of the minor defendant in the coparcenary

(6) [1901] 26 All. 331=10 O. C. 117=31 I. A. 72=4 A. L. J. 232 (P.C.).

(7) A. L. R. 1027 P. C. 121=8 Lab. 507=51 I. A. 211 (P.C.).

property: *Ratanchand v. Sheocharan* (8) and *Brij Narain v. Mangal Prasad* (9). It is immaterial therefore to enquire if the income from the ancestral property was, or was not, sufficient for the needs of the joint family. Under the law, as it stands, the plea contended for is not open to be taken on behalf of the minor appellant.

It was also argued that since the debt covered by the previous mortgage (Ex. P-2) had not admittedly become payable on the date on which the mortgage in suit (Ex. P-1) was executed, one-third of the amount covered by the previous mortgage which formed the major portion of the consideration of Ex. P-1 could not at all be called "antecedent debt," because there was no pressure on the estate for payment of the same and hence there could not be "legal necessity" proved in respect of this portion of the consideration of the mortgage in suit. In other words, the contention advanced was that unless a debt is ripe for payment and for which the creditor can legally make a demand at the moment when it is sought to be charged upon ancestral immovable property by the father, it could not be called "antecedent debt" within the meaning given to these words by the Privy Council decision in *Brij Narain's* case (9) so as to dispense with the proof of its having been incurred for "legal necessity."

Reliance was placed in support of this contention on a single ruling of the Allahabad High Court reported as *Bandhu Ram v. Ram Kishun* (10) where it was held that in order to justify an alienation by the father it is not sufficient merely to show that at the time of the alienation debts binding on the family were outstanding but that it must further be shown that the alienation had to be undertaken under the pressure of a present necessity for the discharge of the debts. This case was, however, decided on 16th March 1923 before the case of *Brij Narain* (9) was decided by the Privy Council, the latter case being actually reported in the year 1924. The earlier view of the Allahabad High Court on the point of "antecedent

debts" must therefore be deemed to have been overruled by the aforesaid Privy Council decision which was, moreover, a case from the same High Court. We, therefore, refuse to follow the view of the law as propounded in *Bandu Ram's* case (10).

It was frankly admitted by the learned counsel, who appeared for the appellants, that such a narrow interpretation of the expression "antecedent debts" is not supported by direct authority of any case reported after the decision of the Privy Council in *Brij Narain's* case (9). On the contrary, in para. 1631 of his valuable Hindu Code, Third Edition, Sir H. S. Gour observes that

"If the debt was 'antecedent' it is immaterial that it was neither pressing nor even due, since pressure is not a pre-requisite of 'antecedence,' though it is proof of necessity, nor is the fact that the debt might have been otherwise paid even relevant to the question of antecedence."

It is not denied in the present case that the debt secured by the previous mortgage (Ex. P-2) was a pre-existing debt, and simply because it was not repayable till 1922 it could not be said that it was not an "antecedent debt" on 20th April 1920 when by common consent of the creditor and the debtor it was taken as discharged by its inclusion in the consideration of the mortgage in suit (Ex. P-1).

An argument by analogy was also advanced in support of the above contention on the basis of a ruling of this Court reported as *Chitnavis v. Nathu Sao* (11), where it was held that the alienation of a minor's estate by a guardian for payment of debts, the recovery of which is barred by time, is voidable as lacking legal necessity. It was, therefore, contended that debts barred by time were on a par with debts not ripe for payment and if an alienation for the discharge of the former was void it must equally be void in respect of the latter. We are, however, of opinion that this contention is not tenable. In the eye of the law, as well as in fact debts the recovery of which is barred by time are really no subsisting debts at all and therefore the argument put forward cannot hold good in the present case.

The case of *Jawahir Singh v. Udai*

(8) [1919] 15 N. L. R. 88=51 I. C. 28.

(9) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

(10) A. I. R. 1923 All. 535.

(11) A. I. R. 1925 Nag. 2=20 N. L. R. 106.

Parkash (12), which was also cited as supporting indirectly the contention that debts not due for payment were not "antecedent debts" is hardly in point. That was a case where a Hindu father had contracted to sell part of the joint family property in order to discharge a mortgage upon other parts of it, but the mortgage had already been discharged before the purchase price was received and which was, moreover, applied by the father to his own purposes. It was, therefore, rightly held that sale was not made to discharge an "antecedent debt."

Great reliance was placed on the following passage appearing at p. 157 of the report of the above case :

"The doctrine of 'antecedent debt' has been carried far enough ; if the present contention is acceded to, it would mean that a contract for loan which never was completed to pay off a previous debt otherwise discharged, would become 'antecedent debt.' This contention is on the face of it, absurd."

We fail to notice where the relevancy of the passage quoted above comes in for the decision of the point under consideration.

The following observations appearing at p. 801 (of 47 *All.*) in the case of *Lal Bahadur v. Ambika Prasad* (13), were also relied on in this connexion :

"The effect of that explanation, in their Lordships' judgment, is to show that in the circumstances of this case both of the mortgages of 1895 were 'antecedent debts' which would justify for their liquidation a sale of family property *not otherwise improper*."

We have underlined (italicized) the words in the above quotation on which special emphasis was laid and on the basis of which an argument advanced that even in the case of antecedency of debts pressure or necessity has to be proved to justify an alienation. We are not at all impressed with this argument in view of the definite pronouncement of their Lordships in this very case and earlier cases to the effect that "antecedent debts" of the father do by themselves constitute a form of legal necessity which justifies the alienation and renders it unimpeachable by the sons.

The third point pressed was that because the mortgage in suit (Ex. P-1) was a renewal of the old mortgage (Ex. P-2), it was not for an antecedent debt and

the case of *Jang Bahadur Lal v. Raghu-nath Singh* (14), was cited in support of this contention. The judgment itself, as reported, does not support the contention advanced but the second portion of the headnote states that

"whether a mortgage of joint family property is made by a Hindu father and the son makes an alienation which is wholly a renewal of the previous mortgage made by the father the alienation does not constitute an antecedent debt."

On the other hand, in the case of *Jai Narain v. Mahabir Prasad* (15), the same Court held that the amounts due on two previous mortgage deeds which constituted a portion of the consideration of the mortgage sued on were "antecedent debts" within the meaning of the expression given to them by their Lordships of the Privy Council in *Brij Narain's* case (9). The same view was taken by a Full Bench of the Madras High Court in the case of *Armugham Chetty v. Muthu Koundan* (16), nearly four years before *Brij Narain's* case came to be decided by the Privy Council. We, therefore, hold that debts due under Ex. P-2 and incorporated in the consideration of Ex. P-1, in the present case, were "antecedent debts."

The first two grounds of appeal attack the award of interest by the lower Court. On the principle enunciated in *Purushottam v. Sahu* (17) it was contended that interest at the rate of six per cent per annum only should have been allowed after the whole amount became due. In the reported case prospective sawai interest was already added to the principal and under these circumstances this Court rightly interfered in the matter and awarded simple interest at six per cent per annum. Simple interest at nine per cent. per annum allowed by the lower Court in the present case was the rate agreed upon by the parties and was not at all, in our opinion, an unfair rate. We therefore decline to interfere with the decision of the learned District Judge on this point.

On the second ground we hold that on defaulted instalments simple interest at Rs. 1-4-0 per cent. per mensem should have been allowed instead of compound interest at the same rate. We, there-

(14) A. I. R. 1929 Oudh 43=2 Luck. 401.

(15) A. I. R. 1926 Oudh 470=2 Luck. 226.

(16) [1919] 42 Mad. 711=37 M. L. J. 166=9 M. L. W. 565=52 I. C. 525=(1919) M. W. N. 40 (F.R.).

(17) A. I. R. 1926 Nag. 90=22 N. L. R. 23.

(12) A. I. R. 1926 P. C. 16=48 All. 152=53 I. A. 36 (P.C.).

(13) A. I. R. 1925 P. C. 24=47 All. 795=28 O. C. 371=52 I. A. 413 (P.C.).

fore, order fresh accounts to be made accordingly.

Fresh accounts are accordingly made by the appellants' counsel and checked here. The interest on the defaulted instalments as now awarded comes to Rs. 240-6-4 instead of Rs. 671-9-6 awarded by the lower Court in case of defendant 1 and of Rs. 572-10-0 in case of defendant 2. The decree of the lower Court will therefore be modified by reducing the decretal amount payable by defendant 1 by Rs. 431-3-2 and that payable by defendant 2 by Rs. 332-3-8. The result is that except in the matter of interest the decree appealed against is confirmed and this appeal dismissed. Since the success in appeal is trifling, we order that all the costs of this appeal shall be paid by the appellants. The date fixed for redemption by the lower Court is extended to 1st December 1930.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 48

JACKSON, A. J. C.

Atmaramsao—Applicant.

v.

Rambharos and another—Non-Applicants.

Civil Revn. No. 52 of 1929, Decided on 20th September 1929, from order of First Class, Sub-Judge, Bilaspur, D/- 10th December 1928, in Misc. Case No. 46 of 1928.

(a) Civil P. C., S. 151—Suit dismissed for default—No good cause shown for non-appearance—Court cannot restore suit under S. 151.

If suit is dismissed for default and if no sufficient cause for non-appearance is shown, the Court has no power to restore the suit to file in exercise of the inherent power under S. 151: 34 *All.* 426 and 44 *Bom.* 82, *not. Foll.*; *A. I. R.* 1925 *All.* 610 (*F. B.*); *A. I. R.* 1922 *Pat.* 479; *A. I. R.* 1925 *Nag.* 356 and *A. I. R.* 1927 *Cal.* 920, *Rel. on.*; *A. I. R.* 1928 *P.C.* 137, *Expl.* and *Rel. on.*; *A. I. R.* 1926 *Nag.* 403, *Ref.* [P 49 C 2]

(b) Civil P. C., S. 151—Suit dismissed for default—No sufficient cause shown for non-appearance—Suit restored under S. 151—Revision lies—Civil P. C., S. 115.

A suit was dismissed for default. The Court found that there was no sufficient cause for non-appearance of plaintiff. But Court restored the suit to file in exercise of the inherent power of the Court under S. 151.

Held: that the case was a proper one for revision as the question was whether the Court has jurisdiction to make the order: *A. I. R.* 1929 *Bom.* 198, *Dist.* [P 49 C 2]

D. N. Choudhry—for Applicant.

J. Sen—for Non-Applicant 1.

Order.—This is an application for revision of an order by the lower Court restoring to the file a suit dismissed for default. The lower Court has found that there was no sufficient cause for the non-appearance of the plaintiffs, but has restored the suit to file in exercise of the inherent power of the Court recognized by S. 151, Civil P. C. It has been urged on behalf of the non-applicants that the lower Court's finding that there was no sufficient cause is wrong. The plaint had been rejected by the lower Court as insufficiently stamped. On appeal the order rejecting the plaint was set aside and the case remanded for trial. It was received by the lower Court on 22nd August 1928 and 10th September 1928 was fixed for hearing. The plaintiffs' pleader was present on 22nd August 1928 and has initialled the order sheet but does not appear to have informed the plaintiffs of the date fixed for hearing and on 10th September 1928 he appeared and said that he had no instructions. Plaintiff 1's reason for not appearing is alleged to be that he was informed by the appellate Court that a notice of the date fixed would be issued to him. His evidence is to the effect that it was the Court's reader that gave him this information. That evidence has been disbelieved by the lower Court and in my opinion its decision is correct. Plaintiff 1 on his own evidence did not wait to receive a notice but made enquiries in the lower Court about eight days after the order of remand and found that the record had not been received back. His evidence as to the information given him by the reader of the appellate Court thus does not appear to be correct; it is supported by the evidence of one witness only, who professes to have heard what was said from outside the Court-room, and the reader has not been examined. The plaintiffs appear simply to have been dilatory in making the second enquiry as to the date for hearing. As I agree with the lower Court in rejecting the evidence that plaintiff 1 was told by the reader that he would receive a notice, I need not consider what the effect of such information being given would be.

The point raised on behalf of the applicant-respondent is that the lower Court can only restore a suit to the file under O. 9, R. 9, that is, when sufficient

cause for non-appearance has been shown and that when sufficient cause has not been shown, the Court cannot restore a suit in exercise of its inherent powers. There has been a divergence of opinion among the High Courts on this question. In *Lalta Prasad v. Ram Karan* (1) it has been held that O. 9, R. 9, merely makes it compulsory to restore a suit when sufficient cause has been shown, but leaves the Court discretion to restore in other cases by virtue of its inherent powers. The same view has been taken in *Bilasrai Laxminarayan v. Cursondas Damodardas* (2). In *Ram Sarup v. Gaya Prasad* (3), however, it has been held that a Court has no jurisdiction to set aside an ex parte decree except under O. 9, R. 13, that is, when sufficient cause has been shown, and that there is no inherent jurisdiction to do so. The same view has been taken in *Ajodhya Mahton v. Mt. Phul Kcer* (4) and in a case of this Court *Vishwanath v. Vajinath* (5). Another decision of this Court *Wasudeo v. Inayat Hussain* (6) has been cited in support of the view that the Court has inherent power to restore a suit dismissed for default. That proposition appears in the headnote of the decision, as it appears in an unauthorized series of reports, but in the body of the order it will be found that in the opinion of the Court sufficient cause had been shown for non-appearance. Again in *Sudananda Moral v. Rakhal Sana* (7) it was held that when no sufficient cause for review was made out, the Court could not, by virtue of its inherent powers, assume a jurisdiction forbidden by the legislature. In *Motilal v. Ujjar Singh* (8) it has been held by the Privy Council that under O. 34, R. 3 (2), extension of time for payment of the sum due under a decree for foreclosure can only be granted for good cause shown. Their Lordships do not expressly exclude the exercise of the Court's inherent powers in such a case, but they clearly do so by necessary implication.

(1) [1912] 34 All. 426=14 I. C. 187=9 A. L. J. 666.

(2) [1920] 44 Bom. 82=53 I. C. 252=21 Bom. L. R. 952.

(3) A. I. R. 1925 All. 610=48 All. 175 (F.B.).

(4) A. I. R. 1922 Pat. 479=1 Pat. 277.

(5) A. I. R. 1925 Nag. 356.

(6) A. I. R. 1926 Nag. 409.

(7) A. I. R. 1927 Cal. 920.

(8) A. I. R. 1928 P. C. 137=24 N. L. R. 182=55 Cal. 821=55 I. A. 207 (P.C.).

It has been sought on behalf of the non-applicants to distinguish the rulings which negative the inherent power of the Court, on the ground that they do not relate to cases of suits dismissed for default; but that seems to me to be immaterial. They are authority for the general proposition that when the law entitles a party to an order in his favour on good cause being shown, the Court cannot exercise its inherent power to give that order when good cause has not been shown, whether it be an order restoring a suit dismissed for default, setting aside an ex parte decree, granting extension of time for payment of the sum due under a decree for foreclosure or granting review of a judgment. In my opinion the weight of authority and reason is in favour of that general proposition, and I hold that the lower Court has no power to restore the suit in the case before me.

It has been argued on behalf of the non-applicants that there can be no revision in this particular case and reference has been made to *Krishna v. Bhanu* (9), in which it was held that the High Court will not interfere in revision with an order passed by the lower Court following one out of two divergent lines of authorities. That case is merely a particular application of the view that provided a Court has jurisdiction to entertain a case, even if it decides it wrongly, it is not a ground for interference under §. 115, Civil P. C. Here, however, the whole question is whether the lower Court had or had not jurisdiction to make the order that it did make. In my opinion it had not jurisdiction and this is, therefore, a proper case for revision. I set aside the order of the lower Court restoring the suit to file and direct that the suit be dismissed with costs. The non-applicants will bear the costs of the applicant in this Court. I fix pleader's fee at Rs. 50.

P.N./R.K.

Suit dismissed.

(9) A. I. R. 1929 Bom. 198.

A. I. R. 1930 Nagpur 49

MACNAIR, OFFG. J. C.

Emperor

v.

Pyarelal—Opposite Party.

Criminal Revn. No. 285 of 1929, Decided on 30th September 1929 on report by Sess. Judge, Nagpur.

C.P. Gambling Act, S. 5—No part of money found on person of man arrested can be seized.

No part of the money found on the person of a man arrested in a gaming house can be seized as S. 5 authorizes the seizure of money and securities lying about the premises but of no other money. The reason why such money cannot be seized is that a person convicted for gambling is liable to pay fine and power to confiscate money which belongs to the person arrested is unnecessary : *A.I.R. 1927 Lah. 338* ; *26 Bom. 641* ; *44 Bom. 686, Rel. on.* [P 50 C 2]

V. N. Herlekar—for Opposite Party.

Order.—The learned Sessions Judge is of opinion that the order directing confiscation of Rs. 95, part of the money found on the person of Pyarelal, is illegal as this money cannot reasonably be suspected to have been used or intended to be used for the purpose of gaming. He refers to the judgment of Broadway, J., in *Misri Lal v. Emperor* (1), but his opinion is not in consonance with the view taken in that case, namely, that no part of the money found on the person of a man arrested in a gaming house can be seized or forfeited, as such money should not be considered to have been found in the gaming house. The view of Broadway, J., is in accord with the view taken in *Emperor v. Wailli Mussaji* (2) and *Emperor v. Sadashiv Bab Habbu* (3).

Section 5, Gambling Act specifies the conditions under which the suspected premises may be entered : it then authorises the seizure of instruments of gaming, moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein. It next authorises a search of the premises and the persons of those arrested for the purpose of finding instruments of gaming and the seizure of instruments of gaming found upon such search. The section then appears to authorise the seizure of money found without a special search, but not the seizure of money found in the special search of all parts of premises and of the persons of those arrested or instruments of gaming. S. 8 authorizes the Magistrate to order all instruments of gaming found in a gaming house to be destroyed. Here the words "found there-

in", i. e., in the gaming house, must surely mean found in the house or on the persons of those arrested : for it is clear that all instruments of gaming found ought to be destroyed. S. 8 next authorises the forfeiture of all moneys seized in the gaming house, though the Magistrate is permitted to order any part thereof to be returned to the owner. I do not consider it necessary to decide whether money found on the person of a man arrested should be considered to have been found in the gaming house. It appears to me that S. 5 does not authorize the seizure of money unless this money can be found without a special search. In my opinion S. 5, Gambling Act, authorises the seizure of money and securities lying about the premises but of no other money. I do not think the reason for the distinction suggested by Broadway, J., is the true one. It would frequently be possible to hold that money found on the person of a gambler was likely to have been intended to be used for gambling : part of such money may be marked coin. The real reason in my opinion is that a person convicted for gambling is liable to fine and power to confiscate money which clearly belongs to him is unnecessary : money which is in evidence at the time of search is forfeited as it would be troublesome to decide its ownership.

Pyarelal has been held to be the keeper of a common gaming house and I should expect a keeper to be provided with a moderate amount of funds in order to make prompt payments. It may be that his clients risk a few annas, but it is probable that they do so in order to have a chance of being paid a comparatively large sum. There is then reason to suspect that all the money found on the person of Pyarelal was brought for the purpose of gaming, but, as I have stated, the Act does not authorize seizure of such money. It cannot be seized except for the purpose of use as evidence in the case. It is obvious that the infliction of a larger fine would have had the same result as forfeiture of this money. I therefore direct that Rs. 104, the money found on the person of Pyarelal, may be returned to him.

The learned Sessions Judge considers that as no notice of the charge of an offence under S. 4, Gambling Act, was given, Pyarelal should not have been

(1) A. I. R. 1927 Lah. 338=8 Lah. 320.

(2) [1902] 26 Bom. 641=4 Bom. L. R. 427.

(3) [1920] 44 Bom. 686=55 I. C. 864=22 Bom. L. R. 197.

convicted of offences under S. 3 and S. 4 and have been punished with fine for each offence. It is true that the offence complained of was an offence under S. 3, Gambling Act, but the facts alleged were that Pyarelal and Kunjilal wagered on the market price of cotton with witnesses and there was reason to believe that they wagered with other persons. The keeper of the satta shop ordinarily wagers with his customers much in the same way as a book-maker wagers with persons who bet on horse races. The facts alleged then were that Pyarelal was guilty of offences both under Ss. 3 and 4, Gambling Act. It was clearly stated that Pyarelal had settled the rate at which the bettors would be paid if they won. In my opinion the convictions under Ss. 3 and 4 were not illegal. The total punishment inflicted is not excessive.

P.N./R.K. Order accordingly.

A. I. R. 1930 Nagpur 51 (1)

MUNJE, A. J. C.

Sambha and another—Applicants.

v.

Desru and others—Non-Applicants.

Civil Revn. Appln. No. 273-B of 1929, Decided on 4th October 1929, from order of Second Class Sub-Judge, Wun, D/- 8th August 1929, in Civil Suit No. 160 of 1929.

Civil P. C., S. 115—Application by persons to be made defendants to suit brought for specific performance of contract of sale of field on ground that they were members of joint Hindu family along with defendants and were interested in field—Application dismissed—There is no case decided.

It is not the practice of High Courts to allow revision of interlocutory orders which can be questioned in appeal and interference in revision is allowed in such cases only when great inconvenience or injustice would otherwise result. [P 51 C 1]

Persons applied to be made defendants to a suit brought for specific performance of a contract of sale of certain field on the ground that they were members of a joint Hindu family along with the defendants and were interested in the field. The application was dismissed.

Held: that there was no case decided and the only inconvenience which was sought to be avoided was a possibility of multiplicity of judicial proceedings which was not sufficient to call for extraordinary interference: *A. I. R.* 1924 *Lah.* 425; *A. I. R.* 1928 *All.* 97 and *A. I. R.* 1928 *Cal.* 114, *Rel. on.* [P 51 C 2]

S. A. Ghadgay—for Applicants.

Order.—One Dasru brought a suit for specific performance of a contract of sale of the fields in question against

defendants Dewaji and Rama. The applicants wanted to join in the suit and applied to be made defendants thereto on the ground that they were members of a joint Hindu family along with the defendants and were interested in the said field. The lower Court dismissed their application as in its opinion the applicants were not necessary parties to the suit.

The applicants have now come up in revision and challenge the order of the lower Court. They thus seek revision of a mere interlocutory order. S. 115, Civil P. C., allows a revision when a case has been decided by a Subordinate Court and where there is no remedy by way of appeal. I am in full agreement with the views expressed in the Full Bench case reported in *Lalchand Mangal Sen v. Behari Lal Mehr Chand* (1) and the case in *Equitable Trust Co. v. Muhammad Halim and Co.*, (2) and hold that the applicants here have no "case decided" which they can seek to revise under S. 115. Again it is not the practice of High Courts to allow revision of interlocutory orders which under S. 105 Civil P. C., could be questioned in appeal (*Mati Lal Lyall v. Premi Lyall* (3)). The practice of this Court has also been the same and interference in revision is allowed in such cases only when great injustice or inconvenience would otherwise result. The only inconvenience that is sought to be avoided in this case is a possibility of multiplicity of proceedings. In my opinion this is not enough to call for an extraordinary interference. For these reasons I decline to interfere in revision and dismiss the application without notice to the opposite party.

P.N./R.K. Revision dismissed.

(1) *A. I. R.* 1924 *Lah.* 425=5 *Lah.* 288 (F.B.).

(2) *A. I. R.* 1928 *All.* 97=50 *All.* 276.

(3) *A. I. R.* 1928 *Cal.* 114=54 *Cal.* 1038.

A. I. R. 1930 Nagpur 51 (2)

SUBHEDAR, A. J. C.

Rajmohamad and another—Defendants 3 and 4—Appellants.

v.

Gopal and others—Plaintiff and Defendants 1 and 2—Respondents.

Second Appeal No. 131-B of 1928, Decided on 23rd August 1928, from decree of First Addl. District Judge, Akola, D/- 28th January 1928, in Civil Appeal No. 168 of 1927.

(a) Transfer of Property Act, S. 53—Scope.

A person who is not a creditor at the date of the transfer cannot impeach the same under S. 53. [P 53 C 1]

(b) Transfer of Property Act, S. 53—Auction purchaser is not person having interest in property under S. 53,

Auction purchaser at a sale in execution of a decree is not a person having an interest in the property as S. 53 relates only to transfers of property by the act of parties : 53 I. C. 205 and 39 Bom. 507, *Rel. on.* [P 53 C 1]

G. G. Hatwalne—for Appellants.

R. M. Bhagade—for Respondents.

Judgment.—The facts leading to this second appeal are these : On 4th February 1925 defendant 2 sold his field No. 169, area 31 acres and 36 cunthas, to defendant 1 who mortgaged the same with the plaintiff on 26th June 1925 for a consideration of Rs. 325 defendant 2 being a surety to this transaction. In execution of his simple money decree obtained against defendant 2 in December 1925, defendant 3 purchased this field in the auction sale long after the mortgage in plaintiff's favour. An objection filed by defendant 1 in the execution proceeding of defendant 3's decree on the basis of the sale in his favour was rejected on 12th December 1925 on the ground that the sale was fraudulent.

The plaintiff brought the suit, out of which this second appeal arises, in the Court of the Second Class Subordinate Judge, Akola, to enforce his mortgage. The case proceeded *ex parte* against the first two defendants but defendants 3 and 4 who are father and son resisted the claim on the ground that the original sale of the mortgaged field by defendant 2 to defendant 1 was void being without consideration and intended to defraud certain creditors of defendant 2 including themselves. The contending defendants also denied the mortgage deed sued upon and urged that the order in the execution proceedings disallowing the objection not having been set aside was final and binding on the plaintiff who was the legal representative of defendant 1. The trial Court held the execution of the mortgage deed in suit duly proved but not the passing of the consideration thereunder. It further held that the sale of the mortgaged field by the second defendant to defendant 1 was void, having been made without con-

sideration and in fraud of the creditors of defendant 2. It also held that the order in the execution proceedings bound the plaintiff. As a result of these findings the plaintiff's suit was dismissed. On appeal by the plaintiff to the Additional District Judge, Akola, all the aforesaid findings were set aside and the plaintiff's claim decreed. The lower appellate Court held that there was consideration for the mortgage deed sued upon, that the sale of the mortgage field in favour of defendant 1 was genuine and not fraudulent and that the order in the execution proceedings against defendant 1 was not binding against the plaintiff who could not be called the legal representative of the objector (defendant 1).

Defendants 3 and 4 have, therefore, filed this second appeal. The first point pressed by Mr. Hatwalne for the appellants was that the case should be remanded for a trial *de novo*, because the Courts below committed an error in thinking that the sale of the entire mortgaged field by defendant 2 to defendant 1 was effected by only one sale deed dated 4th February 1925 (Ex. P-3), while as a matter of fact the entire field was conveyed piecemeal under two sale deeds, Exs. P-3 and D-3, dated 12th November 1924. By the latter deed only 6 acres of the entire area was conveyed for a cash consideration of Rs. 1,000 and by the former the rest of the area, viz., 25 acres and 36 gunthas was sold for Rs. 6,000.

There is no doubt that the two lower Courts should have taken into consideration both these sale deeds, but since the evidence on record was sufficient to determine the main question of the genuineness or otherwise of the sale of the mortgaged field by the second to defendant 1, I proposed to proceed under S. 103, Civil P. C. and decide the question here instead of remanding the case for a fresh trial. Accordingly I allowed the pleaders on both sides to argue all questions of fact involved in the case. It seems to me, however, that for the disposal of the present appeal it is not at all necessary to decide the question if the sale of the mortgaged field in favour of defendant 1 was voidable under S. 53, T. P. Act, under which alone, it is conceded by Mr. Hatwalne, the appellants challenged the

sale, for I am clear that the appellants have no locus standi to impeach the same. It is also conceded that the previous order in the execution proceedings is not binding on the plaintiff.

In para. 6 of the written statement filed on behalf of the appellants in the trial Court it was stated that at the time of the transfer of the mortgaged field by defendant 2 to defendant 1 the former was indebted to the appellants to the extent of Rs. 1,300 and that there were certain others creditors, but the extent of their debts was not specified and it was pleaded that the transfer was intended to defraud these creditors. In reply, the plaintiff's pleader controverted these facts and it was therefore incumbent upon the appellants in the very first instance, to establish the existence of their own debts on the date of the transfer sought to be impeached. Mr. Hatwalne candidly admitted that there is no proof upon the record to establish this fact. In other words it is not proved that defendant 2 was indebted to the appellants at all on the date he made the transfer of the field to defendant 1 which is the subject of the mortgage in suit. It follows, therefore, that the appellants not being creditors at the date of the transfer cannot impeach the same under the latter portion of the part 1, S. 53, T. P. Act.

It is equally clear that the appellants being merely auction purchasers of the mortgaged property have no right to challenge the sale in favour of defendant 1 mortgagor, under part 1, S. 53, T. P. Act. In *Awadhut v. Punjaji* (1) it was held by Sir Henry Drake-Brockman, J. C., following *Vasudeo Raghunath v. Janardhan Sadashiv* (2) that an auction purchaser at a sale in execution of a decree is not a "subsequent transferee" entitled to impeach a previous transfer under S. 53, T. P. Act, for the reason that :

"That section relates only to transfers of property by the act of parties, as appears from the preamble to the Act and also from S. 5 which defines a transfer of property as an act by which a person conveys property : an execution sale does not satisfy either the preamble or the definition."

It is thus obvious that the appellants cannot rank for the purposes of S. 53

as persons "having an interest" in the property, the transfer of which is sought to be challenged. For the reasons set forth above the decree appealed against is confirmed and this appeal dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 53

SUBHEDAR, A. J. C.

Mt. Deokuwarbai—Applicant.

v.

Potuprasad—Non-Applicant.

Civil Revn. Appln. No. 215 of 1929, Decided on 20th September 1929, from judgment of Dist. Judge, Raipur D/- 5th February 1929, in Civil Suit No. 135 of 1928.

(a) Civil P. C., O. 44, R. 1.—Reasons for rejection need not be stated—Trial is not vitiated.

Order 44, R. 1, does not require reasons for rejecting leave to appeal in forma pauperis to be stated and the absence of them does not vitiate the trial. [P 54 C 1]

(b) Civil P. C., O. 44, R. 1—Order of refusal under R. 1 is revisable but cannot be interfered with on merits.

Order refusing leave to appeal in forma pauperis can be revised : A. I. R. 1924 Nag. 44, *Rel. on.* [P 53 C 2]

But High Court has no power to interfere on the merits of the order refusing leave to appeal in forma pauperis. [P 54 C 1]

W. B. Dhabe—for Applicant.

R. W. Date—for Non-Applicant.

Order.—The applicant wanted leave to file an appeal in forma pauperis in the Court of the District Judge, Raipur, who in refusing the leave passed the following order.

"Leave to appeal in forma pauperis is refused as the decision of the lower Court does not appear to me to be wrong in law or unjust"

The applicant therefore seeks to have the aforesaid order revised here on the following grounds :

"1. That the lower appellate Court should have held that as it was a first appeal and the findings of fact were challenged, it was merely a question of appreciation of evidence and it could not therefore be said on the face of the judgment that the decision was not wrong or unjust.

2 That under the facts and circumstances of this case, the lower appellate Court should have allowed the applicant to appeal as a pauper."

There is no doubt that the application for revision is entertainable by this Court under S. 115, Civil P. C. : see *Achalsingh v. Seth Jiwardas* (1). But the further question is whether on the merits the order sought to be revised is

(1) A. I. R. 1924 Nag. 44=19 N. L. R. 165.

(1) [1919] 53 I. C. 205.

(2) [1915] 39 Bom. 507=29 I. C. 497=17 Bom. L. R. 522.

a bad order in law. The proviso to O. 44, R. 1, Civil P. C. lays down:

"that the Court shall reject the application unless upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous and unjust."

On the face of it the order under appeal is not very happily worded. Although the memorandum of appeal was not accompanied by a copy of the judgment and decree of the trial Court the lower appellate Court had sent for the record and I must presume that it had perused the judgment and decree appealed from and the grounds of appeal before disposing of the application for leave to file the appeal as a pauper. R. 1, O. 44, Civil P. C. does not require reasons for rejection to be stated and the absence of them therefore does not vitiate the order. On the merits of the order this Court has no power to interfere. The application for revision fails and is dismissed with costs. Pleader's fee Rs. 5.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 54

SUBHEDAR, A. J. C.

Narain—Appellant.

v.

Nilkanth—Respondent.

Second Appeal No. 258-B of 1929, Decided on 18th September 1929, against decree of 1st Addl. Dist. Judge, Akola, D/- 29th June 1929 in C. A. 216 of 1928.

Hindu Law—Joint family—Lease of fields taken by person as manager of joint Hindu family of himself and his brother—Fields cultivated by brother for certain years—Rent for those years can be recovered from him though he be not actual party to lease.

Where a person takes the lease of certain fields not for himself but as manager of the joint Hindu family of himself and his brother and where the brother cultivates the fields for certain years on behalf of the family, rent for those years can be recovered from him for those years even though he was not an actual party to the lease: 1 N. L. R. 178, *Rel. on.* [P 55 C 1]

M. R. Bobde—for Appellant.

Judgment.—The facts leading to this second appeal are shortly these: The plaintiff-respondent sued the defendant-appellant for lease-money for two years, 1924-25 and 1925-26, on the allegation that the lease of the fields was taken for five years in 1920 by the appellant's brother, Maruti, as manager of the joint

family consisting of himself and the appellant, and that the appellant had himself cultivated the fields for the two years in respect of which the rent was claimed.

The appellant resisted the claim by alleging that since the last eight years before the date of suit he had become separate in mess and residence from Maruti; that the separation in estate had also taken place between them three or four years before 26th June 1928; and that he did not cultivate the fields in question in 1924-25 and 1925-26 for which rent was claimed.

The trial Court found all the pleas of the appellant established and dismissed the suit, but on appeal by the plaintiff the Additional District Judge, Akola, held: (1) that Maruti took the lease of plaintiff's fields as manager of the joint family of himself and the defendant, (2) that both the brothers were joint in estate till the year 1925-1926, (3) that the fields were cultivated by the defendant himself for and on behalf of the joint family during the years for which rent was claimed, and (4) that the defendant was thus benefited by the lease. The plaintiff's claim was accordingly decreed with costs but the defendant's liability was restricted to the extent of the family property in his hands.

The defendant has, therefore, filed the present second appeal and the only contention pressed by Mr. Bobde, the learned advocate for the appellant, is that in the absence of a definite finding that the plaintiff respondent created both the brothers as lessees the defendant-appellant could not be held liable to the plaintiff's claim even on the finding that he cultivated the fields in the years for which the rent was claimed. Reliance was placed in support of this argument on the following observations appearing at p. 180 of the report of the case of *Deochand v. Moti* (1) at p. 180:

"Therefore, the question which the Courts had to decide in the present case was not whether the nazarana was paid out of the family funds or whether the cultivation was jointly shared by all the members of the family, but who were the parties to the contract of tenancy. Did the defendant accept Gangaram as his tenant or did he deal with Gangaram as managing member of the joint family? If he dealt with Gangaram as an individual, then the present suit must fail. If, on the other

(1) [1905] 1 N. L. R. 178.

hand, he dealt with Gangaram as representing the family, then on the death of Gangaram the plaintiff would take by right of survivorship and would be entitled to recover possession."

In his judgment the learned Additional District Judge has given his conclusions of facts of which a summary is given by me in para. 3 above. There is a clear finding of the lower appellate Court that Maruti took the lease not for himself but as representing the joint family of himself and his brother the appellant. The present case, therefore, comes well within the principles of law contained in the above quotation and was rightly approached and correctly decided by the lower appellate Court. The appeal fails and is dismissed without notice to the other side.

P.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Nagpur 55 (1)

SUBHEDAR, A. J. C.

Jiwa Umar Kachhi—Applicant.

v.

Gulabchand—Non-Applicant.

Civil Revn. No. 356-B of 1928, Decided 24th April 1929, from order of Dist. Judge, Akola, D/- 27th August 1928, in Civil Misc. Case No. 56 of 1928.

Civil P. C., O. 34, R. 3—Defendant fails to pay amount decreed on due date—Extension prayed for without good cause being shown—Order making decree final is legal.

Where the defendant fails to pay the amount decreed on due date and prays for an extension without good cause being shown, the Court can make the decree final in spite of alleged prayer for extension : *A. I. R. 1928 P. C. 137, Ref.*

[P 55 C 1]

M. B. Niyogi—for Applicant.

Order.—In proceedings for final decree for foreclosure the applicant judgment-debtor pleaded an adjustment but the Court of the first instance held the plea not proved and made the decree final in spite of a belated prayer for extension of time. Against this order an appeal was preferred to the District Judge, Akola, but was rejected. The applicant, therefore, comes up to this Court in revision.

It is argued here that the lower Courts were in error in not accepting the money which the applicant was willing to deposit just before the case was closed. But mere tender of money is not enough. Unless good cause for extension is alleged and proved the Courts

have got no discretion left to condone the delay. The alleged cause for non-payment at the proper time, viz., the adjustment was held not proved by both the lower Courts and therefore they had no power to grant extension : *Motilal v. Ujjar Singh* (1).

The application fails and is dismissed without notice to the other side.

V.B./R.K. *Application dismissed.*

(1) *A. I. R. 1928 P. C. 137=55 Cal. 821=55 I. A. 207 (P.C.).*

A. I. R. 1930 Nagpur 55 (2)

SUBHEDAR, A. J. C.

Ananda—Applicant.

v.

Laxman—Non-Applicant.

Civil Revn. No. 245-B of 1929, Decided on 30th September 1929, against order of Sm. C. C., Judge, Akola, D/- 23rd August 1929, in Civil Suit No. 2216 of 1928.

Court-fees Act, S. 17—Alternative relief claimed—Separate court-fee for each is not necessary.

A suit claiming money due on a pro-note principally from the legal representatives of the executant or in the alternative from another who is alleged to have actually taken the money representing himself to be an agent of the executant does not require separate court-fees for each relief : *A. I. R. 1924 Nag. 169, Expl. and Dist.* [P 56 C 1]

W. B. Pendharkar—for Applicant.

Order.—Plaintiff's case as disclosed in the amended plaint and oral pleadings is that defendant 5, Ananda, brought to him the pro-note in suit ready written up and signed by the father of the first four defendants since deceased and took the consideration of Rs. 500. The plaintiff, therefore, claimed the amount due on the said note principally from the first four defendants as legal representatives of their father or in the alternative from Ananda defendant 5 who actually took the money representing himself to be an agent of the executant.

Under these circumstances it was held by the lower Court that there was neither misjoinder of parties nor causes of action nor any inadequate payment of court-fees. This application is filed by defendant 5 asking this Court to revise the aforesaid order of the lower Court. My attention was drawn by the learned pleader for the applicant to the case of

Hirderam v. Ramcharan (1) wherein it was held that a suit for possession of the land against defendant 2, or in the alternative for the return of the consideration with interest from defendant 1 tenant who had surrendered to the plaintiff landlord requires separate court-fee for each relief because the claim for possession of the land is a claim in respect of the proprietary interest in the land, whereas the claim regarding refund of the money is a suit based on failure of consideration.

But in this very case it was observed that if reliefs are claimed in the alternative with reference to the same cause of action S. 17, Court-fees Act, would not be applicable and that the same rule would apply where the relief claimed is one and the same though the claim is sought to be made out on distinct and alternative grounds. The facts of the present case fall more or less within this principle and I agree with the lower Court in holding that the plaint as amended is correctly stamped. The application for revision fails and is dismissed.

P.N./R.K. *Revision dismissed.*

(1) A. I. R. 1924 Nag. 169.

A. I. R. 1930 Nagpur 56

MACNAIR, OFFG. J. C.

Kadhori—Appellant.

v.

Lakhu—Respondent.

Appeal No. 233 of 1928, Decided on 3rd April 1929, against Appellate decree of Dist. Judge, Chhindwara, D/- 2nd November 1927.

Possession — One co-owner acquiring tenant right for his exclusive benefit—Other co-owner is entitled to joint occupancy or occupancy in common but if he forcibly dispossesses former, Court should pass decree restoring possession—Cosharers.

Where forcible possession is taken civil Courts should restore possession without exercising their discretion in the matter of equitable relief to the persons who have taken forcible possession. Thus where a plaintiff co-owner acquires a tenant right for his exclusive benefit the defendant co-owner has a right to claim joint occupancy or occupancy in common in the acquired land but where the latter who is also a lambardar, forcibly dispossesses the former the Court should pass a decree restoring possession: 4 N.L. R. 120, Ref. [P 56 C 2]

A. V. Wazalwar—for Appellant.

M. R. Pathak—for Respondent.

Judgment.—The findings of fact by the lower appellate Court are not quite clear, but I understand them to be as follows. A field (area about one-fifth

acre) was held in tenancy right by Mindu : he transferred this field on 23rd July 1918 to the plaintiff Kadhori, the cosharer Malguzar : Kadhori concealed the fact of surrender for some years and then cultivated it himself : the lambardar forcibly dispossessed Kadhori on 9th July 1926. The learned District Judge considered that in these circumstances it would be most fair to decree that the defendants should put the plaintiff in joint possession of the field and pay to the plaintiff a proportion of the consideration of the transfer of 1918. In appeal it is urged that the plaintiff, who had been dispossessed, should have been given possession of the land in suit. The law regarding the right of the defendant-co-owners, when the plaintiff co-owner has acquired a tenant right for his exclusive benefit, has been laid down in clear terms by Stanyon, A. J. C., in *Ramdayal v. Gulabia Bai* (1). They had a right to claim joint occupancy or occupancy-in-common in the acquired land. It is unfortunate that this right is, in cases such as this, of little practical use. Had the defendants come to Courts and obtained a decree for joint possession the decree might not have benefited them ; for, they might not have been able to obtain actual partition of the small field. Without the decree they could still obtain partition of the village. Persons in their position will be tempted to take forcible possession of the field if the result will be that their possession will be maintained and the co-owner formerly in possession will be given a decree of doubtful value for joint possession. It appears to me, then, necessary that when forcible possession is taken the civil Courts should restore possession without exercising their discretion in the matter of equitable relief to the persons who have taken forcible possession. I therefore set aside the decree of the lower appellate Court and pass a decree in favour of the plaintiff for possession of the land in suit from which he has been forcibly ejected. Costs in all Courts will be borne by the defendants. Counsel's fee in this Court Rs. 20.

P.N./R.K.

Decree set aside.

(1) [1908] 4 N. L. R. 120.

A. I. R. 1930 Nagpur 57

MACNAIR, OFFG. J. C.

Miran and others—Appellants.

v.

Hanslal—Respondent.

First Appeal No. 80 of 1928, Decided on 21st September 1929.

Hindu Law—Applicability — Gond is not Hindu and is not governed by Hindu Law— But credible evidence, on part of person alleging he is so governed, that on points most frequently arising, custom of family is same as that of Hindu families in the locality could raise inference that all principles of Hindu Law were adopted—It is then for opposite party to show that particular custom governing suit was not adopted.

A Gond is not a Hindu and is not governed by the Hindu Law. In the case of any particular Gond it can of course be proved that his family or any large body of Gonds in which he is included has adopted any particular custom or all the principles of Hindu Law, by becoming converts to the Hindu religion or otherwise, so that they are now bound by that custom or those principles, but it is for the party who alleges this to prove it. Credible evidence that on the points, which most frequently arise, involving personal law, custom of the family or body differs in no respect from that of Hindu families in the locality, would suffice for an inference that all the principles of Hindu Law might have been adopted. It would then be for the opposite party to show that although part of the Hindu Law might have been adopted, the particular custom which governed the disposal of the suit had not been adopted: *A. I. R. 1923 Nag, 317, Rel. on.* [P 57 C 2]

V. R. Dhok—for Appellants.

S. C. Dutt Choudhry—for Respondent.

Judgment.—The five appellants are the four sons of Chhatarsingh and one is the son of Amansingh; Chhatarsingh and Amansingh are Gond brothers who executed a mortgage of a three anna share in the village on 1st October 1915. The trial Court has found that there was legal necessity or antecedent debt to the extent of Rs. 736 only: Rs. 2,000 out of the consideration were taken, not under legal necessity, in order to purchase a four anna share of the property which was mortgaged. The learned Judge, however, has held that the defendants are not governed by Hindu Law and that the property at the time of the mortgage belonged to the executants alone. A preliminary decree has been passed for foreclosure of the eight annas share for the amount due on the mortgage.

In the first three grounds of appeal it is urged that defendants have proved that they were by custom governed by

Hindu Law and that therefore the minor sons had a vested interest in the mortgaged property at the time of the mortgage. The plea on this point was:

"The family is governed in all respects by the Hindu Law originally or at any rate by the reason of its having been adopted by the community to which it belongs."

Now what has been held in *Vithoba v. Lalsingh* (1) is this:

"A Gond is not a Hindu and is not governed by the Hindu Law. In the case of any particular Gond it can of course be proved that his family or any large body of Gonds in which he is included has adopted any particular custom or all the principles of Hindu Law, by becoming converts to the Hindu religion or otherwise, so that they are now bound by that custom or those principles, but it is for the party who alleges this to prove it."

It has never been found that there is any definite body of law which governs large body of Gonds in different parts of the Province. It is therefore not unlikely that a family of Gonds or a large body of Gonds should adopt the principles of Hindu Law when they had no well defined and well known law of their own. Credible evidence that on the points, which most frequently arise, involving personal law, custom of the family or body differs in no respect from that of Hindu families in the locality, would in my opinion suffice for an inference that all the principles of Hindu Law might have been adopted. It would then be for the opposite party to show that although part of the Hindu Law might have been adopted, the particular custom which governed the disposal of the suit had not been adopted. It is clear that there is no authority on Gond Law; no direct evidence can be produced regarding a principle which was of rare application. Uneducated Hindu villagers cannot be expected to state what is Hindu Law except with regard to points which arise frequently, and uneducated Gond witnesses must similarly be unable to state the law which governs them on such points.

Now the appellants have given evidence to the effect that in cases which ordinarily arise, property is inherited by the Gonds in the region where the appellants live in the manner laid down by Hindu Law. Apart from inheritance the question of the exact law governing villagers seldom arises. This evidence is not challenged. It is true that witnesses say that the property of a dead

(1) *A. I. R. 1923 Nag. 317=19 N. L. R. 101.*

brother, who was joint with his brother, will be recorded on the name of his widow but this is a very common practice among Hindus and has been for a long period good law with regard to holdings of Hindu tenants. In my opinion this evidence gives rise to an inference that the Gonds in question have adopted other principles of Hindu law; of course such an inference is not very difficult to rebut.

From the appellants' own evidence, however, it can be inferred that the principle of interest by birth does not exist among the Gonds of the locality where the appellants reside. The witnesses state that a father cannot alienate ancestral property; but this is the point directly in issue and evidence on it must be accepted with caution. The witnesses state that they know of no specific case of an alienation by the father being set aside by his sons. Chhatarsingh (D. W. 1) states:

"After the father dies the son will have the property but not till the father dies."

Bhaddi (D. W. 2) states: "In the father's lifetime the sons have no right."

Chiman (D. W. 4) states:

"I cannot say if a son has any interest in his father's lifetime."

Bhaddi (D. W. 2) and Chiman (D. W. 4) know of no case of the division of property during a father's lifetime. In my opinion this evidence is sufficient to rebut the inference drawn from the fact that the Gonds in question have adopted the principles of Hindu Law on the point which most commonly arises, namely inheritance, that they have adopted the principle of Hindu Law, that interest in ancestral property is acquired by birth. The decision of the learned District Judge that under the law or custom applicable to the parties minor sons have no interest in the ancestral property is therefore correct.

The last ground is that interest should have been reduced. This ground is not argued and compound interest at 1 per cent per mensem is not a very heavy rate. The appeal therefore fails and is dismissed. The appellants will bear their own costs and the costs of the respondent will be added to the decretal debt.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 58

SUBHEDAR, A. J. C.

Gulam Ahmad—Appellant.

v.

Kanhaiyalal—Respondent.

Second Appeal No. 68-B of 1928, Decided on 17th April 1929.

Civil P. C., O. 21, R. 90—Order refusing to set aside sale under O. 21, R. 90—No second appeal lies.

A second appeal does not lie against an order refusing to set aside the sale on an application made under O. 21, R. 90 even where the auction purchaser is the decree-holder.

M. B. Niyogi—for Appellant.

G. G. Hatvalne—for Respondent.

Judgment.—In execution of a decree certain properties of the judgment-debtor appellant were put up for sale and purchased by the decree-holder and other persons who are impleaded as party respondents to this second appeal. The judgment-debtor raised various objections to the sale and wanted to have it set aside under O. 21, R. 90, Civil P. C. Both the Courts below having refused to set the sale aside, the judgment-debtor has come up to this Court and filed this second appeal.

A preliminary objection has been taken on behalf of the respondents that no second appeal lies. Mr. M. B. Niyogi, advocate for the appellant contends that the matter being one under S. 47, Civil P. C., this appeal is competent at any rate so far as the decree-holder himself is concerned. Reliance is placed by Mr. Niyogi on the following statement appearing at p. 713 of Mulla's Civil Procedure Code, 8th Edn.

"When the auction-purchaser is the decree-holder himself and when an application is made to set aside the sale on a ground other than that covered by the present rule and there is no application made under R. 89, the case falls within S. 47 and hence there is a second appeal."

The above passage is from the notes and commentaries on R. 90, O. 21, Civil P. C., but since the application out of which the present proceedings arose was admittedly one under the said rule, the quotation relied on for the appellant does not help him but goes against his contention. I therefore, hold that no second appeal lies in the case and dismiss the appeal with costs. I cannot convert this second appeal into an application for revision because it was not filed within 45 days allowed for filing such application. Pleader's fee Rs. 15.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 59 (1)

SUBHEDAR, A. J. C.

Punnuswamy—Applicant.

v.

Mt. Almelu Bai—Non-Applicant.

Criminal Revn. No. 17 of 1929, Decided on 18th March 1929, from order of Sess. Judge, Raipur, D/- 7th January 1929, in Criminal Revn. No. 28 of 1928.

Criminal P. C., S. 488 — Application by wife for maintenance — Both husband and wife examined — Case closed for orders — Pleader for husband appearing and wishing to argue case and file documents — Court ruling him out and passing judgment against husband — Proper enquiry held not made — Case ordered to be retried.

The wife applied for maintenance allowance and both the wife and husband were examined and the case was closed for orders to be pronounced on a certain date. When the pleader for the husband appeared and wished to argue the case and file some documents, the Court, however, ruled him out and passed orders against the husband. It was contended that the Court's action was justified inasmuch as the husband did not intimate his desire to adduce evidence on the date when the case was closed.

Held: that it was immaterial that the husband did not do so as the Court was bound to ask him if he wished to adduce evidence before closing the case and so there being no proper enquiry the case required to be retried.

[P 59 C 2]

N. B. Bhavalkar — for Applicant.*R. K. Manohar*—for Non-Applicant.

Order.—Almelubai is the wife of a Punnuswami. This lady presented an application on 10th August 1928 in the Court of Mr. Rizve, Sub-Divisional Magistrate, Dhamtari, claiming maintenance allowance from her husband. She was examined on affirmation on the same day and a notice issued to the husband to show cause against the application. At the next hearing on 3rd September 1928 (carelessly put down in the order sheet as 3rd August 1928), the husband appeared and filed a written statement. Both the husband and wife were further examined on this date and the case was closed for orders to be pronounced on 4th September 1928. When the pleader for the husband appeared and wished to argue the case and file some documents but the learned Sub-Divisional Magistrate ruled him out and passed an order under S. 488, Criminal P. C., against the husband to pay Rs. 15 per month to the wife.

The husband filed a revision against the aforesaid order in the Court of the

Sessions Judge, Raipur, who has referred the case under S. 438, Criminal P. C., with a recommendation that the procedure adopted by the Sub-Divisional Magistrate being highly irregular, it has prejudiced the husband seriously and that a retrial should, therefore, be ordered by this Court.

The learned pleader for the lady argued that because the husband did not on 3rd September 1928 intimate to the Magistrate his desire to adduce evidence the Court was justified in closing the case for orders and even in refusing to receive documents at the adjourned hearing before the order was passed. In my opinion the Court was bound to ask the husband if he wished to adduce evidence before it closed the case. The result is that there has been no proper enquiry in the case. I, therefore, accept the reference and the recommendation made by the learned Sessions Judge and setting aside the order of the trying Magistrate, send the case back for retrial according to law.

P.N./R.K.

*Case remanded.***A. I. R. 1930 Nagpur 59 (2)**

SUBHEDAR, A. J. C.

Emperor

v.

J. B. Sane and others—Accused.

Criminal Revn. No. 201-B of 1929, Decided on 5th November 1929, referred by Sess. Judge, Akola.

Criminal P. C., S. 350—Discretion given to a Magistrate to act or not to act upon evidence recorded by his predecessor is controlled by proviso 1 to S. 350—Option is given to accused and it can be exercised only once when second Magistrate commences proceedings.

The discretion given to a Magistrate by S. 350 (1), to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by proviso 1 to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate recalled and re-examined by the succeeding Magistrate. This right, however, has to be exercised by the accused only once, that is at the time "when the second Magistrate commences his proceedings." [P 60 C 2]

G. P. Dick—for the Crown.*M. B. Niyogi*—for Accused.

Order.—The facts leading to this reference under S. 438, Criminal P. C., are very clearly stated by the learned Sessions Judge, Akola, in these words :

"Criminal Case No. 50 of 1927 of the First Class Magistrate, Basim, was owing to a defect in procedure, remanded by the Judicial Commissioner's Court. It is now proceeding as case No. 36 of 1929 in the Court of the Sub-Divisional Magistrate, Basim. Owing to transfer of the Magistrate who first tried the case, S. 350, Criminal P. C., applied. Four accused said that they wanted all the prosecution witnesses and all the Court witnesses to be resummoned and reheard, while the remaining 8 said that there should be a de novo trial from the 'beginning (पुनः पहल्यापासून चालवावा) See applications dated 14th March 1929. In the original case there were witnesses for the prosecution, for defence and for Court. On 19th August 1929 when called upon to enter upon their defence, all the accused prayed that the defence evidence recorded in the previous case and the evidence of Court-witnesses 2, 3, 4 and 5 should be taken as evidence in the present case, and that the original defence witnesses should not be reheard, but that they wanted to give some additional defence evidence. The Magistrate rejected this application."

One more important fact has also to be noted. In para. 21 of this Court's order in Criminal Revision No. 29-B of 1928, Kinkhede, A. J. C., had definitely laid down that :

"all the evidence for both parties which has gone on record between 20th October 1927 and 14th November 1927 and also thereafter must be treated as expunged therefrom and the trial resumed from the stage from which the illegality crept in, except so far as the accused may dispense with such expunction."

When the aforesaid directions were given, it was probably not known that the proceedings after remand would not be conducted before the same Magistrate who had recorded the whole of the evidence at the previous trial. Therefore, when the case came to be retried by the present Magistrate the option given to the accused by the order of this Court was further supplemented by the option expressly reserved to them by proviso. 1 to S. 350 (1), Criminal P.C. The first four accused admittedly exercised this option by naming some of the witnesses examined by the former Magistrate to be resummoned and examined afresh before the new Magistrate and impliedly agreed not to expunge the evidence of the rest of the witnesses recorded at the previous trial, while the rest of the accused wanted the whole of the trial to be conducted de novo, clearly implying that the whole of the evidence whether for the prosecution or defence recorded previously should be expunged and all the witnesses examined afresh.

None of the cases cited before the Sessions Judge or in this Court cover the point actually requiring decision in the present case. It is, however, clear that the discretion given to a Magistrate by S. 350 (1), Criminal P. C., to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by proviso. 1 to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate recalled and re-examined by the succeeding Magistrate. But it is equally clear from the language of the proviso that this right has to be exercised by the accused only at the time "when the second Magistrate commences his proceedings."

Viewed in this light the decision of the trying Magistrate at the commencement of the proceedings to examine all the prosecution witnesses afresh was perfectly in order because all the accused wanted the whole lot of prosecution witnesses to be reheard by him but his second order, which is the subject of the present reference, is evidently wrong as it has the effect of overriding the option of the first four accused not to have their evidence in defence, already recorded at the previous trial, reheard. Since in their application dated 14th March 1929 these accused had impliedly agreed that except the prosecution witnesses and Court witnesses, whom they wished to be resummoned and reheard, the rest of the evidence should not be expunged, the trying Magistrate was, in my opinion, bound to give effect to this agreement.

The exercise of the option given to the accused both under the order of this Court and the proviso to S. 350 (1), Criminal P.C., could, however, be exercised only once and they having definitely exercised the same in a particular manner by their separate applications of 14th March last and the fresh trial having proceeded upon that basis none of the accused had any right to change the course of the trial as they wished to do by their subsequent joint application of 19th August last in which they stated that they did not desire to have certain Court witnesses and defence witnesses resummoned and re-examined. The order passed on this application by the trying Magistrate was, in my opinion, not

strictly a legal one. I, therefore, set aside the said order and direct that the trying Magistrate do retain and act on the evidence of witnesses examined by the first four accused before his predecessor and only resubmit or re-examine the Court witnesses and witnesses for the other accused. The first four accused will of course have the right to summon fresh witnesses in their defence if they so desire.

P.N./R.K.

Order set aside.

A. I. R. 1930 Nagpur 61

MUNJE, A. J. C.

Mt. Sarji—Applicant.

v.

Mt. Bhimi—Non-Applicant.

Criminal Revn. No. 322 of 1929, Decided on 4th November 1929, from order of Dist. Mag., Wardha, D/- 16th August 1929, in Misc. Case No. 2 of 1929.

(a) Criminal P. C., Ss. 435 and 439—Powers of High Court are wide and it can interfere even when certain order though legal is improper.

The powers of High Court under Ss. 435 and 439 are wide and it can proceed in the matter even suo motu and interfere if it considers just and proper. It can call for and examine the record of any proceedings and interfere even when a certain order, though legal, is improper. [P 62 C 1]

(b) Criminal P. C., S. 205—Summons issued in the first instance—Personal attendance of accused can be excused even if warrant of arrest is issued subsequently.

Personal attendance of accused can be excused in all cases where a summons is issued in the first instance to him irrespective of the fact whether he appears in answer to the summons or has to be brought in by a warrant of arrest issued subsequently : *A. I. R. 1924 Pat. 46, Dist.* [P 62 C 2]

(c) Criminal P. C., S. 561-A—High Court can excuse personal attendance of accused.

High Court can, under its inherent powers, pass an order excusing the personal attendance of the accused and permitting him to represent himself in Court by a pleader : *14 Bom. L. R. 236 ; 17 C. W. N. 1248 ; A. I. R. 1927 Rang. 73 and A. I. R. 1926 Bom. 218, Rel. on.* [P 62 C 2]

T. J. Kedar—for Applicant.

A. V. Khare—for Non-Applicant.

Order.—This is an application to revise the order of the District Magistrate, Wardha, by which he exempted the accused *Mt. Bhimi*, the non-applicant here, from personal attendance through the trial. The applicant *Mt. Sarji* has filed a complaint against *Bhimi* for an offence under S. 323, I. P. C. and the case is being tried by the Tahsildar, Wardha. To

start with, a summons was issued to her; she was served but, instead of appearing in person, she sent her husband to represent her. The Court ordered the husband to produce the accused in person, but she did not so appear and this time sent a pleader to represent herself. The case, however, could not be taken up for some reasons for two hearings and on the adjourned hearing the Magistrate again ordered a summons to issue to the accused. No process fee was paid by the complainant and thereupon the complaint was dismissed under S. 204 (3), Criminal P. C.

The case went to the District Magistrate, who thereafter sent the case for disposal to another Magistrate. Eventually, however, the case was again sent back to the Tahsildar and the accused was again summoned. On the date of the hearing the accused again appeared through a pleader and made an application for being exempted from personal attendance. This was not allowed and, instead, a bailable warrant of arrest was issued against her. She was not found and it appeared to the Court that she was avoiding service. A proclamation under S. 87 was therefore issued and, after it was published, the trial commenced under S. 512. Another warrant of arrest was again issued against her.

In the meanwhile the accused filed an appeal before the District Magistrate and was allowed exemption from personal attendance. This order is the subject matter of this revision and runs as follows :

"Previous proceedings indicate that the girl had absconded although there is no evidence to this effect. A certificate of illness is filed and it is stated by counsel that she has been living at Amraoti. In view of the fact that the girl voluntarily appeared (through counsel) and reopened proceedings and that she is young, I allow her to appear through counsel without putting in personal appearance."

The first contention is that the order of the District Magistrate was without jurisdiction as, at that stage no appeal could lie, nor could any such order be passed in revision except by this Court. This has been conceded by the other side, but it is urged on behalf of the accused that the District Magistrate's order, though defective in this respect, could be maintained as this Court had power to pass the very same order in revision. The powers of this Court

under Ss. 435 and 439, Criminal P. C., are wide and a High Court can proceed in the matter even suo motu and interfere if it considers just and proper. A High Court can call for and examine, the record of any proceedings and interfere even when a certain order, though legal, is improper.

A perusal of the proceedings makes it clear that the accused did not altogether disobey the summons; for every time that she was served she did make arrangements to represent herself before the Court. The only particular in which she disobeyed was as regards attendance in person. I fully agree in the reasons given by the District Magistrate in the concluding portion of his order and consider that it would be improper and unnecessary to compel the personal attendance of the accused. She is a young woman of a fairly respectable class and might naturally regard personal appearance as an accused as a greater punishment than a fine. Again, there appears to be nothing in particular for which the trial Magistrate considered her personal attendance necessary. I therefore agree that the trial Magistrate's order in compelling her personal attendance, in the circumstances of the case, was not proper.

It has, however, been contended by the learned pleader for the applicant that, as a warrant of arrest had been issued against the accused, her personal attendance could not be excused under S. 205, and that therefore the whole trial would be vitiated if she were allowed to remain absent. In support of this contention I have been referred to the case of *Abdul Hamid v. Emperor* (1). In that case, however, it appears that in the first instance, a warrant of arrest was issued against the accused; again, the accused was found not to have moved in the matter of his representation in Court and the persons who appeared for him so appeared without his authority. Both these circumstances are wanting in the case before me; for, here, though the accused might subsequently have been arrested, it was only a summons that was issued against her in the first instance. I am not sure if the *Patna* case is an authority for the proposition, urged on behalf of the applicant, viz., that, even where, in the first instance, a

summons were issued, if subsequently during the course of the trial an accused is produced before the Court under a warrant of arrest his personal attendance cannot be exempted. If the *Patna* decision really goes to this length, I must say with due respect that I do not accept that view. S. 205 has to be read and construed with reference to the preceding S. 204 also with reference to the heading of the Chapter, in which both the sections occur, viz. "Of the commencement of proceedings before Magistrate." It has again to be construed with reference to the next preceding four sections occurring in Chap. 16, and has to be read as continuation of all these provisions; and, when so read, it would be clear that it applies to all cases where a summons is issued in the first instance to an accused, irrespective of the fact whether he appears in answer to the summons or has to be brought in by a warrant of arrest issued subsequently.

Even if the above contention were in order and the present case were not covered by S. 205, this Court can, under its inherent powers, as declared by S. 561-A, pass an order excusing the personal attendance of the accused and permitting him to represent himself in Court by a pleader. The inherent jurisdiction of this Court can be invoked so long as no act is done in conflict with any of the provisions of the law or the general principles of criminal jurisprudence. That such a direction does not conflict with the provisions of the Criminal Procedure Code would be clear if a reference were made to the provisions of Ss. 353 and 366 (2). These provisions clearly contemplate cases where the whole trial can take place in the absence of the accused, including the stage of delivering the judgment in cases where the sentence imposed is one of fine only.

The case-law on the subject also does not stand in the way of the exercise of such power; for, in *Emperor v. C. W. King* (2) and *Raj. Rajeshwari Debi v. Emperor* (3) the High Court did pass an order dispensing with the personal attendance of the accused and allowed him to appear by a pleader throughout

(2) [1912] 14 Bom. L.R. 236=15 I. C. 96=13 Cr. L. J. 464.

(3) [1913] 17 C. W. N. 1248=23 I. C. 489=1 Cr. L. J. 281.

(1) A. I. R. 1924 Pat. 46=2 Pat. 793.

the Sessions trial. In the latter case the committal proceedings were indeed initiated with a summons; but in the former, this point has not been made clear; at any rate, no importance seems to have been attached to it. Both these cases have been followed with approval in *In re, Kandambini Devi* (4).

In *Maung Po Fyun v. Hakasing* (5), where the personal attendance of the accused was dispensed with, even his pleader's statement was considered to be his statement under S. 342. Similarly, in *Emperor v. Dorabshah* (6) it has been held that in similar circumstances there was nothing illegal in acting upon the plea given by the pleader of the accused under Ss. 242 and 243 in summons cases.

The principles of criminal jurisprudence also are not abrogated by holding a trial at the instance of the accused in his absence so long as he makes arrangements to represent himself in the trial by a pleader. The rule of holding a criminal trial in the presence of the accused is made especially for his benefit and there is nothing to prevent him from waiving the benefit if he likes. The case would certainly be different, and the trial bad, if it is held without his consent in his absence or, even in the presence of a pleader engaged for him, if the engagement has not been made by the accused: *Emperor v. Sardar* (7); *Abdul Hamid v. Emperor* (1).

In the case before me the accused has herself moved in the matter and is willing to represent herself throughout the trial by her pleader. There can therefore be no force in the contention that the trial would be bad because it would be held in her personal absence. For the reasons given above, I would not disturb the order that has been passed by the District Magistrate, though he was not competent to do so. The trying Magistrate should now proceed with the trial so long as a pleader engaged by the accused appears and need not ordinarily compel her appearance except to hear judgment under S. 366 in case he means to award a sentence heavier than that of fine. As the prosecution

witnesses have been examined in her absence and her pleader was also not present, the trial Magistrate should now start with the trial afresh. With these remarks the application is dismissed.

P.N./R K.

Revision dismissed.

A. I. R. 1930 Nagpur 63

SUBHEDAR, A. J. C.

Mohammad Sarwar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 35-B of 1929. Decided on 2nd September 1929, against judgment of First Class Magistrate, Mandla, D/- 22nd June 1929.

Penal Code, S. 84—Mere ailment before offence is not sufficient defence—Apparent motive for offence is not necessary.

A person is not entitled to claim relief under S. 84 simply for the reasons that he is ailing for some time before commission of an offence, that he does not take food for some days and that there is no apparent motive for committing the offence: 17 C. P. L. R. 113. *Appl.*

[P 64 C 1]

G. G. Hatvalne—for Appellant.

G. P. Dick—for the Crown.

Judgment.—The appellant has been convicted by Chandorkar, Magistrate First Class, Akola, exercising powers under S. 30, Criminal P. C., of an attempt to murder Mt. Amirbi and sentenced to five years rigorous imprisonment. The facts of the case are clearly proved and are briefly these: The appellant had been ailing for sometime before 12th April last and his mother Gulabbi (P. W. 2), therefore, called Amirbi (P. W. 11) to come to her house and keep her company for the night. Amirbi accordingly went there and prepared "Harira" food for the appellant and he ate it. Thereafter every inmate of the house, except probably the appellant, went to sleep in the same room in which was the appellant. Sometime after this Amirbi was roused from her sleep by the blow given to her by the appellant with a hatchet and the appellant further struck her two or three more blows after she had got up and then she fell unconscious. Gulabbi also got up hearing the cries of Amirbi and then Goteckhan (P. W. 4) and Jabbar-khan arrived upon the scene and secured the appellant and attended to the wounded woman.

The appellant in his examination pleaded ignorance of all the events that

(4) A. I. R. 1922 Mad. 79=45 Mad. 359.

(5) A. I. R. 1927 Rang. 73=4 Rang. 506.

(6) A. I. R. 1926 Bom. 218=50 Bom. 250.

(7) [1917] 36 P. R. 1917=42 I. C. 335=47 P. W. R. 1917 Cr

happened on that eventful night. As there was no evidence to bring the case of the appellant within the purview of S. 86, Penal Code, the trying Magistrate held him guilty of an offence under S. 307, I. P. C.

Mr. Hatvalne who appeared for the appellant in this Court argued that there being evidence to show that the appellant was ailing for sometime before the occurrence and had not taken food for some days and from the absence of motive it should be presumed that the case was covered by S. 84, I. P. C. The law on the point of legal insanity to bring a case within the purview of S. 84, I. P. C., has been fully and elaborately discussed by Sir Henry Stanyon in *Emperor v. Kataya Kisan* (1) and applying the principles laid down there to the facts proved in the present case I am decidedly of opinion that the appellant has failed to make out a claim for relief under S. 84, I. P. C. But in view of the fact that the appellant was in a bad state of health when he committed the crime for which apparently no motive is even suggested by the prosecution, I consider that the ends of justice will be met if I reduce the sentence from five years passed by the trying Magistrate upon the appellant to three years rigorous imprisonment, which I hereby do. With this modification of the sentence I dismiss the appeal.

P.N./R.K.

Sentence reduced.

(1) [1904] 17 C. P. L. R. 113.

A. I. R. 1930 Nagpur 64

SUBHEDAR, A. J. C.

Emperor

v.

Santoki—Accused—Non-Applicant.

Criminal Revn. No. 274 of 1929, Decided on 16th September 1929, made by Sess. Judge, Jubbulpore, on 22nd July 1929.

Forest Act, S. 26 (d)—Cattle grazing in the Government forest—Owner not authorizing directly nor indirectly such grazing—He cannot be convicted.

A Person's cattle were found grazing in the Government forest in charge of a boy. The person had not authorized either directly or indirectly the boy to graze the cattle in the forest.

Held: that he could not be convicted: 11 N. L. R. 76, Ref. [P 64 C 2]

S. C. Dutt Chaudhury — for Non-Applicant.

Order.—This is a reference by the Sessions Judge, Jubbulpore, recommending that the conviction of Santoki by a Magistrate First Class, Mandla, under S. 26 (d), Forest Act, be quashed as it was in conflict with the law propounded by this Court in *Saiyyad Rahim v. Emperor* (1).

The facts are that eight buffaloes belonging to the accused were found grazing in the Government forest block No. 18 in charge of one lad named Shankar. It is established by the evidence of Chhiddi (D. W. 2) that the accused had employed Shankar's father and not Shankar as grazier and it is not proved that the accused had, in any way authorized directly or indirectly Shankar to graze his cattle in the forest block No. 18. The conviction of the accused under these circumstances was, therefore, clearly illegal.

The learned District Magistrate supports the conviction on the ground that because in his examination the accused referred to the license (Ex. D-1) which he had obtained from the purchaser from whom he had purchased some of the buffaloes which were found grazing in the Government forest, it could be presumed that the accused :

"meant to graze the buffaloes in Government forest on the original license and therefore connived at the illicit grazing."

The statement of the accused as recorded by the Magistrate is as under :

"The eight buffaloes were covered by a license hence my grazier may or may not have grazed them in Government forest. I have no personal knowledge of this."

The statement quoted above cannot surely be construed in the manner suggested by the learned District Magistrate in his explanation. The accused clearly denied all knowledge of the illicit grazing and it was, therefore, necessary for the prosecution to have established knowledge or connivance on the part of the accused to connect him with the offence. I therefore accept the reference and set aside the conviction of the accused. The fine if paid will be refunded.

P.N./R.K.

Conviction set aside.

(1) [1915] 11 N. L. R. 76=29 I. C. 325=16 Cr. L. J. 485.

* A. I. R. 1930 Nagpur 65

MACNAIR, OFFG. J. C., AND

MOHIUDDIN, A. J. C.

Laxman—Plaintiff—Appellant.

v.

Bhulabai—Defendant—Respondent.

Appeal No. 583 of 1926, Decided on 5th November 1929, from appellate decree of First Addl. Dist. Judge, Wardha, D/- 18th August 1926.

* (a) C. P. Tenancy Act (1920), Ss. 5 and 11—Hindu widow cannot surrender absolute occupancy or occupancy holding so as to defeat expectancy of reversioner—She may surrender it to escape liability for rent—C. P. Tenancy Act (1920), S. 89.

A Hindu widow has not the right to surrender her late husband's holding, whether absolute occupancy or occupancy, in such a manner as to defeat the expectancy of a reversioner when the object of the surrender is to defeat that expectancy, although according to the nature of property she may surrender it to escape liability for rent : 6 C. P. L. R. 135 ; 15 C. P. L. R. 89 ; 8 N. L. R. 154 ; 6 C. P. L. R. 138 ; 5 N. L. R. 172 ; A. I. R. 1925 Nag. 306, *Foll.* ; A. I. R. 1927 Nag. 129 ; A. I. R. 1927 Nag. 320, *not Appr.* [P 70 C 2]

(b) C. P. Tenancy Act, (1920), S. 89—Hindu widow cannot alienate property inherited from her husband.

A Hindu widow is not at liberty to defeat the rights of a reversioner by alienating or wasting property of any kind inherited from her husband : A. I. R. 1925 Nag. 306, *Foll.* ; 9 N. L. R. 126, *deemed overruled by* 21 N. L. R. 62 ; A. I. R. 1925 Nag. 306 ; 89 I. C. 44 and A. I. R. 1927 Nag. 30, *not Appr.* 4 N. L. R. 57 and 8 *Mad.* 304, *Ref.* [P 69 C 2]

(c) C. P. Tenancy Act, (1920), S. 89—Rights of absolute occupancy tenant are similar to those of owner of property.

Per *Macnair, Offg. J. C.*—The rights of an absolute occupancy tenant are now so similar to those of owner of property that it seems impossible to hold that a Hindu widow can wilfully defeat the expectancy of a reversioner. [P 71 C 1]

(d) C. P. Tenancy Act (1920), S. 89—Right of absolute occupancy is not based on contract—It is semi-proprietary right.

Per *Mohiuddin, A. J. C.*—In the case of absolute occupancy holding the basis of contract is wholly inapplicable. It is a right created by Government and conferred on old malguzars who had lost their proprietary rights in course of time. It is therefore, not a contractual tenancy right but a sort of semi-proprietor's right with certain restrictions. [P 73 C 2]

Y. V. Jakatdar, M. V. Padhye and *M. R. Patak*—for Appellant.

N. G. Bose—for Respondent.

Macnair, Offg. J. C.—The reference—1930 N/9 & 10

ence to the Bench is in the following terms :

“Has a Hindu widow the right to surrender her late husband's holding whether absolute occupancy or occupancy to defeat the expectancy of a reversioner, even when her surrender is intended to defeat the claim of such person ?”

It seems clear that by “surrender to defeat” is meant surrender so as to defeat, not surrender in order to defeat. The question then may be stated thus :

“Has a Hindu widow the right to surrender her late husband's holding whether absolute occupancy or occupancy in such a manner as to defeat the expectancy of a reversioner when the object of the surrender is to defeat that expectancy ?”

It is desirable to state briefly the facts which led to this reference. One Raghu was a tenant of one field in occupancy right and of two fields in absolute occupancy rights. He died on 5th March 1921. His interest in the holdings passed to his widow in accordance with the provisions of Ss. 5 and 11, Central Provinces Tenancy Act (Act 1 of 1920). His widow Bhulabai desired that the rights should pass to her grand nephew Rama. Accordingly on 27th June 1924 she executed a surrender deed in favour of the landlord and the landlord on the same day gave a lease to Rama. Laxman, the son of Raghu's brother, sued for possession of the fields on the ground that Bhulabai a Hindu widow, could not transfer property inherited from her husband without legal necessity. The lower appellate Court held that Bhulabai had not in reality surrendered the fields, but had transferred them to Rama and that this transfer did not affect the rights of the plaintiff Laxman. A decree was passed declaring that the plaintiff, on the death or remarriage of Mt. Bhulabai, was entitled to possession of the fields subject to payment of certain sum. Laxman filed a second appeal in the Court of Pridaux, A. J. C., and that Judge made this reference. I remark that the reference was made prematurely ; there should have been a decision that the transaction effected by Bhulabai was a surrender and not a transfer before this reference was made. The reference has, however, been accepted and it is necessary to decide the question referred.

The reference raises two questions : the widow's right with respect to the

absolute occupancy holding and her right with respect to the occupancy holding. The reported rulings, which interpret the provisions of the Tenancy Acts of 1863 (Act No. 11) and of 1898 (Act No. 11) with respect to the right of a Hindu widow do not make any substantial distinction between absolute occupancy and occupancy holdings. The changes introduced by the Tenancy Act of 1920 (Act 1) do not appear to affect the reasoning given in these judgments so far as occupancy holdings are concerned and the published rulings interpreting this Act deal with occupancy holdings. I shall therefore consider in the first place the question which refers to the occupancy holdings.

In order to understand the law laid down in numerous rulings of this Court it is necessary first to consider a more general question which may be stated thus. When a Hindu widow has succeeded at the death of her husband to an occupancy tenancy, has she the same power to transfer the holding as her husband possessed during his lifetime?

The decisions of this Court with regard to this question are numerous and until recently entirely consistent. In 1893 Stevens, J. C., answered this question in the negative. *Fakira v. Hari* (1). He stated:

"If it had been intended to be possible that a widow inheriting an absolute occupancy holding from her husband should obtain such an interest in it as to enable her to alienate it to the prejudice of her husband's next male heir, the law would never have provided that the occupancy right should 'devolve as if it were land.'"

In *Mt. Salita v. Sitaram* (2), the same view was taken by this Judge: in this case the holding was in occupancy right. I quote from p. 139:

"It is plain, then, that when a woman succeeds to an occupancy right, she does so subject to the personal law by which she is governed and that the character of her interest will vary accordingly."

In *Sheohankarpuri v. Mt. Rukhma* (3), Ismay, J. C., referred to these cases and stated that in his opinion they were rightly decided. In *Vithu v. Mt. Mendri* (4), Drake Brockman, J. C., expressed approval of these rulings: he remarked that S. 35, Tenancy Act of 1898, enabled a Hindu widow

to surrender, but he held clearly that the Tenancy Act by making a tenancy devolve as if it were land did not enlarge the interest which an heir would otherwise take under the personal law governing him. Stanyon, A. J. C., in *Bhura v. Ramrao* (5), entirely concurred with the view taken in the rulings I have cited. He states on p. 158:

"Ever since an absolute occupancy tenure was made heritable it has been accepted law in these Provinces that, when held by a Hindu widow, as such, it is governed by all the restrictions applied by Hindu Law to the estate of a Hindu widow in land inherited by her from her husband."

He remarks that the rights of a Hindu widow in the absolute occupancy holding are subject to the provisions of the statute as to surrender and alienation: but this remark is clearly consistent with his finding on the question which I am considering. In *Wasudeo v. Bhiwa* (6), Baker, J. C., and Kinkhede, A. J. C., expressed approval of the view that the person who succeeds to a tenancy after a Hindu widow is an heir of the last male holder. A number of rulings which I have discussed were accepted as good law.

In 1926 apparently for the first time the correctness of this long series of decisions was challenged. Hallifax, A. J. C., in *Bikram v. Ganesh Singh* (7), considered the provisions of S. 11, Tenancy Act of 1920, but the law regarding the devolution of an occupancy tenure (apart from a proviso with which I am not concerned) was not materially changed by the Act of 1920. In para. 8 he states:

"A tenancy, like any other contract, is personal, and without S. 11 the unexpired term of any tenancy held by a Hindu woman would pass on her death to her own heirs, however she acquired it. S. 11 alters that in respect of an agricultural tenancy acquired by inheritance from a male, and makes it pass to the heirs of the male instead of her own. But it alters nothing else, and she has the same rights in respect of the contract of tenancy while it exists as if she had made it herself with the landlord."

In para. 12 he states that the decision in *Wasudeo v. Bhiwa* (6) and the cases there mentioned deal:

"with the passing on the death of a Hindu woman of a tenancy inherited by her from a male and still held by her up to her death not

(1) [1892] 6 C. P. L. R. 135.

(2) [1892] 6 C. P. L. R. 138.

(3) [1902] 15 C. P. L. R. 89.

(4) [1903] 5 N. L. R. 172=4 I. C. 792.

(5) [1912] 8 N. L. R. 154=17 I. C. 366.

(6) A. I. R. 1925 Nag. 306=21 N. L. R. 62.

(7) A. I. R. 1927 Nag. 129=23 N. L. R. 1.

with her rights and liabilities in respect of it during her life."

It is unfortunate that the attention of Hallifax, A. J. C., was not drawn to all the cases to which I have referred. In *Fakira v. Hari* (2) Stevens, J. C., dealt with the right of alienation possessed by a widow. In *Sheoshankarpuri v. Mt. Rukhma* (3), Ismay, J. C., held that the rights of the widow were extinguished on her remarriage. In *Vithu v. Mt. Mendri* (4), decided by Drake Brockman, J. C., and in *Bhura v. Ramrao* (5), decided by Stanyon, A. J. C., the question was the widow's right to transfer the holding. But I do not think that the finding in the other rulings that the widow took a limited estate in her lifetime can be disregarded on the ground that the question before the Court was the devolution of the tenancy at the death of a widow. It does not seem to me clear that if a female holds an absolute estate inherited from her husband during her lifetime, that estate will, on her death, pass to her husband's heirs. It might be urged that her estate bore greater analogy to an estate in which a female obtained an absolute interest by the will of her husband than to an estate in which the female had the limited interest of a "Hindu widow." If the Judges preferred to decide the question of devolution at a female's death by holding that the female held during her lifetime the estate of a Hindu widow, the latter findings are not, in my opinion, obiter dicta. The opinion of Hallifax, A. J. C., was approved by Findlay, J. C., in *Mt. Gangoo v. Laxman* (8), but in this case also the attention of the Judge was not directed to the long series of cases which dealt with the rights and liabilities of a Hindu woman during her life with regard to a tenancy inherited by her from a male. In my opinion, the law which has been laid down so consistently and so frequently between the years 1892 and 1926, should not be altered. The principle of stare decisis applies with exceptional force. If we accept the dictum of Hallifax, A. J. C., that a Hindu widow has the same rights in respect of a contract of tenancy inherited by her from her husband as if she had made it herself with the landlord, it appears to me that the question

of devolution of such a tenancy may be re-opened. Again, the reasons given by the distinguished Judges who held that a widow obtained by inheritance from her husband a limited interest in a holding have considerable force. I quote from Mayne's *Hindu Law*, 9th edition, p. 885:—

"Hindu Law knows nothing of estates for life, or in tail, or in fee. It measures estates not by duration but by use."

Section 11, C. P. Tenancy Act of 1920, enacts that the interest of an occupancy tenant shall on his death pass by inheritance in accordance with the personal law, and this appears to me to mean that an estate limited by restriction upon its use passes to a widow on the death of her husband. In my opinion, then the provisions of the Tenancy Act relating to succession do not give a Hindu widow, who succeeds to an occupancy holding, more extended rights of transfer than those she would have obtained over other landed property under the personal law by which she is governed.

The question which I have now to consider is whether S. 89, Tenancy Act of 1920, enables a Hindu widow to surrender her late husband's holding in order to defeat the expectancy of a reversioner. This view is stated by Drake Brockman, J. C., as an obiter dictum in *Vithu v. Mt. Mendri* (4). It is repeated by the same Judge in *Dajiba v. Raghunath* (9), a judgment delivered in 1913. Drake-Brockman, J. C., states that sub-S. (1) S. 35 is so generally worded as to preclude the reversioner from questioning a Hindu widow's surrender: that the subsection gives power to surrender "the holding," not merely the right of the tenant of the time being in his holding: and that if a Hindu widow could surrender only her limited interest in her husband's land, a landlord might have to deal with a reversioner's claim as much as a century after the death of the tenant from whom descent should be traced. Although Hallifax, A. J. C., states that the view of Drake-Brockman, J. C., has prevailed since the date of his judgment, he instances no case in which the point arose. In *Wasudeo v. Bhiwa* (6), a judgment delivered 11 years after *Dajiba v. Raghunath* (9) Kinkhede,

(8) A. I. R. 1927 Nag. 330=24 N. L. R. 63.

(9) [1913] 9 N. L. R. 126=20 I. C. 920.

A. J. C., clearly dissented from the view taken in that case.

As it has been stated that the point did not arise in *Wasudeo v. Bhiwa* (3), it is desirable to mention the facts which were considered in *Wasudeo v. Bhiwa* (6). Dewaji an occupancy tenant, died and his widow Mt. Soni inherited the holding. She surrendered it to the landlord with the express object of divesting herself of the tenant right as she contemplated remarriage. Dewaji's mother Bahena applied to the revenue Courts and was placed in possession, in accordance with the provisions of S. 36 of the Tenancy Act of 1898, on payment of arrears of rent. Bahena remained in possession till her death and after her death there was a contest between the revisioner of Dewaji and a relative of Bahena for the holding. Kinkhede, A. J. C., held that the surrender of Soni opened the estate of the deceased husband to the next heirs:

"The revisioner's interest must therefore begin to operate and fasten itself on the estate held by the woman, the moment she is divested of her widow's estate either by natural death, or by civil death, as in the case of remarriage, or by a bona fide self effacement as in the case of a total renunciation of the widow's whole interest in the whole of the estate in favour of the nearest reversioner or whole body of next reversioners. i. e., her husband's next heirs.

Kinkhede, A. J. C., next held:

"It was to this principle recognized by law that the legislature when enacting the Tenancy Law of 1898 gave prominent sanction by enacting the provisions of S. 36. If a female relation who is the heiress of the outgoing tenant takes advantage of this provision of law she does so in virtue of her position as such an heiress and not independently of it, and if she pays the money, she pays it not for acquiring a new right but in discharge of an obligation which attaches to her in that capacity." (P. 73 of 21 N. L. R.)

He therefore held that Bahena took the holding as an heiress and had the limited title of a female heir. It followed that Bahena did not become a fresh stock of descent and the reversioner of Dewaji succeeded to the holding at Bahena's death. Baker, J. C., agreed with this reasoning. Now it appears to me an essential part of this argument that Soni's surrender did not extinguish the tenancy but, as her death would have done, enabled the reversioner to obtain possession of the holding. It was considered that S. 36, Tenancy, Act laid down the procedure by which the heirs could so obtain possession and did not

give them a right which, apart from this section, they did not have. I do not then see why the findings in this ruling, regarding the position of reversionary heirs after a surrender by a Hindu widow, should be held obiter dicta. It might have been possible to decide *Wasudeo v. Bhiwa* (6), on other principles but this does not alter the fact that the finding regarding surrender was a necessary part of the reasoning which was adopted.

Kinkhede, Ag. J. C. furnishes replies to the arguments of Drake-Brockman, J. C., in *Dajiba v. Raghunath* (9). He points out the settled law that a surrender of tenant-right after the tenant had created a valid usufructuary mortgage operated as a transfer of the equity of redemption only to the landlord. *Baliram v. Ram Rao* (10). This state of the law seems inconsistent with the view that a tenant has power to surrender not merely his rights in the holding but the holding itself. On the view he takes the landlord has no special difficulty in dealing with the claim of a reversioner: when the tenant surrenders he has to deal with this claim in exactly the same way as if the tenant had died.

I respectfully differ from the view expressed by Drake-Brockman, J. C., in *Dajiba v. Raghunath* (9) that S. 35 (1), Ten. Act (11 of 1898):

"is so generally worded as to preclude the reversioner from questioning a Hindu widow's surrender."

The words to which reference is made are merely these:

"Any tenant not bound by a lease or other agreement for a fixed period, may, at the end of any agricultural year, surrender his holding."

My reason for so differing is three-fold. In the first place, the words of S. 35 (1) do not appear more general than those of S. 41 of the Act:

"The right of an absolute occupancy tenant in his holding . . . shall be transferable subject to the condition contained in this section,"

and the latter words were not held by Drake-Brockman, J. C., to preclude the reversioner from questioning a Hindu widow's transfer. Next, as Kinkhede, A. J. C., has pointed out, it has long been considered settled law that a surrender of the tenant after he has created a valid usufructuary mortgage does not put an end to the tenancy. Drake-Brockman, J. C., held that this was the case in (10) [1908] 4 N. L. R. 57.

Baliram v. Ramrao (10), and does not suggest in *Dajiba v. Raghunath* (9) that he has changed his opinion on this point. A tenant then cannot in all cases by surrendering his holding put an end to the tenancy, and an argument based on the fact that the words of S. 35(1) are general is without force. Lastly, it appears to me that S. 35 merely prescribed the manner in which a tenant could surrender. It is not the case that the power of surrender is peculiar to the tenants to whom the provisions of the Act apply: the provisions of very many leases both of agricultural and other property, enable the lessees to surrender before the period of the leases expires. The relations between the landlord and tenant were by the Tenancy Acts removed to a large extent from the domain of contract. It was therefore necessary that the Acts should prescribe the manner in which a tenant who did not desire to retain his holding should avoid liability for rent in future years. If there were no provisions regarding surrender in the Tenancy Acts, the Courts would in my opinion hold that a tenant by giving due notice to his landlord could surrender his holding and thus avoid liability. The provisions of S. 89, Act 1 of 1920, which detail the manner in which a surrender can be validly made, lend support to the view that the object of the sections regarding surrender is to prescribe the method of surrender.

It is, however, necessary to consider the argument that the decision in *Dajiba v. Raghunath* (9), whether correct or otherwise, should be accepted as settled law. It is true that this decision was not overruled during a period of 11 years, but it appears to me doubtful whether it was followed in very many cases. Had the decision been widely known and treated as settled law, I think that female tenants would have attempted to take advantage of the law in order to benefit their relations by defeating the expectancy of reversioners and this would have led to a number of suits on facts similar to those in *Mt. Gangoo v. Laxman* (8) and in the present case. As it was settled law that a widow could not transfer her holding, it seems probable that these attempts would have raised the question whether the course taken amounted to a transfer or to a surrender, and this question

would in some case or other have been the subject of a ruling of this Court. Again if the attempts to defeat the expectancy of reversioners by surrender had been common, it appears to me probable that after the Tenancy Act was revised in 1920, steps would have been taken to put a stop to such attempts by a provision in the new Act: for it is clearly desirable that such attempts should not be made. After 11 years had elapsed, *Wasudeo v. Bhiwa* (6), was decided by a Bench and in my opinion that decision overrules the view taken by *Drake-Brockman, J. C.* The decision in *Dajiba v. Raghunath* (9), has had the unfortunate result that it has led to evasions of the law that a widow cannot transfer her holding in order to defeat reversioners. I consider then that the decision in *Dajiba v. Raghunath* (9), which was overruled in 1924, should not now be considered settled law.

The provisions of the Tenancy Act regarding surrender then do not give rise to an inference that a Hindu widow tenant has unrestricted power to put an end to the tenancy by surrender. It is a well established principle that a Hindu widow is not at liberty to defeat the rights of a reversioner by alienating or wasting property of any kind inherited from her husband. In *Buchi Ramayya v. Jagapathi* (11), the power of a widow to deal with moveable property is discussed. It is stated at p. 323:

"Convenience suggests that a widow should have power to make such dispositions of immovables as are consistent with their nature and requisite for their enjoyment, e. g., grain must be sold or consumed, the increase of cattle must be disposed of when not required for the purposes of the estate; but it is one thing to hold that a widow has a disposing power for the purposes of enjoying moveable property, and quite another to hold that she is at liberty to waste it, or alienate it as she pleases so as to defeat the interests of the reversionary heirs."

Similar considerations apply to the right of a widow over a tenancy holding. The nature of the property makes it necessary that the widow should be able to surrender it with the object of escaping liability for rent, but she cannot surrender it in order to defeat the interests of the reversioners.

The question referred to the Bench must obviously be answered in the negative if a surrender by a Hindu widow

(11) [1834] 8 Mad. 304.

does not affect the rights of the reversioner after her death; if the surrender does so affect the reversioner's rights, it is clear that the surrender to which the question refers is an act of waste which the widow has no right to commit. Thus the question must be answered in the negative whether, as Baker, J. C. and Kinkhede, A. J. C., have held, it causes the reversioner to become entitled to the holding at once or is effective for the lifetime of the widow or has the effect of putting an end to the rights of the reversioner.

The question: "What is the reversioner's remedy?" is closely connected with the question referred to the Bench but has not been fully argued; I do not find it easy to answer. Clearly the reversioner has a remedy: *ubi jus ibi remedium*: if the surrender puts an end to the rights of the reversioner, he can obtain an injunction against a proposed surrender and can ask that the surrender, if effected, should be set aside. I have not been able to find any ruling relating to the remedy of reversioners when a Hindu widow surrenders valuable leasehold rights other than rights to which the provisions of the Tenancy Act apply. The holding of leasehold property entails obligations and it is at least doubtful whether the rights of a reversioner are similar to the rights possessed by him when the widow transfers freehold estate. It does not appear equitable that a reversioner should make no attempt to fulfil the obligations of the lessee during the widow's lifetime and at the widow's death exercise the option of claiming the rights of the lessee. On the other hand, there are difficulties in adopting the view taken by Baker, J. C. and Kinkhede, A. J. C., that the surrendering widow can be regarded as dead with respect to the leasehold property but not with respect to other property. In the absence of full argument on this question I leave it undecided. The Courts in this Province are in my opinion bound to follow the ruling of Baker, J. C., and Kinkhede, A. J. C., at all events with regard to an occupancy holding until their decisions regarding the nature of the remedy is reconsidered. I add that the application of this ruling does not involve undue hardship either to the widow who has committed an act of waste or to the

landlord who is placed in the same position as if the widow had died.

The argumentum ab inconvenienti used by Drake-Brockman, J. C., is based on the supposition that the only remedy which a reversioner can have is that which is given to him when immovable property is transferred. Even if it be the case that a reversioner can wait until the widow's death and then challenge the surrender, the burden of proof that the surrender was not made in order to avoid the obligation of payment of rent would in my opinion rest on the reversioner, and the inconvenience would not be very serious.

In my opinion then a Hindu widow has not a right to surrender her husband's occupancy holding and thereby defeat the expectancy of a reversioner when the object of her surrender is to defeat his claim.

The reasons which I have given for my opinion with regard to an occupancy holding apply with full force to an absolute occupancy holding: the only reasoning affected is that on which the opposite opinion was upheld. But even if it be held that the nature of an occupancy holding is such that a Hindu widow can put an end to the tenancy rights by surrender, I think it should still be held that a Hindu widow has no right to surrender her late husband's absolute occupancy holding in order to defeat the expectancy of a reversioner. The right of an absolute occupancy tenant under Act 2 of 1898 resembled in many respects the right of an owner of property liable for payment of revenue. In *Ragho v. Sadco* (12) (at p. 10 of 6 N. L. R.) it was remarked:

"Although then the Tenancy Act incorporates an absolute occupancy tenant within its sphere of operation and classes him as a tenant along with tenants properly so called, yet in its essence his right is something quite apart from the rights of tenants proper. Mere inclusion in the Act does not subject him to the disabilities of tenants apart from what the Act specially provides for."

While a decree for arrears of rent of an occupancy tenancy could be executed by ejectment (S. 85, Act 2 of 1898), the remedy in the case of an absolute occupancy holding was sale of the holding (S. 43): thus the absolute occupancy right still subsists in circumstances in which it must come to an end if it were based on contract. In *Dajiba v. Raghu-* (12) [1909] 6 N. L. R. 6=5 I. C. 428.

nath (9), *Drake-Brockman, J. C.*, considered the argument that the nature of an absolute occupancy right was different from that of an occupancy right. His decision that, in spite of this fact, a Hindu widow had power to surrender an absolute occupancy holding, is based on the view, which appears to me untenable that the provisions of the Tenancy Act regarding surrender were so generally worded as to preclude the reversioner from questioning a Hindu widow's surrender. By the changes introduced by Act 1 of 1920 the rights of an absolute occupancy tenant have become still more distinct from the rights of other tenants or leaseholders. While S. 11 of the new Tenancy Act states that the interest of an occupancy tenant shall on his death pass by inheritance (the way in which rights founded on contract pass), S. 5 enacts that the interests of an absolute occupancy tenant shall pass by inheritance or survivorship: the acquisition of a right in the holding by birth strongly differentiates this right from a right due to contract. The rights of an absolute occupancy tenant then are now so similar to those of owner of property that it seems impossible to hold that a Hindu widow can wilfully defeat the expectancy of a reversioner although it may be that the remedies open to a reversioner, after a surrender, are not the same as those after a transfer.

In my opinion then the reference to the Bench must be answered in the negative.

Mohiuddin, A. J. C.—The question which has been referred by Priedaux, A. J. C., for decision by the Bench is the following:

"Has a Hindu widow the right to surrender her late husband's holding whether absolute occupancy or occupancy to defeat the expectancy of a reversioner, even when her surrender is intended to defeat the claim of such person?"

I have had an opportunity of reading the opinion, recorded by Macnair, Offg. J. C., in this matter. Macnair, Offg. J. C., considered the following question first:

"When a Hindu widow has succeeded at the death of her husband to an occupancy or absolute occupancy tenancy, has she the same power to transfer the holding as her husband possessed during his lifetime?"

He referred to the cases *Fakira v. Hari* (1), *Mt. Salita v. Sitaram* (2), *Sheoshankarpuri v. Mt. Rukhma* (3),

Vithu v. Mt. Mendri (4), *Bhura v. Ram-rao* (5), and *Wasudeo v. Bhiwa* (6), and applying the principle of stare decisis, answered the question in the negative. It is an established rule to abide by former precedents or cases already adjudicated upon, where the same points come again in litigation, and as the rule about transfers by widows has become settled law, it must be observed. I am therefore of opinion that for the sake of attaining uniformity, consistency and certainty, we must accept it as settled law that a Hindu widow who succeeds to an absolute occupancy or occupancy holding, at the death of her husband, has not got the same power of alienation or transfer, which her husband had.

The question to be considered next is whether the restrictions which have been imposed on the widows' powers, regarding alienations or transfers, apply also in the cases of surrenders or there is such a marked difference between the two transactions—surrender and transfer—that while by applying the judicial rule stare decisis in one case her power of transfer is restricted, she enjoys unrestricted power in the case of the other transaction, that is surrender.

Surrender is nowhere defined in the Tenancy Act. "A surrender" as defined by Foa in his well known book "The Relationship of Landlord and Tenant:" "is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may merge by mutual agreement."

By surrender, the subordinate right of a tenant disappears, and merges in the right of ownership possessed by the landlord.

The only section which deals with surrenders in the Tenancy Act, is S. 89, but that section does not lay down anything except this, that it indicates one of the modes by which an absolute occupancy tenant or occupancy tenant can put an end to the tenancy, even without the permission or consent of the landlord. The section in general terms permits a tenant to surrender the holding by delivering a registered document, executed in favour of the landlord and thereby he ceases to be a tenant from the next agricultural year. The section does not introduce any new provision, but, as pointed out, in the Select Committee's Report, was intended mainly to

facilitate and simplify the modus of surrender, in consequence of the strong opinion expressed by the Judicial Commissioner that false cases of surrender often arose in the civil Courts and, therefore, a registered document should be insisted on. The object with which the section was enacted had, therefore, nothing to do with the introduction of a new rule of law or expansion of the rights of the tenant which he otherwise possessed in the holding.

In the matter of succession to a tenancy holding whether absolute occupancy or occupancy, Ss. 5 and 11, respectively, lay down that the same will be governed by the personal law of the tenant and it is significant to notice that the Act of 1920 has expanded the rule in respect of succession to absolute occupancy holding, by introducing another rule of Hindu Law, viz., survivorship, which was not in the previous law. If, therefore, the succession is to be governed by the personal law, it does not stand to reason that the other incidents of the right of the tenant whether during his lifetime or after his death should not be governed by the same law. Of course there is no difference of opinion that after the death of the Hindu widow, her holding will devolve not on her heirs but on her husband. The controversy then narrows down only to the consideration of a Hindu widow's rights *inter vivos*.

It would, in my opinion, be unreasonable to hold that a right, necessarily restricted, which a Hindu widow inherits should develop into a full and absolute one, during her enjoyment of the same in her lifetime and again resume its original character after her death. The above view would be wholly repugnant to all rules of Hindu Law and for the matter of that, of any law regulating succession and enjoyment of real property. The general principle is that the character of the right in its origin continues throughout unless its scope has been augmented by fortuitous circumstances such as a subsequent grant or acquisition of the residue right.

It is thus clear that no one can surrender a larger estate than he possesses. If a Hindu widow's interest *qua* widow enures only for her lifetime, she cannot yield up an estate which does not extend beyond her life, viz., the estate which

the heirs of her husband will acquire after her death. Therefore, though S. 89 merely speaks of a tenant surrendering his holding, we must see what right he possesses in it, or in other words, whether he is a full fledged tenant or merely a life-estate holder as in the case of a Hindu widow. A tenant is defined in S. 2 (11), Tenancy Act, as a person who holds land of another person and is or but for a contract, would be liable to pay rent for such land to such other person. This definition would include a life-estate holder. A holding is defined in S. 2 (4), Tenancy Act, as a parcel of land held by a tenant of a landlord, under one lease or one set of conditions. So when S. 89 says a tenant can surrender the holding, it does not import anything more than this, that he can at his option yield up the parcel of land he holds to the landlord. But so long as the particular tenant is not competent to yield up the full rights of his tenancy the landlord must take it subject to that contingency. We have seen that the personal law of the Hindus does not ordinarily permit of a Hindu widow inheriting an absolute estate in immovable property. Tenancy holdings are of course property. The term "property" has been variously defined in various text books, but the main idea is that property is "anything which is capable of ownership." Wharton's Law Lexicon defines property as "the highest right a man can have to anything." It is of three kinds, absolute, qualified and possessory. A Hindu widow's tenancy holding is property, but her interest therein is of a qualified character. Whatever she holds, she gives up, and, therefore, surrender in her case is of her qualified estate.

The trend of the recent decisions of this Court is that a Hindu widow surrenders an absolute estate and, therefore, the reversioners cannot question it. The authority for this is sought in S. 89, Tenancy Act of 1920. I may here point out that the decision in *Bikram v. Thakur Ganesh Singh* (7) and *Mt. Gangoo v. Laxman* (8), related to occupancy holdings and there is a fundamental distinction between the two classes of tenancy. But we have to see whether S. 89 has in any way abrogated the rule of Hindu Law which is the basis for succession. The tenancy legislation in the Central

Provinces has never sought to lay down any new rule of inheritance excepting that in the case of occupancy holding collateral succession is restricted. The policy of the law being thus based on adherence to personal law of the tenant, no part of the enactment can be said to have deviated from that rule. I am, therefore, in full agreement with Macnair, Offg.J.C., that the census curiae of the decisions of this Court up to the year 1926, when *Bikram v. Thakur Ganesh Singh* (7), was decided, should be followed.

I need not refer in detail to the published decisions of this Court beginning from *Fakira v. Hari* (1), to *Wasudeo v. Bhiwa* (6), which have consistently and uniformly upheld the rules of Hindu Law. *Dajiba v. Raghunath* (9), related to an absolute occupancy holding, the incidents of the tenant's rights to which were almost equal to those of an occupancy tenant under the old law except as to certain rights of transfer. But the Act of 1920 has expanded the incidents of an absolute occupancy tenants' right and has now added another peculiar feature of Hindu Law to it, viz., right of survivorship making it more plain that an absolute occupancy tenant is subject to the rule that his sons acquire a right by birth to the holding and that his coparceners can claim to succeed by right of survivorship. The position of a Hindu woman regarding absolute occupancy land is almost analogous to her position regarding any other property. The surrender effected by a Hindu widow cannot come into operation at once, if the absolute occupancy holding has been mortgaged. In this view of change in the law, the authority of *Dajiba v. Raghunath* (9), is no longer good law.

Moreover in the case of occupancy holdings the relationship may be said to have originated in a contract, and this is the real basis of the decision in *Bikram v. Thakur Ganesh Singh* (7), which has been followed in *Mt. Gangoo v. Larman* (8), and it seems to have been assumed that any of the contracting parties could by mutual consent put an end to the contract, but it is doubtful whether the reasoning can be extended to a widow who takes by inheritance, and, moreover there is the difficulty to carry on the analogy of a contract, be-

cause surrender can be unilateral and does not require the consent of the other contracting party, viz., the landlord. So the basis of contract cannot hold good. I may point out that in the case of absolute occupancy holding the basis of contract is wholly inapplicable. It is a right created by Government and conferred on old malguzars who had lost their proprietary rights in course of time: see *Ragho v. Sadoo* (12). It is, therefore, not a contractual tenancy right but a sort of semi-proprietary right with certain restrictions.

The Tenancy Act does not contain any express provision curtailing or restricting the power of widows in the case of surrender but it seems to me that on the analogy of transfer which is a transaction very similar to that of surrender, it must be held that a widow has no power to surrender her late husband's holding whether absolute occupancy or occupancy, to defeat the expectancy of a reversioner, especially when her surrender is intended to defeat the claim of such person. I am, therefore, of opinion that the reference made to the Bench should be answered in the negative.

V.S./R.K.

Reference answered
in negative.

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FINDLAY, J. C.

on difference between

KOTWAL AND KINKHEDE, A. J. Cs.
Noksing—Applicant.

v.

Bholusing and others—Non-Applicants.

Civil Revn. No. 65-B of 1925, Decided on 31st January 1927, from order of 1st Addl. Dist. Judge, Akola, D/- 25th February 1925, in Misc. Appeal No. 18 of 1924.

(a) Suits Valuation Act, S. 9—(Per Findlay, J. C., and Kotwal, A. J. C.)—Notification No. 1641 of 1911, Cl. 3 (Proviso)—Suit by reversioner for declaration that alleged adoption is invalid affects title of adopted son to property—Word "affects" cannot be taken to refer to present time only—Ad valorem court-fee must be paid. (Kinkhede, A. J. C. Contra.)

Per Findlay, J. C. and Kotwal, A. J. C.—A suit by a reversioner for a declaration that the alleged adoption is invalid as being opposed to law affects title of the adopted son to the property since if a declaration is granted his title as adopted son to the property will go and so

the reversioner has to pay ad valorem court-fee. (*Kinkhede, A. J. C. contra.*)

The word "affects" cannot be taken strictly as referring to the present time only for if that construction were to be put on that word, then in no conceivable case could the title to the property be said to be affected at the time when the question of court-fees has to be determined. What the Court has, therefore, to have regard to is what the result will be at the time the plaintiff seeking the declaration gets his decree, assuming the suit to be decided in his favour. [P 86 C 2]

(b) Suits Valuation Act, S. 9—Notification No. 1641 of 1911—Rule contained in the Notification is not ultra vires nor illegal.

The terms of S. 9 permit of the re-valuation of the suit of the class contained in Art. 17 (v) Sch. 2, Court Fees Act, and there can be no question that the valuation of Rs. 10 fixed under that article is an arbitrary one and so it is intra vires for the High Court, with the previous sanction of the Local Government, to have laid down the rule contained in Notification No. 1641 of 1911. *Ganpatrao v. Laxmibai F. A. No. 66 of 1916, Rel. on.* [P 86 C 1]

(c) Court-fees Act—Court should consider in order to determine amount of court-fee, the substance and not mere language of plaint.

Per *Kinkhede, A. J. C.*—In order to determine the amount of court-fee payable in a suit, the Court has to see in each particular case what the nature of relief claimed is and for that purpose it must look at and see to the allegations contained in the plaint. The substance and not the mere language of the plaint must be looked to in order to determine the amount of court-fee payable: 21 C. W. N. 375; 38 *Mad.* 922 and 40 *Cal.* 615, *Foll.* [P 75 C 2]

(d) Interpretation of Statutes—Fiscal enactments must be strictly construed—Court-fees Act.

Per *Kinkhede, A. J. C.*—It is a rule of construction peculiar to fiscal enactments that they must be very strictly construed so as not to impose an unnecessarily heavy burden on the subject. Such an Act being a taxing statute must use very clear and unambiguous language: *A. I. R.* 1918 P. C. 188; *In Parington v. Attorney General* (1869); 4 *H. L.* 122; *Attorney-General v. Earl of Selborne*, (1902) 1 *K. B.* 388, *Rel. on.* [P 76 C 2]

(e) Interpretation of Statutes—Courts have to construe Acts as found—They have no power to alter or amend them—It is for legislature and not for Courts to see if words used will give effect to object which the statute may have in view.

Per *Kinkhede, A. J. C.*—The Courts have to construe the Acts of legislature as found therein, whether they approve of them or not, nor to alter or amend them. They have no power to read into the Court-fees Act or in any other Act or Code a section or words which it does not contain. It is for the legislature and not for the Courts to consider whether the words employed in framing an Act will give effect to the object and policy which the statute may have in view: 11 *Bom.* 1, *Foll.* [P 77 C 1]

(f) Hindu law—Reversioner—Rights of—Till female owner dies reversionary right is mere possibility—Object of declaratory suit during lifetime of female owner is simply to remove apprehended danger to interests of all reversioners.

Per *Kinkhede, A. J. C.*—Under the Hindu Law the death of the female owner opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or spes successionis; the Law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid or an alienation effected by her is not binding, against the inheritance. The object is to remove a common apprehended injury to the interest of all the reversioners, presumptive and contingent alike: *A. I. R.* 1915 P. C. 124, *Foll.* [P 79 C 2]

(g) Practice—Practice is not necessarily binding if unwarranted by law.

Per *Kinkhede, A. J. C.*—The High Court is not necessarily bound to follow a practice which is not warranted by law: *A. I. R.* 1918 P. C. 188 and 12 *All.* 129 (F.B.), *Rel. on.* [P 82 C 1]

A. V. Khare and *W. B. Pendharkar*—for Applicant.

R. R. Jaiwant—for Non-Applicants.

Kinkhede, A. J. C.—Plaintiff Noksing instituted the suit out of which the present application for revision arises on a stamp of Rs. 20 in the Court of Second Class Subordinate Judge, Akola, valuing the subject-matter at Rs. 400 and praying for the following relief:

That a decree be passed that the adoption of defendant 1 by defendant 2 to her husband is invalid as being against law and that defendant 1 cannot thereby be the adopted son of Kisan Singh, and that therefore he is not entitled to become the owner of the property described in para. 1 (but the words "and that para. 1" had been scored out from the plaint before it was presented in Court). The invalidity is said to be due to want of husband's authority and to defendant 1 being the son of Kisan Singh's daughter defendant 3. A preliminary objection was raised that the value of property, title to which was affected by the declaratory suit was Rs. 15,000 and that the plaint should bear a fee ad valorem that property.

The plaintiff replied that he wanted only a declaration that the alleged adoption is invalid and had properly valued his suit at Rs. 400 for purposes of jurisdiction as required by the Judicial Commissioner's Civil Circular II-8 and for

purposes of court-fees under Sch. 2, Art. 17 and Cl. 6, Court-fees Act. (At that time the court-fee was doubled by a Local Court-fee Amendment Act). He admitted the value of the property of Kisan Sing to be Rs. 15,000 but asserted that he did not claim any:

"declaration as regards it, and that the suit was properly valued for purposes of court-fee and jurisdiction."

The Court of first instance holding that the suit "affects a title to property" worth Rs. 15,000 returned the plaint for presentation to proper Court. The 1st Additional District Judge, Akola, in his turn maintained that order in appeal relying on *Ganpatrao v. Laxmibai* (1), decided by Batten, A. J. C. The plaintiff has come up in revision challenging the correctness of the above orders on the ground that they are erroneous and opposed to the express provisions of Sch. 2, Art. 17, Cl. 5, Court-fees Act; it is also contended that even if the suit as laid were not specifically covered by Cl. 5, the other Cls. 3 and 6 at any rate are sufficiently wide to cover it, and, further that as a fixed fee of Rs. 10 only is prescribed by the Court-fees Act, the notification issued under S. 9, Suits Valuation Act, could not be applied to it; the question then is whether the present suit as laid fell within the strict terms of the proviso to Cl. 3 of the notification with regard to the use of the words "affects a title to property," it is next complained that the proviso has not been properly interpreted in the several decisions of this Court and that a wider construction has improperly been put upon it as if it used the words "affects or will affect a title to property," the absence of the words "or will affect" is said to exempt a presumptive reversioner from payment of an ad valorem fee.

The notification so far as it bears on the questions raised runs as follows:

"Under S. 9, Suits Valuation Act 1887 the Judicial Commissioner, with the previous sanction of the Chief Commissioner, directs that suits of the following classes shall for the purposes of the Court-fees Act 1870, the Suits Valuation Act 1887, the Central Provinces Courts Act 1904, be treated as if the subject matter of such suits were of the value of four hundred rupees: (3) suits for a declaration that an adoption is valid or invalid.

Provided that if a suit for a declaration that an adoption is valid or invalid affects a title to property, then the value of that property if it

exceeds Rs. 400 shall be deemed to be the value of the subject matter of the suit."

I will first take up the applicant's contention that his plaint as amended claims only a declaratory relief regarding defendant 1's status pure and simple and does not seek a declaration which "affects" either the plaintiff's or the defendant's "title to property" in the immediate present. I will then discuss whether his second contention that the previous decisions of this Court do not touch the present case, is correct.

It must be accepted that in order to determine the amount of court-fee payable in a suit the Court has to see in each particular case what the nature of the relief claimed is, and for that purpose it must look at and see to the allegations contained in the plaint: *Bagala Sundari Debi v. Prosanna Nath Mukrejee* (2). No doubt the substance and not the mere language of the plaint must be looked to in order to determine the amount of court-fee payable: *Arunachalam Chetty v. Rangaswamy Pillai* (3), *Harihar Prasad Singh v. Shyam Lal Singh* (4), Judging by these tests and bearing in mind that the words:

"and that therefore he is not entitled to become the owner of the property described in para. 1"

were scored out from the plaint before the same was filed in Court, I am of opinion that only one conclusion could have irresistibly followed and it was that though by the plaint as drafted the plaintiff's intention may have originally been to institute against the defendant "a suit which affects his status as well as title to property," he expressly abandoned it and converted his claim into one for a mere declaration affecting only the status of defendant 1 by actually deleting the words reproduced above in inverted commas. He made the point very clear even in the reply quoted above in para. 1. The plaintiff's word must be accepted as regards the relief he seeks. If he says he does not seek any declaration of title in his suit, the Court cannot say you have asked for it, and whether you shall have it or no, you must pay ad valorem court-fee on it: and I think the Courts below have under this im-

(2) [1916] 21 C. W. N. 375=35 I. C. 797.

(3) [1915] 38 Mad. 922=28 M. L. J. 118=28 I. C. 79=(1915) M. W. N. 118 (F.B.).

(4) [1917] 40 Cal. 615=21 I. C. 404

(1) F. A. No. 66 of 1916.

pression improperly regarded this suit as "affecting title to property." Had the question of liability of a plaint to be classed under a particular head for purposes of the Court-fees Act not been mixed up by the Courts below with that of its maintainability in a particular form with reference to the provisions of S. 42, Specific Relief Act, but kept distinct, they would not have fallen into this error.

Having thus determined what the nature of the relief prayed for by the plaintiff is, the question to be next considered is whether to such a case the proviso to Cl. 3 of the notification applies so as to substitute in place of the prescribed value of Rs. 400 the value of the property affected, as the standard for valuation for purposes of court-fees and jurisdiction. My answer is that it cannot and in fact does not apply to a suit where the only relief is one affecting the status merely, and not title to property, whether by itself, or, in conjunction with, the status of the defendant. Whether a particular suit aims at affecting only the status, or only the title to property, or both, of the person sued, must originally depend upon the antecedent circumstances which have necessitated its institution. It must also depend upon the character in which the person is suing, as also on the right which he seeks to assert or repudiate in detail of that of his opponent, and much more, upon the question whether the law makes it obligatory on him to sue for and obtain such a declaration as a condition precedent to his questioning his adversary's, and enforcing his own rights, present or future, to the property owned or likely to be owned, by him, so as to prejudice the immediate or future title of the person sued. It will therefore be my endeavour to show in the following paragraphs that these matters have not received their due weight and attention at the hands of the Courts below, and they have consequently come to a wrong conclusion on the question of the plaintiff's liability to have his present suit which affects status only, classed as if it was a suit which affects a title to property or one which affects status as well as title to property and that too immediately.

I will first deal with the question

of a Court's duty in interpreting fiscal statutes. The notification being issued by this Court and the Local Government, under a power vested in them by S. 9, Suits Valuation Act, it acquired the force of law, and became a part of the Court-fees Act which is a taxing or fiscal enactment. Their Lordships of the Privy Council observe as follows in *Rachappasubrao v. Shidappa Venkat-rao* (5) at p. 518 (of 43 Bom.):

"The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State."

It is a rule of construction peculiar to fiscal enactments that they must be very strictly construed so as not to impose an unnecessarily heavy burden on the subject. Such an act being a taxing statute must use very clear and unambiguous language.

In *Parington v. Attorney General* (6), Lord Cairns said :

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown, is seeking to recover the tax but the subject is within the letters of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

Similarly in *Attorney General v. Earl of Selborne* (7), Collins, M. R. observed as follows :

"Therefore, the Crown fails if the case is not brought within the words of the statute interpreted according to their natural meaning ; and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by an attempt to construe the statute benevolently in favour of the Crown."

Unless therefore, the burden, on the language used, is clear the charging authorities cannot assess the charge : cf. *Emperor v. George Banerji* (8). *Shambhu Dyal, In the matter of* (9) and *Secy. of State v. Laldas* (10). A Court cannot alter the law or read into the statute words which it thinks should have been there : *Damodar Das v. Jhaoo Sing* (11). The Courts have to

(5) A. I. R. 1918 P. C. 183=13 Bom. 507=45 I. A. 24 (P.C.).

(6) [1859] 4 H. L. 122.

(7) [1902] 1 K. B. 388.

(8) [1916] 14 A. L. J. 850=36 I. C. 877 = 18 Cr. L. J. 45.

(9) [1915] 37 All. 159 = 27 I. C. 731 = 13 A. L. J. 96 (F.B.).

(10) [1910] 34 Bom. 239 = 5 I. C. 610 = 12 Bom. L. R. 16.

(11) [1917] 15 A. L. J. 319=39 I. C. 87.

construe the Acts of legislature as found therein, whether they approve of them or not, not to alter or amend them. They have no power to read into the Court-fees Act or in any other Act or Code a section or words which it does not contain. I may here add that it is for the legislature and not for the Courts to consider whether the words employed in framing an Act, will give effect to the object and policy which the statute may have in view: *Jehangir Dhanjibhai v. Perozbai* (12). Acting on this principle it was the look-out of the Court and the Local Government when they issued the notification to consider whether the word "affects" will sufficiently give effect to their object. In this connexion it will be useful to point out the very internal evidence as to the primary object, scope and original intention of the Notification No. 3240, dated 7th June 1888 as issued in the form of Civil Circular 11-18 in 1888 and reproduced in the compilation of Judicial Commissioner's Civil Circulars also as 11-18 in 1897 and as 11-15 in 1908, so far as the question of court-fee was concerned; it was clear, from its para. 2 itself which ran as follows :

"2. This notification affects only the court-fee in the case of those suits the subject matter of which cannot be valued and for which a fixed fee is not prescribed by the Court-fees Act."

It, therefore, followed that a fee ad valorem on Rs. 400 or the property was for the first time prescribed by the notification only in respect of those suits for which a fixed fee was not prescribed by the Act. Thus suits which fell within Cls. (iii), (v) and (vi), Art. 17, Sch. 2, Court-fees Act for which a fixed fee was prescribed were clearly outside the scope of that notification, so far as the question of court-fees payable was concerned. I may as well mention here that the correspondence which is available in the Judicial Commissioner's office regarding the expediency of issuing this notification clearly shows that the main object of fixing the value as high as Rs. 400 was to prevent the specified classes of suits from going to the Revenue Officers like Tahsildars, who had jurisdiction up to Rs. 300 only, and were either not empowered in those days to try civil suits relating to immovable property except house property, or were

(12) [1887] 11 Bom. 1.

not considered sufficiently competent to decide complicated questions of status of title to property, for purposes of the Central Provinces Courts Act of 1885 then in force. But this para. 2 has since been deleted when the notification was republished as Notification No. 1641 dated 28th September 1911 in Judicial Commissioner's Civil Circular 11-8 in the subsequent editions of Civil Circulars of 1912 and 1920. No correspondence showing why it was deemed expedient to omit it or whether its deletion was deliberate or merely accidental is available. Whatever may be the cause of the non-repetition of para. 2 that circumstance has given the Courts a chance to construe the notification of 1911 as conveying a possible intention to levy a fee ad valorem on Rs. 400 or instead thereof one which has reference to the value of the property title to which the suit for declaration affects, even in cases where Sch. 2 prescribed a fixed fee. But it must not at the same time be forgotten that the Local Government left the words 'affects a title to property' and the rest of proviso unchanged as it was.

It is therefore argued that the very fact that this Court and the Local Government did not insert in the notification (though it was open to them to do so) words 'affects or will affect a title to property' or some other words of sufficient amplitude in place of the only words used 'affects a title to property' so as to expressly bring every suit for a declaration that an adoption is valid or invalid, by whomsoever brought, within the scope of the proviso, clearly showed that it was the intention of the notification as also of the proviso as it stands not to levy ad valorem duty invariably in respect of every such suit; but that on the contrary the absence of the words "will affect" was a clear indication of the intention to exempt from its operation suits wherein the relief sought affected status merely; or only affected the future operation of suits wherein the relief sought affected status merely; or only affected the future operation of a title and that the use of the present tense which the word 'affects' denotes showed that ad valorem fee was payable only in suits where the relief asked for was to affect title immediately and not

merely in the future, I think this argument has great force. The expression 'affects a title to property' used in the proviso to the third clause of the notification denotes the present tense; it must therefore be necessarily read as limited in its operation, and covering only such declaratory suits, as are brought by one of the parties to the adoption namely the adopted son, or the adoptive father or mother against the other party thereto, and aim at the immediate establishment or annulment of the adoption in question.

I will now illustrate this distinction. It is ordinarily, in suits by parties to the adoption, that one may with some degree of definiteness expect the claimant to ask for a declaration immediately affecting his opponent's and also his own title to property; it may also reasonably be inferred from such cases, that consequent on the adoption (the validity of which is sought to be affirmed or impugned) the title to property had already become vested or been vacated either wholly or partially to the detriment of either party, and that a necessity for obtaining a declaratory decree either affirming or annulling the alleged adoption in the immediate present or even with retrospective effect must therefore have arisen. What may seem to be an apparent title of one party may by reason of the assertion or repudiation of the adoption, stand in need of being once for all either declared or negatived as a real title to property. Similarly where the person in whom the estate is vested either as the adopted son or as the adoptive father or mother, sues for a declaration because he or she apprehends dispossession therefrom by the other party to the adoption, or where the person adopting is only a coparcener owning joint ancestral property and the adoption made by him limits his own interest in it by creating a present interest in the adopted son and therefore wants through the medium of the declaratory suit to get rid of the apparent title created by the adoption in favour of his opponent, the object of each of such suits is on the face of it to affect not only the status but also the title and that too not merely his or her own but that of the opponent as well, not merely in the remote futuro

but in present, such suits only can in my opinion come in the category of "a suit which affects a title to property" within the strict words of the proviso. It is the decrees passed in such suits which can affect the stability of title to property, or of the existing rights thereto, created or extinguished by the adoption in favour of or as against either party and thus directly or immediately affect i. e., establish, impugn, annul or revise the claimant's title for his or her own immediate benefit in derogation of the title of his opponent.

I can very well imagine that even amongst suits by parties to the adoption it is likely that there may be suits in which the declaration sought affects only the status but not title to property. As for example, where an adopted son discovering some flaw in his so-called adoption or for some other ulterior object, himself wants to have it declared that it is invalid; even if we assume that it is in order to clear up his own title to his estate in the natural family, it would be highly unjust to call upon him to pay a fee ad valorem his adoptive father's family property which he will lose or from which he wants to voluntarily walk out. Another instance is the one mentioned by the learned Additional District Judge, who says that it is conceivable that in a suit brought for validating or invalidating an adoption made by a father possessing a self-acquired property in which the son does not get any interest by reason of the adoption, there is merely a question of status and it does not affect property. I do not think I need multiply instances in support of this proposition.

At this stage I must also bring out prominently another phase of the litigation of this character to make this distinction still clearer. The first test as stated above is to see from the plaint whether the relief claimed affects status only or status as well as title to property; the second is to see whether the person suing for the declaration is a party to the adoption or a person claiming under such a party; and the third and still more decisive test is to see whether the claimant is such a person as cannot recover possession or property from his opponent without first obtain-

ing a declaration as to the validity or otherwise of the adoption he wishes to assert or challenge. A very fitting analogy is to be found in the declaratory suit which a party to an instrument or decree brings for obtaining a declaration that he is not bound by it. In such a case the declaration sought really affects title to property covered by the deed or decree or the liability created or determined thereunder. The law is very clear on the point that as a condition precedent to the obtaining of any other relief regarding the property conveyed or covered by the deed or decree, a party to the transaction affecting such property must sue to set aside his own instrument or a decree to which he was a party. In such cases a fee ad valorem the property sought to be affected, or the liability avoided, by the declaration has to be paid by the party seeking to avoid the debtor the decree; cf. *M. M. Karnavan v. K. Achammal* (13), *Arunachalam Chetty v. Rangaswamy Pillai* (3), *Harihar Prasad Singh v. Shyam Lal Singh* (4), *Ganesh Bhagat v. Sarda Prasad Mukerjee* (14) and *Devidas v. Ramlal* (15) where this distinction has been taken into account in levying ad valorem fee instead of a fixed fee.

It is the absence of any such legal duty or obligation cast by Hindu Law upon a reversioner to set aside the adoption as a condition precedent to his suing to get or getting possession of the property after the succession opens out, which distinguishes his case from that of a party to the adoption, and restricts his liability to pay a fixed fee instead of the ad valorem fee because the only declaration he is interested in suing for under S. 118, Lim. Act, is as regards the status of the so-called adopted son and not a title to the property inherited by the widow who makes the adoption. There is no rhyme or reason why he should be put upon the same level with a party to the transaction who must either set it aside or get its validity or otherwise, if any, established in a declaratory suit as against the party interested, in repudiating it, before he can assert his or her own title to the property affected thereby.

The following observations of their Lordships in *Venkatanarayana Pillai v. Subbammal* (16), (410-411 of 38 Mad.) clearly set out the object and nature of the reversioner's declaratory suit and adjudication taking place there:

"Under the Hindu law the death of the female owner opens the inheritance to the reversioners and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility or *spes successionis* . . . the Indian law, however, permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is not valid, or an alienation affected by her is not binding against the inheritance. . . . the object is to remove a common *apprehended injury* to the interest of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character: one relates to *status* and involves the adjudication of a right in *rem*: the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights."

I have underlined (*italicized*) the important words in the quotation.

The two articles referred to are 118 and 125 of the Limitation Act. The words "status" as used with reference to Article 118 is very significant. Similarly the expressions "apprehended injury" and "danger" are also very important as defining the scope and character of the declaratory suit. This clearly shows that the object of the reversioner's suit is to remove an "apprehended injury" or "danger" to the reversion, and the subject-matter of the suit is such as merely affects the so called adopted son's status and involves an adjudication of a right in *rem*. In substantial accord with this view are also the decisions in *Janki Ammal v. Narayanaswami Aiyar* (17), *Kesho Prasad Singh v. Sheo Pargash Ojha* (18), *Annada Mohan Roy v. Gour Mohan Malik* (19) and *Amrit Narayan Singh v. Gaya Singh* (20). In the last case Mr. Ameer Ali described the situation very clearly in the following words:

"A Hindu reversioner has no right or interest in *praesenti* in the property which the female owner holds for her life. Until it vests

(16) A. I. R. 1915 P. C. 124=33 Mad. 406=42 I. A. 125 (P.C.).

(17) A.I.R. 1916 P. C. 117=39 Mad. 634=43 I. A. 207 (P.C.).

(18) A. I. R. 1924 P. C. 247=46 All. 831=51 I. A. 331 (P.C.).

(19) A. I. R. 1921 Cal. 501=48 Cal. 536.

(20) A. I. R. 1917 P. C. 95=45 Cal. 590=45 I. A. 35 (P.C.).

(13) [1910] 20 M. L. J. 791=5 I. C. 927=7 M. L. T. 177.

(14) [1915] 42 Cal. 370=30 I. C. 111=19 C. W. N. 835.

(15) [1911] 7 N. L. R. 190=13 I. C. 864.

in him on her death, should he survive her; he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise, until then it is mere spes successionis."

One has only to put this distinction in the right perspective to realise the great bearing it has on the question of stamp payable on a declaratory suit brought by a person who has a mere spes successionis, in relation to the fruit which he may not live to enjoy as the result of the litigation he undertakes. There is no immediate need or legal obligation on him to file such a suit at an early date except that important evidence may disappear by lapse of time. He is a claimant other than a party to the adoption, and as such does not stand to derive any immediate profit by the litigation; being a person who has only a hope of succession he has no present transferable interest in the inheritance, and as such his mere hope or chance of succession can have no market value. It is so uncertain that it may even be valueless. It is so uncertain that it may even be defeated by the act of some person having the present disposal of the property. Then again his interest is merely contingent upon his surviving the widow and the non-intervention of a full heir. He cannot be in a position to predicate at the date of his suit for declaration, with any degree of certainty what particular property will be left when the succession would definitely open out in favour of the reversion. I do not understand how he can be legally compelled to value the subject matter of his suit either with reference to the then existing property or some uncertain and unknown property which the alleged adopted son may stand to lose at some future or uncertain day. The estate while in the hands of the widow or for the matter of that of her alleged adopted son, may be alienated for a justifying necessity, and corpus may thus be considerably reduced. It may even be wasted or deteriorated or undergo conversion to such an extent as would destroy all identity, and may not be the self same property at widow's death, as the one he may have specified as having existed at the date of the suit. Is the declaration, if obtained only with regard to specific property existing at the date of suit, to become nugatory and

ineffectual as to the 'property' that may be found existing at the time when the succession opens out? Unless the decree contains some comprehensive words such as;

"or such property belonging to the estate of the male holder as may be left at the widow's death,"

the declaration would be unavailing to plaintiff; but even then technically speaking it may not give the actual reversioner any right to say that his title to the property which the defendant's adopted son may actually possess at the widow's death, was affirmed or that the adopted son's title to it was already annulled. Then again, it is doubtful whether a Court which is so exacting as regards the court-fee would permit such vague words to remain in the plaint without insisting upon some value being put on the property to be comprised in them. Taking these circumstances into consideration the only plausible inference which I think can be drawn is that the property which the adopted son either stands to lose or will ultimately lose is not a sure criterion for valuing the subject matter of such suits by reversioners although that seems to be the view taken by the Madras High Court in *Keshava v. Lakshminarayan* (21).

The Allahabad High Court expressly dissented from the above view taken by the Madras High Court in *Sheo Deni Ram v. Tulshi Ram* (22) where it was pointed out that plaintiff can put his own valuation unless and until the High Court with the sanction of the Local Government thinks fit to prescribe such value under the power given by S. 9, Suits Valuation Act. This is also the view taken by the Calcutta High Court in *Prohlaid Chandra Dass v. Dwarka Nath Ghose* (23). In *Kalora Bhujangrav v. Padapa Bhujangrav* (24) Westropp, C. J., held that:

"independently of any claim to the property a suit to set aside adoption would lie The legislature seems distinctly to have recognized the right of a person to bring a suit to set aside an adoption as a substantive proceedings, independent of any claim to property, and to have fixed a special court-fee for such a suit (Act 7 of 1870, Sch. 2, Art. 17, Cl. 5); and in the new limitation Act (9 of 1871), Art. 129, the right to bring such a suit has since been again distinctly recognized."

(21) [1883] 6 Mad. 192.

(22) [1893] 15 All. 378 = (1893) A. W. N. 147.

(23) [1910] 27 Cal. 860 = 6 I. C. 636 = 14 C. W. N. 929.

(24) [1875] 1 Bom. 218.

I have underlined (*italicized*) the important words. It is in the fitness of the things to expect a presumptive reversioner under such circumstances to sue for and obtain only such a declaration as merely affects the status of the alleged adopted son; a declaration of his own title and a negation of this adversary's title to specific property actually existing at date of suit, is not, in my opinion, the *sine qua non* of his declaratory suit.

As the only object of bringing such a declaratory suit at an early date is to secure an adjudication as to the status of the defendant when the evidence is quite fresh in order to avert an apprehended injury or danger which may stand as a bar against or come into conflict with the working out of the future rights of the plaintiff or of such other person or persons as may happen to become interested in the reversion by the time the death of the widow takes place, a declaration as to the status obtained under such circumstances can have absolutely no reference to the value of any specific property; it can at the most relate to the inestimable future or contingent right, title or interest which the actual reversioner may happen to get in the widow's estate and accretions thereto. Under such circumstances, the adopted son's present title to the so-called ownership and enjoyment of the property inherited by the widow remains unaffected by the declaration until the latter's death. To estimate the money value of such possibilities or impossibilities is a difficult task. It is for meeting cases such as these that the legislature as pointed out by Westropp, C. J., have in their wisdom prescribed a fixed fee of Rs. 10 under Art. 17, Sch. 2, Court-fees Act and given power to the High Court and Local Government to supplant the artificial value which the plaintiff may put on the subject matter of a suit by one based on what that might consider reasonable basis of valuation. Whereas this Court and the Local Government have under the power so given by S. 9, Suits Valuation Act, to fix any other reasonable basis of valuation in selected classes of suit, issued the notification in question fixing Rs. 400 as the value of the subject matter of suits coming under Cl. 3, read with its proviso, they have to be valued at Rs. 400 for court-fee and jurisdic-

tional purposes. So the obligation to value the subject matter of the suit at Rs. 400 is the primary and substantive rule enacted by the notification and that of valuing the relief according to the value of the property title to which the suit affects is an exception to the same. On the authority of such a proviso, to ask a person who has a mere spes successionis to pay ad valorem fee is virtually to give prominence to the exception over the substantive rule of law and practically force him as it were to pay the heavier duty leviable for the relief of present possession of the property although under the Hindu Law he is not entitled to pray for and claim it during the lifetime of the widow.

Since it is the duty of every Court to see that its construction of a fiscal statute or for the matter of that of our present notification which being a part of fiscal enactment has the force of law, is neither such as would impose an unnecessary or unwarranted burden upon the subject, nor at the same time, such as deprives the state of its legitimate revenue, it must be seen whether it would be opposed to, or in consonance with the plain meaning of the word "affects a title to property," used in the notification, to include such suits in the proviso. The mere circumstance that the future operation of the title of the alleged adopted son to the property will be affected after the widow's death by the declaratory decree is, in my opinion, no justification for classifying the suit of a mere presumptive reversioner for a pure declaration that an adoption is valid or invalid, as a suit which "affects a title to property," and thus bringing it on a par with the suit of a party to the adoption or with the one brought expressly for the purposes of affecting such title. It will thus be seen that there is a great distinction between a suit by a party, and a suit by a non party claimant (who is under no legal obligation to sue) for a declaration that the adoption is valid or invalid, this coupled with the relief actually claimed in the plaint and not the consequences directly or indirectly flowing from it, must determine the real test in the matter of the applicability or otherwise of the proviso, to such suits. Unfortunately this distinction has been ignored in the Courts below with the result that a burden of an ad valorem fee

is being sought by the defendants to be put upon the head of the claimant who cannot be legally compelled to sustain it. In construing the notification in this manner the Courts below have extended the operation of the proviso beyond its proper limits and looked at it as if it contained the words :

"affects or will affect a title to property in place of the words 'affects a title to property.'"

To so extend its scope was to construe fiscal enactments against the recognized canons of construction specially applicable to them.

I am conscious of the existence of a series of decisions of this Court which are opposed to the view taken by me and on the basis of which the levying of an *ad valorem* fee has become the practice as it were of the Courts of these provinces. I, however, do not feel myself bound to decide this question on the principle of *stare decisis* especially as the contrary view expressed by Sir Henry Drake-Brockman in his orders dated 23rd June 1915 and 27th January 1916 in *Daji v. Radhabai* (25) commends itself to me. I am not necessarily bound to follow a practice which was not warranted by law, as pointed out by their Lordships of the Privy Council in *Rachappasubrao v. Shidappa Venkatrao* (5), and also by the Allahabad, Bombay and Calcutta High Courts in several cases. Chief Justice Edge of the Allahabad High Court observed as follows in *Balkaran Rao v. Govind Nath Tiwari* (26), with regard to the erroneous practice obtaining in the provinces subject to that High Court:

"A practice which is in contravention of the law even if such practice be the practice of a High Court, cannot make lawful that which is unlawful; nor can a practice of a Court justify a Court in putting upon an Act of the Legislature a construction which is contrary to the plain wording of the Act. Such a principle of construction in such a case would lead, not to making the law certain but to confusion and uncertainty."

This view has been accepted by the Bombay High Court in *Murad Ali Shamji v. B. N. Lang* (27), and also by the Calcutta High Court in *Khedon Mahto v. Budhun Mahto* (28), and *Bunwari Lal v. Daya Sankar Misser* (29). A practice which is in contravention of the plain provision of our notification as

I understand it cannot be accepted as binding. I do not therefore uphold it in this case which is clearly distinguishable from the cases covered by the proviso as shown above. I will discuss the previous decision of this Court.

(1) The case of *Mt. Mainabai v. Vithal* (30), was one in which the daughter who had a reversionary interest only and had claimed a declaration that the respondent was not duly adopted either by her father or under his authority, was made to pay *ad valorem* fee on her memorandum of appeal by Batten, Ag. J. C., on the strength of an office note based on the notification. No reasons whatever are given in support of the view.

(2) The case of *Bapu Anna v. Mt. Sitalai* (31), decided by Stanyon and Prideaux, A. J. Cs., arose out of a suit by the Manager of Annachhatra, the beneficiary under the will of one Mr. Jog, Pleader, Berar, for a declaration that the adoption made by the testator's widow (to which plaintiff was not a party) was void on the ground that it was not in accordance with the directions of the testator. In that case also an *ad valorem* fee was demanded on the plaint on the view that the declaration "will affect" title to property worth Rs. 40,000 and that the case *therefore fell within the proviso*. The underlined (*italicized*) words are important for the purposes of the distinction pointed out above.

(3) *Ganpatrao v. Laxmibai* (32) was a case where the appellant had claimed two reliefs on the strength of his status as an adopted son. As a person duly adopted by Mt. Laxmibai to her husband Bhaskarrao, he claimed a declaration that his adoption was valid and that he was therefore entitled to retain to himself the possession of property of which he was let into possession by the adoptive mother, as against Shamrao, the illegitimate son of Nilkantrao, the surviving undivided brother of Bhaskarrao, who ultimately obtained a decree therefor against his adoptive mother. In virtue of the same status as the adopted son and not independently of it, he also claimed to be the reversionary heir of the estate of Nilkantrao after the death of his widow Bhagirathibai, on the

(25) Appeal No. 36 of 1915.

(26) [1890] 12 All. 129=1890 A.W.N. 39 (F.B.)

(27) [1919] 21 Bom. L. R. 980=53 I. C. 627.

(28) [1900] 27 Cal. 508=4 C. W. N. 333 (F.B.).

(29) [1909] 13 C. W. N. 815=1 I. C. 670.

(30) First Appeal No. 78 of 1914.

(31) C. R. No. 55-B of 1915, dated 30th September 1915.

(32) First Appeal No. 66 of 1916.

ground that the brothers had separated in estate during their own lifetime. He lost his suit in the Courts below on the ground that his adoption having been made during the pendency of the illegitimate son's suit for possession against his adoptive mother, he was bound by the decree ultimately passed therein. He was consequently held bound to pay a fee *ad valorem* the property title to which was affected by the declaration sought, as per decision of the third Judge Batten, A. J. C., to whom the question was referred owing to a difference of opinion having arisen between Drake Brockman, J. C. and Prideaux, Ag. J. C., on the point of fee leviable. The important words are underlined (*italicized*) by me.

(4) *Zibal v. Narayan* (33), decided by Kotwal, A. J. C. was a case in which one co-widow of the 1st male holder in possession of a part of the inheritance sought a declaration against the alleged adopted son and her co-widow, that the adoption never in fact took place or was invalid. The first Court ordered the levy of *ad valorem* fee. In dismissing the application for revision my learned brother, Kotwal, A. J. C., made the following observations :

"In the present case the property the title to which will be affected by the suit for the declaration sought by the plaintiff will be the whole property belonging to the deceased Jairam the alleged adoptive father of defendant 1, and Court-fees must be paid on the value of that property. I am unable to agree with the contention . . . that Court-fees should be paid only on the value of the property which is in the possession and enjoyment of the plaintiff, and "the title to which alone will be affected" so far as she was concerned. The notification speaks of property generally and not merely property in which the plaintiff is interested."

(5) *Chinki v. Narayan* (34) was the case of a daughter suing as a reversioner for a declaration that the defendant's adoption never in fact took place. Kotwal, A. J. C., held in that case that such a suit was of the kind referred to in the notification on the ground that an adoption which never took place cannot but be invalid. An *ad valorem* fee was, therefore, held payable by the plaintiff on her plaint.

(6) *Mulji Bai v. Raja Mankura Bai* (35) decided by Hallifax, A. J. C., arose out of a suit in which plaintiff prayed that he is the next and immediate reversioner of

the said Madan Singh and will be entitled to inherit all the property of the said Madan Singh after the death of defendant 1 and that defendant 2 has *no right* to Madan Singh's property. In this case a fee *ad valorem* the whole of the property inherited by Mulji Bai from her husband was demanded in the first Court and that demand was confirmed in revision. I lay emphasis on the words "no right to . . . property" which I have underlined (*italicized*).

Against this series of decisions there is the decision of Drake-Brockman, J. C., in *Daji v. Radhabai* (36), in which the appellant was the alleged adopted son against whom the daughters of the last male holder had brought a suit to get it declared that his adoption never in fact took place. The memorandum of appeal was stamped with a fixed fee of Rs. 10 only. The office took objection to it in view of the proviso. Drake-Brockman, J. C., in an order dated 23rd June 1915 distinctly observed that the notification on which the objection was based did not apply to suits where Court-fees Act prescribed a fixed fee, and provisionally treated the memorandum of appeal as duly stamped. But in view of an interpretation later on put upon the notification by the Bench in *Bapu Anna v. Mt. Sitabai* (37), a fee of Rs. 30 was considered to be the proper fee leviable in such cases, and the deficiency was realized as per order dated 27th January 1916. The learned Judicial Commissioner declined to apply to the case the proviso appended to Cl. (3) of the notification as he thought that :

"the immediate title to the deceased Raghoba's property is not, however, affected so far as the plaintiff's right to possession was concerned."

I lay emphasis on the words "immediate title" which I have underlined (*italicized*). The above will show how the practice of this Court has grown and how the notification has been treated in the past as requiring *ad valorem* fee in every suit by or against the adopted son, irrespective of the question whether the plaintiff is the adopted son or the widow or co-widow or a mere reversionary heir or even a beneficiary who may stand to gain some property under the terms of the will, in case there were no adoption.

(36) F. A. No. 36 of 1915.

(37) C. R. No. 56-B of 1915, dated 30th September 1915.

(32) C. R. No. 161-B of 1917.

(34) First Appeal No. 16-B of 1919.

(35) C. R. No. 154 of 1926.

With due deference to the view taken the above cases 1, 2, 4 and 5, I venture to say that in all suits where the plaintiffs, is either a presumptive reversioner or a person other than a party to the adoption an ad valorem fee is not leviable, due regard being had to the fact (i) that the plaintiff not being a party to the adoption is under no legal duty to sue to obtain the declaration which he or she seeks to get and which is operative only in future, and (ii) that the present tense in the expression "affects a title to property" restricts the proviso to suits where the immediate title to property is affected. In all such cases the real dispute is merely as regards the adopted boy's status or legal character and not as regards the property which may or may not perhaps be vested in him for the time being.

As pointed in *Daji v. Radhabai* (36) the proviso could not be applicable to such a case because "the immediate title to the deceased X's property is not" as rightly observed "affected so far as the plaintiff's right to possession was concerned," for the simple reason that plaintiff who has a mere spes successionis has no right to present possession of the property during the widow's lifetime as explained above. The other case, viz., No. 3 being of a party to the adoption and No. 6 such as expressly asked for a declaration *affecting title to property* were both distinguishable from the rest and the present case. The scope of the proviso has, I respectfully venture to say, been extended beyond its proper limits so as to include in it cases which ordinarily could not come within its strict wording or would come in only by substituting the words "affects or will affect a title to property" in place of the words "affects a title to property in it." I, therefore, feel myself bound to express my respectful dissent from everyone of the decisions wherein the proviso has been made applicable even to a presumptive reversioner's suit to obtain a mere declaration that an alleged adoption was invalid or never in fact took place. If it be permissible to me to explain its cause I may say that this was due to inadvertance, or at any rate, to the peculiar significance of the use of the word "affects" denoting only the present and not the future operation of the declaration not having

been pointedly pressed upon the attention of the Judges concerned as a ground for relief from the additional burden placed on the litigant before them. The Additional District Judge was clearly wrong in applying the analogy of *Ganpatrao v. Laxmibai* (32) a suit by an adopted son to get round a decree passed against his adoptive mother, i. e., virtually against himself—to the allegations in this plaint—and in construing the relief claimed as coming under the proviso. He was wrong in assuming that Ganpatrao was a reversioner, because he had not that capacity apart from his status as an adopted son. To my mind the observations made in *Ganpat Rao v. Laxmibai* (32), by Batten, A. J. C., who was considering the applicability of the proviso to Cl. (3) of the notification, to the particular case before him namely the appeal of a so-called adopted son by which he was trying to get rid of a decree passed against his adoptive mother in a suit filed by Shamrao, and not to the case of a reversioner suing for a declaration pure and simple, do not touch the point of distinction definitely made out in the present case. To rely upon it as an authority for holding that ad valorem fee on Rs. 15,000 was payable by the plaintiff who sued as a mere reversioner to obtain a declaration as regards defendant 1's status only and who expressly omitted from his plaint all reference to the relief of title to property, was to construe the law in an unwarranted manner.

The learned Additional District Judge's following remarks are incorrect and I must say a few words about them before I close my opinion:

"In the present case the plaintiff claims to be the reversioner after the widow and her daughter and if the adoption is declared invalid the adopted son will be divested of his property which will vest in the widow and give the plaintiff a chance of succession. The declaration therefore affects title to property."

They disclose some confusion of thought based on an improper extension of the construction of the proviso adopted in *Mainabai v. Vithal* (30); *Bapu Anna v. Mt. Sitabai* (31); *Zibai v. Narayan* (33) and *Chinki v. Narayan* (34). As a matter of fact the intervention of defendant 3 who is the daughter of the deceased, and of her

two sons including the one alleged to have been adopted who are presumably "full heirs" will indefinitely postpone the plaintiff's chances of succession to the estate and it is just possible that he may never have any, if the daughter and her sons survive the widow and also the plaintiff. Moreover the adopted son is not going to be divested of the property during the lifetime of the widow defendant 2, or of his natural mother defendant 3; so it is impossible that the estate may vest in the widow as the learned Additional District Judge thinks. If the adoption be invalid the property never vested in the boy; if it be valid it is not going to be divested at all, so as to re-vest in the widow much less before her death.

If any divesting of the alleged adopted son's title to property is at all to follow the declaration, it will date only since the widow's death and not earlier; thus whatever rights the adopted son may have acquired by virtue of the adoption to the present ownership and enjoyment of property must during the lifetime of the adoptive widow, ordinarily remain unaffected by the declaration, if any, which the Court may grant in the suit, for protecting the plaintiff's reversionary interest which may come into being on the widow's death. It may not necessarily be vested in the present plaintiff, unless he survives the widow defendant 2, the daughter defendant 3 and her another son who is in existence at present, but may vest in such ultimate actual reversioner as may happen to live when the succession opens out. In short there is or can be no divesting or vesting of any title of the alleged adopted son to the property at least so long as the adoptive widow is alive. All I need add is that every case must be decided on its own allegations and circumstances peculiarly its own.

My opinion then is that the value of the subject matter of the present suit for purposes of the court-fees and jurisdiction was Rs. 400 and not Rs. 15,000 the value of the property. Since I hold that the jurisdictional value of the subject matter of this suit as determined by the notification was Rs. 400 the order returning the plaint for presentation to proper Court was wrong and it is liable to be reversed. For the above reasons

I recommend that the revision be allowed with a direction that the plaintiff be ordered to make good the deficiency of Rs. 10 within a time to be fixed if he wishes to go on with the suit.

Kotval, A. J. C.—The rule contained in notification No. 1641 dated 28th September 1911, para. 1, given in the Judicial Commissioner's Civil Circular II-8 has the force of law and the only question is whether the present suit which is admittedly one for a declaration that an adoption is invalid affects title to property. In my judgment it does affect the title of defendant 1 to the property, since if the declaration is granted his title as adopted son to the property he now holds will go. If the word "affects" is to be taken strictly as referring to the present time only, it would lead to an inference of ignorance of law on the part of the legislators, for no suit for a declaration, at the time that the question of court-fee is to be determined, that is, when it is instituted, affects a title to property. I am in respectful agreement with the views of the Benches referred to in my learned brother's opinion. I do not think they have read into the proviso to Cl. 3 to the rule anything that is not there or failed to grasp the significance of any words therein, nor do I see any special inequity or oppression in requiring a reversioner to pay *ad valorem* Court-fee on a claim like the present the effect of which, if allowed, will be to take away the defendant's title. I am of opinion that the order of the lower Courts is correct and the revision application should be dismissed.

Findlay, J. C.—I have had the advantage of perusing the opinions of my brothers, Kotval and Kinkhede, A. J. C's. on this matter and have heard also counsel for the parties. I do not find it necessary to go into the matter at length in view of the wealth of material already available on the point, much of which has been discussed in the opinion recorded by Kinkhede, A. J. C.

In argument before me the learned counsel for the applicant has taken up the position that the rule contained in notification 1641 was *ultra vires* and illegal, inasmuch as it clashed with the definite provision contained in Art. 17 (v), Sch. 2 to the Court-fees Act of 1870. On this point, however, I find myself in

full agreement with the remarks contained in the judgment of Batten, A. J. C., dated 9th June 1916, in *Ganpatrao Laxmilai* (32), and I am of opinion that the terms of S. 9, Suits Valuation Act 1878, permit of the re-valuation of the suit of the class contained in Art. 17 (v), Sch. 2, Court-fees Act. There can be no question that the valuation of Rs. 10 fixed under the article quoted of the Court-fees Act is an arbitrary one, and it clearly seems to me *intra vires* for this Court, with the previous sanction of the Local Government to have laid down the provision in question in the notification quoted.

The said notification, therefore having the force of law, the only question is whether, in view of the nature of the relief claimed by the plaintiff applicant, the suit can be said to come within the purview of the phrase:

"if a suit for a declaration that an adoption is valid or invalid affects a title to property."

It is possible, of course, to look at the matter from one angle and to say that only a question of status is involved but I am wholly unable to understand on what grounds it can be held that in the present case a title to property is not affected. With all deference to my brother Kinkhede, A. J. C., I think the learned Judge has relied upon the present tense only being employed in the word 'affects.' If that construction were to be pushed to its logical conclusion, then in no conceivable case could the title to the property be said to be affected at the time when the question of court-fees has to be determined. What we have, therefore, to have regard to, is what the result will be at the time the plaintiff-applicant gets his decree, assuming the suit to be decided in his favour. Then undoubtedly, at and from the moment, the title of the defendant 1 to the property will disappear. From this point of view therefore I find myself in full agreement with the opinion of Kotval, A. J. C. and with the many previous decisions of Judges of this Court to the same effect. I therefore, am of opinion that the order of the lower appellate Court is correct and return the reference accordingly.

Kinkhede, A. J. C.—The facts of the case which gave rise to the revision are set forth in the opinion recorded by me. The sole question to be considered has also been stated in it. As there was difference

of opinion between Kotval, A. J. C., and myself the point of law was referred to a third Judge as required by law. The Judicial Commissioner was pleased to act as the third Judge. He heard the arguments and delivered his opinion. The Judicial Commissioner and Kotval, A. J. C. being of the same opinion, the decision of this revision application, must, on the analogy of an appeal, be according to the opinion of the majority of the Judges who have heard including those who first heard it, as laid down in S. 98 (2) proviso of the Civil P. C. In accordance with the opinion of the majority the order of the lower Court demanding *ad valorem* court-fee is upheld and the revision application dismissed with costs. Pleader's fees Rs. 100.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 86

JACKSON, A. J. C.

Nagraj—Plaintiff—Appellant.

v.

Ganpat and others—Respondents.

First Appeal No. 23-B of 1929, Decided on 29th October 1929.

Hindu Law—Mortgage by father—"Legal necessity" — "Benefit to the estate" explained.

Any act for which the character of "legal necessity" or of "benefit to the estate" can be claimed must be an act of a defensive character: *A. I. R. 1925 All. 333*; *A. I. R. 1928 All. 403*; *A. I. R. 1929 All. 139* and *A. I. R. 1929 Bom. 251, Rel. on.*; *A. I. R. 1928 All. 454* and *A. I. R. 1922 Bom. 122, Expl.* [P 88 C 1].

N. G. Bose—for Appellant.

M. B. Niyogi and R. S. Gokhale—for Respondent 3.

Judgment.—This appeal arises from a suit to enforce a mortgage deed executed on 16th December 1924 by Ganpat and Soma, defendants-respondents 1 and 2, who are the fathers of defendants 3 to 6. Ganpat and Soma and their father, Januji, separated and divided between them the joint family property, Survey No. 130 of mouza Talegaon Dashashastra. Ganpat took S. No. 130/1, Soma S. No. 130/2 and Januji S. No. 130/3. After the death of Januji, Ganpat and Soma bought S. No. 130/3 from their stepmother for Rs. 3,500; and in order to pay the consideration, they mortgaged all three sub-numbers of S. No. 130 for Rs. 3,600 to the plaintiff, the balance of Rs. 100 being required for expenses in connexion with the sale. In the suit,

out of which this appeal arises, brought to recover the mortgage debt, it was pleaded successfully by the sons of Ganpat and Soma that the mortgage was not for "legal necessity" or for "benefit of the estate" and a decree has been passed which exempts from liability the shares of defendants 3 to 6 in S. Nos. 130/1 and 130/2. The plaintiff has come in appeal to have it declared that the mortgage was for benefit of the estate and that the whole of the property mortgaged is liable for the debt.

It is admitted that there was no actual necessity, but it is pleaded that the mortgage was in fact for a purpose that benefitted the family. It has been held in a number of cases that any act for which the character of 'legal necessity' or of "benefit to the estate" can be claimed must be an act of a defensive nature. This view has been taken in *Shankar Sahai v. Bechu Ram* (1), *Inspector Singh v. Kharak Singh* (2), *Kishen Sahai v. Raghunath Singh* (3) and *Totaram Ragho v. Zaga Ekoba* (4). In *Jagat Narain v. Mathura Das* (5), however, it has been held that transactions justifiable on the principle of "benefit to the estate" are not limited to those transactions which are of a defensive nature.

The last mentioned decision is that of a Full Bench of the Allahabad High Court and it has traced the history of the question before me and come to the conclusion that the view taken that an act for the benefit of the estate must be one of a defensive nature is not warranted by the two Privy Council decisions on which it is based. The first of these is the well known case of *Hanooman Pershad Panday v. Mt. Babooee Munraj Koonweree* (6), in which their Lordships of the Privy Council limit the power of a manager to charge the estate to cases in which it is exercised in case of need or for benefit of the estate: the learned Judges of the Full Bench lay emphasis on the fact that "benefit of the estate" is alternative to "necessity" and cannot find in the pronouncement of the Privy Council

any justification for the suggestion that a transaction, for the "benefit of the estate" must necessarily be of a "defensive nature." The other case is *Palaniappa Chetty v. Devasikamony Pandara Sannadhi* (7), in which their Lordships of the Privy Council declared it impossible to give a precise definition of the term "benefit to the estate" that would be applicable to all cases. They then go on to say:

"The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits."

The conclusions drawn by the Full Bench of the Allahabad High Court are that the instances of benefit given in *Palaniappa Chetty v. Devasikamony Pandara Sannadhi* (7) have wrongly led to the view being taken, first, in *Bhagwan Das Naik v. Mahadeo Prasad Pal* (8) and then in subsequent cases, that all acts to be regarded as for the benefit of the estate must be acts of a defensive nature and that their Lordships of the Privy Council do not intend to limit the meaning of the term "benefit to the estate" by the fact that the instances that they gave were all of a defensive nature. It was held that the wording used in *Hanooman Pershad Panday v. Babooee Munraj Koonweree* (6) permitted a wider meaning being given to that term. It is to be noted in this connexion that rulings which take a different view lay down the rule, that the act must be of a defensive nature, merely as the ordinary rule and thus recognize that there may be exceptional cases.

It seems doubtful, however, whether there are any real exceptions to the rule. If there are, then the Full Bench decision in *Jagat Narain v. Mathura Das* (5) is one of them. That case, however, has been considered by a Bench of the Allahabad High Court in *Kishen Sahai v. Raghunath Singh* (3), and it has been there pointed out that the fact of that case actually bring themselves within the purview of the decision in the case of *Shankar Sahai v. Bechu Ram* (1). In *Jagat Narain v. Mathura Das* (5) the transaction challenged was a sale of family property situated far away from the place of the family's residence which

(7) A. I. R. 1917 P. C. 33=40 Mad. 70J=44 I. A. 147 (P.C.).

(8) A. I. R. 1923 All. 293=45 All. 390.

(1) A. I. R. 1925 All. 333=47 All. 381.

(2) A. I. R. 1928 All. 403=50 All. 776.

(3) A. I. R. 1929 All. 129=51 All. 473.

(4) A. I. R. 1929 Bom. 251=53 Bom. 419.

(5) A. I. R. 1928 All. 454=50 All. 969 (F.B.).

(6) [1854-57] 6 M. L. A. 393=18 W. R. 81=2 Suther 29=1 Sar. 552 (P.C.).

it was found inconvenient to manage, the intention of the vendors being to purchase other property nearer to their place of residence which would be easier of management. It was in fact, as was pointed out in *Kishen Sahai v. Raghunath Singh* (3), in its inception an act that it was designed to protect or defend the family from an inevitable recurring loss. So again in another apparent exception, *Nagindas Maneklal v. Mahomed Yusuf* (9), the transaction impugned was of a defensive nature; it was the sale of a house that could not be used for the family residence and could fetch no rent. It seems to me clear that the exceptions to the rule laid down in *Shankar Sahai v. Bechu Ram* (1) are more apparent than real and that that rule holds good, namely, that an act for which the character of "benefit to the estate" can be claimed must be of a defensive act.

I can detect nothing in the transaction that I am considering that can give it a defensive nature. It has been urged that the mortgagors had to protect themselves against the chance of a stranger coming into possession of S. No. 130/3 and that they needed the well in that sub-number to assist them in their own cultivation. It has also been urged that, as it has been found by the lower Court that the well in field S. No. 130/3 was in fact bringing in an income of Rs. 400, it was for the benefit of the family. In view of what I have already said this last contention has no force. On the evidence it is impossible to hold that the well had the importance attributed to it on behalf of the mortgagee; and it has not been made clear that there was any danger of a stranger coming in to occupy S. No. 130/3. In the circumstances, it is impossible to hold that Ganpat and Soma, by mortgaging their unincumbered fields, Nos. 130/1 and 130/2, in order to acquire S. No. 130/3 also incumbered, did an act for the benefit to the estate.

It has been argued that the defendants ought at least to be ordered to refund the income from S. No. 130/3, which is found by the lower Court to be Rs. 400 per annum, which, I may remark, is appreciably less than the interest accruing each year on the mortgage debt. I do not know on what principle the demand is made and I

cannot grant it. The mortgagee must be content with the decree granted to him against S. No. 130/3 and the shares of his mortgagors in S. No. 130/1 and S. No. 130/2. I dismiss the appeal with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 88

SUBHEDAR, A. J. C.

Mt. Rahamatbi—Applicant.

v.

Badridas—Non-Applicant.

Civil Revn. No. 254-B of 1929, Decided on 16th September 1929, against order of 1st Addl. Dist. Judge, Akola, D/- 15th August 1929, in Misc. A. No. 28 of 1929.

Civil P. C., S. 115—Scope.

A mistake of law even as regards limitation, does not entitle the aggrieved party to the remedy of revision. A revision does not lie on the ground that burden of proving that an application was within time was placed on the wrong party : 4 N. L. R. 184, *Appl.*

[P 88 C 2]

M. R. Bobde—for Applicant.

Order.—This is an application for revision of an order passed in appeal by the First Additional District Judge, Akola, upholding the order of the trial Court rejecting the application of the applicant to have an ex parte decree set aside. Both the Courts below have concurrently held that the applicant failed to prove that she did not have knowledge of the passing of the decree prior to 15 or 20 days of the presentation by her of the application for setting aside the ex parte decree.

It is urged here that the Courts below wrongly threw the burden upon the applicant of establishing that she had no knowledge of the passing of the decree within 20 days as alleged by her and therefore erred in law in holding that the applicant's application was time barred under Art. 164. Lim. Act. But, as held in *Duri v. Mohan Lal* (1), a mistake of law, even as regards limitation, does not entitle the aggrieved party to the remedy of revision, under S. 115, Civil P. C. I, therefore, dismiss this application as untenable under S. 115, Civil P. C.

P.N./R.K.

Revision dismissed.

(9) A. I. R. 1922 Bom. 122=46 Bom. 312.

(1) [1908] 4 N. L. R. 184.

A. I. R. 1930 Nagpur 89

JACKSON, A. J. C.

Jaduram—Plaintiff—Appellant.

v.

Bhawanisao and *another* — Respondents.

Second Appeal No. 65 of 1929, Decided on 21st November 1929, from decree Addl. Dist. Judge, Bilaspur, D/- 22nd October 1928.

(a) C. P. Land Revenue Act (2 of 1917), S. 203 (2)—Transfers of all kinds of houses in *abadi* without *malguzar's* permission are forbidden.

Wajibularz forbids all kinds of transfers, whether by sale or otherwise of houses in the *abadi* without *malguzar's* consent. Thus a mortgage of such a house without *malguzar's* permission is void against him and can only be enforced as against the superstructure.

[P 83 C 2]

(b) Mortgage—Suit to enforce mortgage of house in *abadi*—Persons joined as defendants being subsequent mortgagee—Plea that they were *malguzars* and owners and that mortgagor was incompetent to mortgage house—Court can go into it—Civil P. C., O. 34 R. 1.

In a suit to enforce a mortgage of a house in the *abadi*, persons were joined as defendants as being subsequent mortgagees of the house. They alleged that they were proprietors of the *patti* in which the house was situated and contended that the owner mortgagor was incompetent to mortgage the house without their consent.

Held : that the Court could go into the question of paramount title claimed by them as *malguzars* : 6 N. L. R. 156 and 13 N. L. R. 69 ; 44 Bom. 693, *Expl.* ; 40 All. 584, *not Foll.*

[P 90 C 1]

D. T. Mangalmurti—for Appellant.

D. N. Choudhry and *G. R. Deo*—for Respondents.

Judgment.—This appeal arises from a suit to enforce a mortgage of a house situated in the village of Mungeli. The respondents were joined as defendants as being subsequent mortgagees of the house. They are also proprietors of the *patti* in which the house is situated and they raise the pleas that the owner of the house was incompetent to mortgage it without their consent, that the mortgage is consequently void as against them and that it cannot be enforced. The trial Court refused to go into the question of the respondents' right under the paramount title claimed by them, but the lower appellate Court has decided the question and has held that the respondents were proprietors of the *patti*, in which the house is situated at the time of the mortgage in plaintiff's favour, that the mortgage is void as against

them and that it can only be enforced as against the superstructure : the decree of the trial Court has been modified accordingly.

It is urged in appeal that the village had not been divided into *pattis* at the time of the mortgage in plaintiff's favour and that the lower appellate Court's finding on this point is indefinite. That does not appear to me to be so : the finding of the lower appellate Court is that at the time of the mortgage the present appellants, that is, the respondents in this Court, were the owners of the *patti* in which the house is situated and that the mortgage having been made without their consent is not binding on them so far as the site of the house is concerned. That clearly means that the village had been divided into *pattis* at the time of the mortgage. There is evidence to support that finding and it is binding upon me.

It is urged that the *wajibularz* only forbids transfers of houses in the *abadi* by means of sale without the *malguzar's* permission : but I consider that the lower appellate Court is right in holding that all transfers without the *malguzar's* permission are forbidden.

It is next urged that this term of the *wajibularz* is not in practice enforced. The learned advocate, who appeared for the plaintiff-appellant, did not go so far as to argue that there was an established custom by which houses in the *abadi* could be mortgaged without the *malguzar's* consent and, there being no custom, the fact that there have been mortgages without the *malguzar's* consent does not make the mortgage in suit a valid one as against the *malguzar*. The fact that the respondents had themselves taken a mortgage of the house proves nothing : they were the *malguzars* and no consent was, therefore, necessary.

Another point taken on behalf of the appellant is that the lower appellate Court was not entitled to go into the rights of the respondents under the paramount title that they claimed as *malguzars*. In this connexion reference has been made to *Hanumansingh v. Manulal* (1) : but in that decision it is not laid down that rights claimed under a paramount title cannot be gone into but merely that the party claiming that title is not bound to set it up by

(1) [1910] 6 N. L. R. 156=3 I. C. 1121.

way of defence: and similarly in *Raghunath v. Seolal* (2), it is not laid down that a paramount title cannot be pleaded. That decision merely says that a party, who claims to be dismissed from the suit on the ground of paramount title, cannot afterwards claim to redeem the mortgage in a subsequent suit. *Gobardhan v. Manna Lal* (3) and *Satagauda Appanna v. Satapa* (4), have also been relied on. In the latter case the defendants who set up a paramount title, were held not to be proper parties to the suit; and, with due respect to the decision in the former case, I am unable to see why the respondents in the present case, who are proper parties to the suit as subsequent mortgagees and were not denying the mortgagor's title to the house but merely his power to make an effective mortgage as against them, should not have all questions arising between them and the appellant settled in this suit. I see no reason for dissenting from the lower appellate Court's decision that the mortgage can be enforced only against the superstructure on the site. I dismiss the appeal with costs.

P.N./R.K. *Appeal dismissed.*

(2) [1917] 13 N. L. R. 69=39 I. C. 849.

(3) [1918] 40 All. 584=46 I. C. 559=16 A.L.J. 639

(4) [1920] 44 Bom. 693=57 I. C. 577=22 Bom. L. R. 815.

A. I. R. 1930 Nagpur 90

MUNJE, A. J. C.

Mohanlal—Applicant.

v.

Abdul Rahim—Non-Applicant.

Civil Revn. No. 466 of 1929, Decided on 24th October 1929, from order of Dist. Judge, Bhandara, D/- 6th September 1929, in Misc. Appeal No. 3 of 1929.

Civil P. C., S. 20 (1) — Contract to sell *tendu* leaves at B—Price expressly agreed to be paid at C—Suit for recovery of price of leaves supplied at B can be entertained even by Court at B.

A suit was brought in the Court at B for the recovery of price of *tendu* leaves supplied by P to D at B. D made the contract of sale at B but expressly agreed that P shall receive the price of leaves at C. It was contended that the only Court having jurisdiction was the Court at C because the suit was for the performance of that agreement whereby the price was to be paid and that part was to be performed at C.

Held; that Courts at both B and C could entertain the suit: A. I. R. 1925 P. C., 290,

Rel. on; 31 Mad. 223 and 16 C. L. J. 279, Dist. [P 91 C 1]

D. N. Choudhry—for Applicant.

Order.—This is an application in revision against the appellate decision of the District Judge, Bhandara, which set aside the order of the Subordinate Judge, Balaghat, returning the plaint for presentation to the proper Court (the Court at Bhandara) and directing that Court to admit the plaint. The suit was for recovery of price of *tendu* leaves supplied by the plaintiff to the defendant at Arjuntola in the Balaghat District. The defendants made the contract of sale at Arjuntola but expressly agreed that the plaintiff shall receive the price of the leaves at the defendant's shop at Tumsar in the Bhandara District. The Court of the Subordinate Judge at Balaghat returned the plaint as, in the Judges' opinion, the suit could only lie in the Court at Bhandara. In appeal, the learned District Judge set aside the order and held that both the Courts, i. e., at Balaghat and at Bhandara, had jurisdiction to try the suit and that, as the plaintiff had made his election the Court at Balaghat had no reason to return the plaint.

In revision, the only question before me is whether the Court at Balaghat had no jurisdiction to entertain the plaint. The learned pleader for the applicants argues that the only Court having jurisdiction was the Court at Bhandara because the suit was for the performance of that part of the agreement whereby the price was to be paid and that part was to be performed at Tumsar in the Bhandara District. He has also referred me to two cases in support of his argument, viz., *Raman Chettiar v. Gopalachari* (1) and *Sailendra Nath v. Ram Sundar* (2).

Both the authorities cited are in my opinion not to the point as in both the cases the contract was entered into and money thereunder was payable at one and the same place, i. e., within the jurisdiction of the Court where the suit was brought. In the case before me the contract was entered into and also partly performed, in the Balaghat District and the remaining portion thereof was to be performed in the Bhandara District and thus the cause of action

(1) [1908] 31 Mad. 223=4 M. L. T. 97.

(2) [1912] 16 C. L. J. 279=15 I. C. 885.

arose partly within the jurisdiction of both the Courts. S. 20 (c), Civil P. C., formerly ran as follows ;

"... every suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action arose."

As there was a difference of opinion on the point whether the expression "cause of action" also included a part of the cause of action, the legislature in 1882 added the following explanation to the section viz :

"Explanation 3.—In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places namely : (i) The place where the contract was made..."

It is thus clear that under the old Code, as amended in 1888, this suit could have been brought in the Court at Balaghat because it was within the local limits of the jurisdiction of that Court that the "contract was made." In the present Code this explanation has been omitted and instead the words "wholly or in part" have been added in Cl. (c). It would thus appear that the Court, within the local limits of whose jurisdiction the contract was made, or a part of the cause of action arose, has jurisdiction to try the suit. If any authority on this point were needed, I might refer to the recent cases of *Bansilal Abirchand v. Ghulam Mahbur Khan* (3) at 94 of 53 Cal. where their Lordships observe as follows :

"It follows that in their Lordships' judgment no part of the obligations either of the principal debtor or of the surety was to be discharged at Secunderabad. And no obligation was assumed there. No part of the plaintiff's cause of action accordingly arose within the local limits of the Court of the trial Judge."

It could not therefore be said, as was argued by the learned pleader for the applicant that the only tribunal where the suit could be brought was the tribunal within the local limits of whose jurisdiction any payment under the contract was to be made. For these reasons the application is dismissed without notice to the other side.

P.N./R.K. *Revision dismissed.*

A. I. R. 1930 Nagpur 91

MACNAIR, OFFG. J. C., AND

MUNJE, A. J. C.

Chunnilal—Applicant.

v.

Gulabchand and another—Non-Applicants.

Misc. Petn. No. 37 of 1929, Decided on 4th November 1929, from decision in Second Appeal No. 15 of 1928, D/- 15th March 1929.

Civil P. C., S. 109 (c) — Leave to appeal under S. 109 (c) cannot be granted merely on ground of existence of important question of law—Subject matter must not be reducible to money value.

The mere existence of a substantial and important question of law does not justify certification under S. 109 (c). Leave to appeal under that section can be granted when the subject matter in dispute is also such as cannot be reduced into actual terms of money: *A.I.R. 1921 P.C. 25, Rel. on.; 23 All. 415 (I.C.), Ref.* [P 92 C 1]

M. B. Niyogi—for Applicant.

N. G. Bose—for Non-Applicants.

Order.—This is an application for leave to appeal to His Majesty in Council against the judgment and decree passed by Staples, A. J. C., in the case which will be found reported in *Gulabchand v. Chunnilal* (1). The subject matter of the suit and the appeal is admittedly very much less than Rs. 10,000 in value, and no property of any such value is involved in the decree. Thus, unless the case falls under Cl. (c), S. 109, Civil P. C., the application must be dismissed.

It is contended on behalf of the applicant that the case involves a point of law of general importance and hence is fit to be certified under S. 109 (c), Civil P. C., but it is not material whether the case involves a point of law of general importance. The principle to be observed in granting certificates for leave to appeal to the Privy Council has been clearly stated by their Lordships of the Privy Council in *Banarasi Prasad v. Kashi Krishna Narain* (2), *Radha Krishna Das v. Rai Krishna Chand* (3) and *Radhakrishna Ayyar v. Swaminatha Ayyar* (4). In the last of these cases their Lordships, after referring to the previous cases, state:

(1) A. I. R. 1929 Nag. 156=25 N.L.R. 85.

(2) [1901] 23 All. 227=28 I. A. 11=8 Sar. 447 (P.C.).

(3) [1901] 23 All. 415=28 I. A. 182 (P.C.).

(4) A. I. R. 1921 P. C. 25=44 Mad. 203=18 I. A. 31 (P.C.).

(3) A. I. R. 1925 P. C. 290=53 Cal. 88=53 I. A. 58 (P. C.).

"It is not necessary to examine them again, for the principle which they establish is plain and cannot be questioned. That principle is this: that as an initial condition to appeal to His Majesty in Council, it is essential that the petitioners should satisfy the Court that the subject matter of the suit is Rs. 10,000, and in addition that in certain cases there should be added some substantial question of law. This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money. Sub-S. (c), S. 109, Civil P.C., contemplates that such a state of things exists, and R. 3, O. 45 regulates the procedure."

The cases in which leave to appeal can be granted under the provisions of S. 109 (c), Civil P. C., then, are cases in which the subject matter in dispute cannot be reduced into actual terms of money. It appears from the examples quoted by their Lordships that, when the decree or final order involves, directly or indirectly, some claim or question respecting a right, that right may in some cases be treated as the subject matter in dispute. But it is clear that the existence of a substantial and important question of law does not justify certification under the provisions of S. 109 (c). The decree cannot be said to involve a claim to certain property because it is based on the decision of a question of law which will arise if a suit is instituted to enforce that claim. It follows that the certificate under S. 109 (c), Civil P. C., cannot be granted in this case. The application is dismissed with costs. No fix pleaders' fees at Rs. 50.

P.N./R.K. *Application dismissed.*

A. I. R. 1930 Nagpur 92

SUBHEDAR, A. J. C.

Rao Sardarsingh and others—Defendants—Appellants.

v.

Rao Vishalsingh and others—Plaintiffs—Respondents.

Second Appeal No. 250 of 1928, Decided on 26th August 1929, against decree of Dist. Judge, Jubbulpore, D/23rd January 1928.

(a) Civil P. C., O. 7, R. 7—Court can grant relief though not specifically prayed for in

plaint if facts pleaded and found proved show that plaintiff is entitled to it.

Where a person, alleging that the land though belonging exclusively to him was by mistake recorded as jointly belonging to him and another, brings a suit for amendment of the settlement record so as to have it declared the land as belonging exclusively to him, the Court cannot order the amendment but where the facts pleaded and found proved show him entitled to a declaratory relief, the Court can grant that relief and in doing so it does not make out a new case simply for the reason that such relief was not specifically prayed for: 21 All. 53 (P. C.), Appl.; 35 Cal. 189 (P. C.), Dist. [P 94 C 2]

(b) C. P. Land Revenue Act, S. 66 (1)—Entries by Patwari in khasra and jamabandi do not cast cloud on title of person affected thereby making it necessary for him to bring suit—Cause of action arises when such wrong entries are made by Settlement Officer under S. 66 (1).

The entries made by the Patwaris in the khasras and jamabandis are merely a piece of inclusive evidence as to the real position of the persons and do not carry the same weight as the entries made in the Record-of-Rights by the Settlement Officer. Thus wrong entries made by the Patwari do not cast any cloud on the title of the person affected thereby making it necessary for him to rush into Court with a suit. The cause of action to sue arises when such entries are made in the Record-of-Rights by the Settlement Officer. [P 95 C 1, 2]

M. B. Kinkhede and D. N. Chowdhry—for Appellants.

B. K. Bose, V. Bose and J. Sen and P. N. Rudra—for Respondents.

Judgment.—The facts necessary for the disposal of this second appeal are briefly as under:

Mahal No. 1 of Mouza Hirapur, Tahsil and District Narsinghpur was originally owned by two brothers, Rao Dhiraj-singh and Rao Anantsingh. The former had mortgaged his undivided half to one Kanakmal who foreclosed the mortgage in 1897-98 and soon after got an imperfect partition made. Ex. P-24 is the map prepared at this partition showing the two pattis, that of Kanakmal as No. 1/1 coloured red and the other of Anantsingh as No. 1/2 coloured blue. At this partition there was also a sham-lat patti made which included only a muafi khairati holding.

In 1901 the plaintiffs purchased Kanakmal's patti and it is their case that since the partition the lands in dispute as described in para. 8 of the plaint have been held by their predecessor and themselves exclusively, but that by mistake they were recorded in the sham-lat patti at the recent settlement. The

plaintiffs therefore brought the suit out of which this second appeal arises in the Court of the Additional District Judge, Narsinghpur, for amendment of the settlement record as per original partition, so as to declare the fields in suit as belonging exclusively to themselves.

The defendants who are the grandsons of Rao Anantsingh resisted the claim on various more or less inconsistent grounds. They admitted the partition of 1897-98 but said that it was never acted upon, and asserted that there was an implied agreement by which the parties agreed to have the lands in dispute as shamlat and that they were so recorded in the jamabandis since 1903. They denied that the plaintiffs were in exclusive possession of these lands and contended that the plaintiffs' claim was barred by time.

A fair idea of the pleadings of the parties would be gathered from the following issues on which the parties went to trial :

"1. Whether plaintiffs and defendants respectively own eight annas share as proprietors in Mahal No. 1 of M. Hiranpur ?

2. Whether the predecessors-in-title of the parties to the suit took separate possession of their respective pattis in pursuance of the partition ?

3 (a) Whether in the partition of 1897-1898 the plaintiff's predecessor-in-title got the fields mentioned in para. 8 of the plaint allotted to his patti ?

(b) Whether plaintiffs and their predecessor-in-title have been in separate and exclusive possession of the above fields since the date of partition ?

4. Whether the village Patwari wrongly entered the fields mentioned in paras. 8 and 9 of the plaint in the shamlati patti in the village papers ?

5. Whether the settlement entries recording the fields in dispute in the shamlati patti of the mahal are wrong and liable to be corrected ?

6. What is the value of the land in suit ?

7. Whether the suit is barred for any of the reasons mentioned in para. 19 of the W. S. ?

8. Whether this Court has no jurisdiction to give the relief claimed ?

9. Whether the partition of 1897-1898 was not acted upon by the predecessors-in-title of the parties and whether the defendants and their predecessors have been in exclusive possession of the plots in suit for the last more than 12 years ?

10. Whether in 1960 Samvat there was an implied agreement between Rao Dalipsingh and plaintiff 1 as manager of plaintiffs' family, such as is alleged by the defendants ? Is it binding on the plaintiffs ?

11. What relief, if any, are plaintiffs entitled to ?"

The learned Additional District Judge in an elaborate judgment, after an ex-

haustive review of the evidence on record, decided all the issues in the affirmative except issue 7, latter part of issues 9 and 10 which were decided in the negative. On issue 11 the finding was that the plaintiffs were entitled to a decree for a declaration of their rights to the property in dispute and accordingly a declaratory decree was given in plaintiffs' favour.

On appeal by the defendants the District Judge, Jubbulpore, upheld all the findings of the trial Court and dismissed the appeal. The defendants have, therefore, filed the present second appeal on the following grounds :

"1. That the Courts below having held that the suit framed was not maintainable, should not have gone out of their way to make out a new case for the plaintiffs and granted them a decree for the mere declaration.

2. That the Courts below failed to consider the essential element in a suit for a mere declaration viz., when the right to sue accrued and as in the plaint the right to sue was stated to have accrued on the date of announcement of the settlement which, according to the decision of both the Courts was not the correct basis, the plaint should have been rejected as disclosing no cause of action.

3. That the suit for a mere declaration even if maintainable, was barred by time as the plaintiffs' right to sue, if any, arose or should be deemed to have arisen in 1903-1904 or at any rate more than six years before the suit.

4. That the Courts below did not rightly consider the effect of continuous entries in village papers from 1903-1904 to the date of settlement and the legitimate presumption arising out of the same should have been drawn against the plaintiffs.

5. That it should have been held as the effect of the above entries that the partition of 1897-1898 was never acted upon and the presumption was that the parties remained in joint possession of the shamlat patti including the lands in suit.

6. That it should have been held that the suit for a mere declaration in the circumstances of the case did not lie.

7. That the lower appellate Court was wrong in holding that the suit as brought was under S. 66, Land Revenue Act."

The following additional ground was also allowed to be urged at the hearing of the appeal ;

"1. For that the Courts below wrongly decided that the plaintiffs were in exclusive possession of the fields claimed in the suit without there being any evidence on the record to rebut the presumption arising out of the village records for a continuous period of twenty years."

Elaborate and very learned arguments were addressed on both sides and after a careful consideration of the same I have come to the conclusion that the

concurrent decisions of the two lower Courts are correct and that this appeal must fail. It was rightly conceded by Rai Bahadur Chowdhry for the appellants that the present suit was one which fell within the purview of S. 66 (2), C. P. Land Revenue Act. Under sub S. 1 of the said section the Settlement Officer had recorded the lands in suit in the shamlat patti as jointly belonging to both the parties. The plaintiffs alleged that this record was wrong because it was not in consonance with the rights of the parties in these lands as declared and settled at the previous partition according to which the lands had fallen to the plaintiffs' share and were included in their patti No. 1/1, and that since then they had been in exclusive possession of the plaintiffs. As the settlement entry had the effect of declaring the defendants as joint proprietors of these lands, a cloud on plaintiffs' title was undoubtedly cast by the said entry giving them a substantive cause of action to establish their right to the lands in dispute and they accordingly filed the present suit under S. 66 (2), C. P. Land Revenue Act. Ground 7 of the appeal is, therefore, not tenable.

Grounds 1, 2 and 6 go together. On a careful reading of the plaint and pleadings it is abundantly clear that the plaintiffs' suit was to establish his right to the lands in dispute and to have it declared that the settlement entry was erroneous. Right to institute such a suit is expressly reserved under sub-S. 2, S. 66, C. P. Land Revenue Act, to a person against whom a record is made by the Settlement Officer under sub-S. 1 *ibid.* It is, therefore, difficult to uphold the contention of the appellants that a new case not disclosed in the pleadings of the parties was made out by the lower Courts. All that they did was to disallow the relief of ordering the amendment of the settlement entry which admittedly they could not do.

It is admitted that the settlement records can only be corrected in the manner provided for by S. 46, C. P. Land Revenue Act, and the civil Courts therefore could not grant the relief erroneously asked for by the plaintiffs in para. 19 of their plaint. But simply because the plaintiffs were mistaken in claiming their relief the trial Court was not powerless in granting them any, if

the facts pleaded and found proved showed them entitled to the declaratory relief which was actually awarded. O. 7, R. 7, Civil P. C. clearly lays down that: "it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent, as if it had been asked for."

In *Govind Rao v. Sita Ram Kesho* (1) where the claim made by the plaintiffs, having been founded on an exclusive title, was dismissed by the High Court but the dismissal was accompanied with a declaration of the rights of the parties to the extent of a moiety in the estate in dispute "to prevent further litigation between these parties" their Lordships the Privy Council not only confirmed the said declaration but setting aside the dismissal of the suit actually passed a declaratory decree in favour of the plaintiffs. At p. 69 of the report the weighty reasons assigned by their Lordships for the course taken appear in the following words:

"Their Lordships quite agree with the High Court that, as a rule, relief not founded on the pleadings should not be granted. But in this case, as their Lordships have been at pains to show, the substantial matters which constitute the title of all the parties are touched though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule. As between plaintiff and defendant the case has been thoroughly tried out."

These observations of their Lordships fully apply to the facts of the present case and completely refute the argument of the appellant's learned advocate that the plaintiffs' suit should have been dismissed because the sole relief claimed by them was refused and that the lower Courts had no power to grant the declaratory relief which was never specifically claimed by the plaintiffs. The plaint in the present suit clearly set out all the salient facts necessary to disclose the plaintiffs' cause of action and the subsequent elaborate pleadings recorded in the case distinctly disclosed the title of both the parties and all matters in controversy formed the basis of adequate issues on which the parties went to trial and led their respective evidence. It is therefore incorrect to say that a new case has been made out for the plaintiffs by the trial Court, simply because it

(1) [1897] 21 All. 53=25 I. A. 195=7 Sar. 370 (P.C.).

gave them a relief not specifically prayed for by them.

The principle of the decision in the case of *Walihan v. Jogeshwar Narayan* (2) cited for the appellants has no application to the facts of the present case. It was a suit by a reversioner for possession of property on the ground that the lady who was in possession thereof was dead. It having been found that the lady was alive even a declaration of plaintiffs' title to the property after the widow's death which was granted by the Courts in India was set aside by the Privy Council and the suit dismissed.

It is not denied that on its findings on the several issues the lower Court could have granted the relief of amending the settlement entries if it only had the jurisdiction to do so. If that be the case it is indeed difficult to understand why the Court could not grant the declaratory relief which naturally flows out of its findings on the several issues. I, therefore, hold that the declaratory decree was rightly passed in plaintiffs' favour in the present case without any formal amendment of the relief clause in the plaint. In these circumstances no order is necessary to be passed upon the plaintiffs-respondents' application presented to this Court for formal amendment of the plaint.

On ground 3 of appeal it was urged that the present suit, taken as one for a mere declaration, was barred by time because the cause of action must be deemed to have arisen to the plaintiffs when the first entry in the village papers was made by the Patwari in 1903-1904 recording the lands in dispute as shamlat. The reply of the respondents to this argument is very simple and cogent. It is rightly contended on their behalf that the Patwari's entries did not at all cast any cloud on their title and they had therefore no necessity to rush into Court with a suit of the present type. As already stated by me in para. 8 of this judgment the cause of action accrued to the plaintiffs as alleged by them after the Settlement Officer made the record in 1925 under sub-S. 1, S. 66, C. P. Land Revenue Act, and the present suit which was brought by the plaintiffs under the provisions of sub-S. 2 of the same section was amply within limitation. It

is not denied that to a suit of this nature Art. 120, Sch. 1, Lim. Act, applies and therefore the present suit was rightly held to have been filed within limitation.

The entries made by the Patwaris in the khasras and jamabandis are merely a piece inclusive evidence as to the real position of the parties and do not carry the same weight as the entries made in the Record-of-Rights by the Settlement Officer under the provisions of the Land Revenue Act during the course of the settlement operations, and it is therefore obvious that the former entries could not have been so prejudicial to the right, title and interest of the plaintiffs in the lands in dispute as to have furnished them with a cause of action to bring a civil suit even for a declaration of their rights. On the other hand the entries made in the Record-of-Rights under S. 66 (1), Land Revenue Act, which had the effect of declaring the defendants joint proprietors of the land in dispute, not only cast a cloud upon the plaintiffs' title but were likely to extinguish it in course of time if steps were not taken by the plaintiffs as expressly provided for by sub-S. 2 of the same section.

It was also argued that the suit was governed by Art. 14, Sch. 1, Lim. Act, because in effect it was one to set aside an order passed by the Settlement Officer recording the lands in dispute as joint property of the parties. But since I have already held above that the suit was essentially one for declaration of title under S. 66 (2), C. P. Land Revenue Act, it is clear that it does not come within the purview of Art. 14, Limitation Schedule.

The remaining three grounds of appeal attack pure findings of fact which are not open to be challenged in second appeal. It was strenuously argued at an inordinately great length that there was no legal evidence to prove that the plaintiffs were in separate and exclusive possession of the lands in suit since the partition of the village in 1897-98. I have been taken through the entire evidence both oral and documentary that is on record and both sides have also filed schedules containing synopsis of the said evidence. All this evidence has been fully considered by the trial Court in para. 13 of its judgment and by the learned District Judge in para. 9 of his

(2) [1908] 35 Cal. 189=35 I.A. 38=12 C.W.N. 227 (P.C.).

judgment. I am not called upon here to determine if the evidence, as it is, was good or even sufficient to justify the concurrent findings of fact of the two lower Courts on this point. But I have only to determine if the evidence relied on is legal.

Plaintiff 1 Rao Vishalsingh who is 60 years of age swore to the fact that since the transfer of the patti No. 1/1 in his favour by Kanakmal in 1901 he had been in exclusive possession of all the lands appertaining to that patti. It is not denied that the lands in dispute in the present case were at the partition of 1897-1898 included in this patti. As a matter of fact it is admitted that the parties remained in possession of the lands of their respective pattis upto 1903 when the Patwari recorded them in the shamlat patti. Apart from any other evidence the testimony of plaintiff 1 is therefore enough to dispose of the contention of the appellants that there was no legal evidence in support of the finding on issue 3 (b).

I cannot accept the contention of the learned advocate for the appellants that the entries in the remarks columns of Exs. P-10 to P-16 recording each party in possession of definite areas of particular fields that had been allotted to him at the partition of 1897-1898 are not legally admissible to prove possession, because the Patwari (D. W. 1) stated that he made them at the instance of the revenue inspector. But this witness also stated further that he had verified the fact of possession and found each set of proprietors in separate possession of their respective shares as allotted to them at the partition. These entries therefore coupled with the oral evidence of the Patwari and plaintiff 1 unmistakably proved plaintiffs' exclusive possession of the lands in dispute and the two lower Courts were therefore perfectly justified in relying upon them in support of their findings on the point of possession.

Moreover there are clear admissions of the appellants' counsel in the revenue proceedings (Exs. P-21 and 27) to the effect that since the partition each of the parties remained in possession of the patti allotted to him. It was urged that these admissions do not clearly refer to the lands in dispute in the present case, but this argument has no force when it

is admitted that the lands in dispute are those that had fallen to the share of Kanakmal at the partition and were included in the patti No. 1/1. I have, therefore, no hesitation in holding that the findings as to plaintiffs' exclusive possession arrived at concurrently by the two lower Courts are based upon legally admissible evidence on record and that the inferences drawn by them from that evidence are perfectly justified. There only remains the consideration of the application filed by the appellants on 24th July 1929 for framing an issue

"as to the agreement between the parties to hold the shamlat patti jointly"

and remanding the case for trial of the same under O. 41, R. 25, Civil P. C. The appellants alleged that no such issue was framed. A reference to the pleadings makes it clear that only an implied agreement was pleaded by the appellants and issue 10 was expressly framed on this point. I therefore reject the application which appears to have been filed under some misconception. The result is that the appeal fails and dismissed with all costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 96

SUBHEDAR, A. J. C.

Tukaram—Accused—Applicant.

v.

Dagdu—Complainant—Non-Applicant.
Party.

Criminal Revn. No. 23-B of 1929, Decided on 12th June 1929, against decision of Sub-Divisional Magistrate, Basim, in Criminal Appeal No. 61 of 1928.

Criminal P. C., S. 12 — Honorary Magistrate appointed for term of years—No order cancelling appointment—His powers do not cease even after expiry of term.

Where an Honorary Magistrate has been appointed in the Central Provinces for a term of years his jurisdiction to decide cases must be considered to continue unless there is an order cancelling such appointment. [P 97 C 1]

V. N. Herlekar—for Applicant.

S. S. Deshpande and G. P. Dick — for Non-Applicant.

Order.—In a trial held by a Bench of Honorary Magistrates, Basim, the applicant Tukaram was ordered, under S. 22, Cattle Trespass Act, to pay to the complainant Dagdu Rs. 15 as compensation by way of fine and Rs. 8-8-0 by way of expenses for illegal seizure of six head of cattle belonging to the complainant and

impounding the same in the cattle pound. The Sub-Divisional Magistrate, Basim to whom an appeal was preferred upheld the above order of the Bench of Magistrates and dismissed the appeal. The applicant has therefore filed an application for revision to this Court on several grounds the first of which is reproduced below :

"That Mr. S. K. Rahim was appointed an Honorary Magistrate by virtue of notification No. 1653-889V appearing in the C. P. Gazette dated 4th August 1923 on p. 937 for five years only and the Quarterly Civil List for 1st July 1923 also shows the date of expiry of the term of his office as 29th July 1928. Thus he had ceased to be a Magistrate on 6th October 1928 when the judgment was delivered by the Bench. It is thus illegal and passed without jurisdiction."

In reply to the rule calling upon the District Magistrate to show cause against the application that learned officer referring to the above ground merely stated that the judgment of the trying Magistrates was not vitiated because :

"The Honorary Magistrates under standing orders continue to exercise powers so long as they are not cancelled or withdrawn."

Since the learned District Magistrate had not in his reply given any reference to the standing orders I had to call upon the Government Advocate to appear and support the view of the District Magistrate.

The learned Government Advocate has accordingly appeared today and placed upon the record a copy of the Circular letter No. 2062/1774-V issued by the Chief Secretary to Government, Central Provinces, to all District Magistrates, Central Provinces and Berar, which makes it perfectly clear that the practice of appointing Honorary Magistrates under S. 12, Criminal P. C., for a term of five years was wrong because the said section like S. 14 *ibid* makes no provision of any time limit. The letter therefore states that :

"Government has accordingly been advised that the five years term imposed in accordance with recent practice is *ultra vires* and should be regarded merely as an expression of the intention of the Local Government to withdraw the Magistrate's powers after the expiry of five years, unless in the meanwhile it determines to continue them."

In para. 2 the letter goes on to state that :

"I am accordingly to say that in all cases in which a Magistrate has been appointed for a term of years, his jurisdiction must be considered to continue even after that term has expired."

Even in the Quarterly Civil Lists for October 1928 and January and April 1929 the name of Mr. S. K. Rahim appears among the list of existing Honorary Magistrates and therefore it is evident that his appointment had not ceased on the day that he signed the judgment of the Bench with his other colleagues. There is thus no force in the first ground of the application. Neither is there any force in the other grounds which merely attack the concurrent findings of the two lower Courts with which I agree. The result is that this application for revision fails and is dismissed.

P.N./R.K.

Revision dismissed.

* A. I. R. 1930 Nagpur 97

JACKSON, A. J. C.

on difference between

STAPLES AND SUBHEDAR, A. J. Cs.

Daulat and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 28 of 1929, Decided on 7th August 1929, from an order of Sess. Judge, Hoshangabad, D/- 16th February 1929.

(a) Evidence Act, Ss. 133 and 114, *Illus.* (b)—(Per Subhedar, A. J. C.)—Scope—Rule in S. 114, *Illus.* (b) has almost acquired force of law by judicial decisions—(Jackson, A. J. C.) *doubting.*

Per Subhedar, A. J. C.—The rule in S. 114, *Illus.* (b), that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of so universal application that it has now almost acquired the force of law. [P 99 C 1]

Per Jackson, A. J. C.—S. 133 cannot be entirely nullified by judicial decisions and there may be cases in which the rule in S. 114, *Illus.* (b), should not be applied. The question arising in every case where the uncorroborated evidence of the accomplice has to be considered is whether it can be believed or not. Further when the evidence is strengthened by corroboration of other facts of the story by evidence of several accomplices or by confessions of co-accused, the question whether the maxim should still apply must receive careful consideration : A. I. R. 1921 Nag. 29, *Rel. on.* [P 107 C 2]

* (b) Evidence Act, S. 114, *Illus.* (b) — (Per Subhedar and Jackson, A. J. C's.) — Even where there are several accused, approver's story should be corroborated as regards particular accused and must be confirmed on some point which implicates that particular accused—(Staples, A. J. C., *contra.*)

Per Staples, A. J. C.—It is true that an approver's story should be corroborated not only as regards the facts of the case but also as regards the identity of the accused, but where

there are several accused and the story of the approver has been confirmed on many points, and as regards the identity of several of the accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason. The real test of the evidence of the approver is whether it has been believed or not and when it has been corroborated on many points and has not been shown to be false in any particular it should be accepted; and when once it has been accepted as a whole corroboration as regards the identity of each of several accused should not be demanded: *A. I. R. 1921 Nag. 30*; *9 All. 528, Expl.; Rex v. Baskerville, (1916) 2 K.B. 658, Dist. [P 104 C 1, 2]*

(Per Jackson and Subhedar, A. J. Cs.)—Even where there are several accused persons, an approver's story to be corroborated as regards a particular accused must be corroborated on some point which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused: *A. I. R. 1921 Nag. 39, Rel. on*; *14 Bom. 331*; *A. I. R. 1922 Nag. 172*; *A. I. R. 1925 Nag. 78, Appl. [P 107 C 1]*

(c) Evidence Act, S. 30—(Per Subhedar, A. J. C.)—Confession of co-accused cannot be used to corroborate evidence of approver—(Staples, A. J. C., contra.)

(Per Subhedar, A. J. C.)—Confessional statements of accused cannot be used in corroboration of the evidence of the approver inasmuch as tainted evidence is not made better by being corroborated by other tainted evidence.

[P 101 C 1]

(Per Staples, A. J. C.)—Confessions of co-accused must be taken into consideration and cannot be brushed aside merely as tainted evidence: *A. I. R. 1921 Nag. 39, Rel. on.*

[P 105 C 1]

(d) Evidence Act, S. 133—Corroboration may be circumstantial.

(Per Staples, A. J. C.)—Corroboration of approver's story may be circumstantial: *A. I. R. 1922 Nag. 172, Rel. on.*

[P 105 C 2]

R. N. Padhye—for Appellant.

G. P. Dick—for Respondent.

Opinion

Subhedar, A. J. C.—The following nine persons were tried by the Sessions Judge, Hoshangabad, for two separate offences under Ss. 302 and 395, I. P. C.: (1) Daulat, son of Jairam Bhoir, (2) Hiraji, son of Sakia Bhoir, (3) Lehram, son of Sakia Bhoir, (4) Lehram, son of Gangu Bhoir, (5) Bajya, son of Sukhya Bhoir, (6) Keoli, son of Ganesh Bhoir, (7) Ganpat, son of Jairam Bhoir, (8) Patiram, son of Karu Mehra, (9) Bho-mia, son of Bhogaji Mehra. Of these accused 1, 2, 3 and 6 were convicted and sentenced to death for the offence of murder and to transportation for life

for dacoity and the rest were acquitted. The convicted persons have preferred appeals which are registered in this Court as Criminal Appeals Nos. 28, 29, 30 and 31 of 1929. There are also references by the Sessions Judge for confirmation of the sentences of death passed upon the appellants and these are registered as Criminal References Nos. 6, 7, 8 and 9 of 1929. The Local Government has also preferred appeals against the acquittal of accused 4, 5, 7 and 8 and these are registered as Criminal Appeals Nos. 51, 52, 53 and 54 of 1929. As the two sets of appeals and the references are connected, this judgment will govern the disposal of all the cases.

The case for the prosecution was that in pursuance of a conspiracy all the nine accused and one Tukaram (P. W. 2), who turned an approver, entered the house of one Shiamrao Sonar, a malguzar and money lender of mouza Siladehi, in the Multai Tahsil, Betul District, on the night of 11th October 1928, and while the unfortunate man was fast asleep accused 1 and 2 did him to death by striking him with an axe while the other accused and the approver watched this atrocious crime being committed in their presence, and that after the murder all the accused rifled the safe of the deceased and robbed him of its contents and also took away other articles from the house valued at about Rs. 2,000. The case rests almost entirely upon the evidence of the approver Tukaram (P. W. 2) whose testimony has been believed in by the learned Sessions Judge as it was sufficiently corroborated by the recovery of some of the stolen articles at the instance of some of the accused. At the hearing of the appeals in this Court Mr. R. N. Padhye represented accused 1 Daulat, Mr. Razak appeared for accused 2 and 3, Hiraji and Lehram, while Mr. Pathak appeared for accused 6 Keoli. In the Government appeals Mr. Fida Husain appeared for all the four accused 4, 5, 7 and 8, who had been acquitted in the lower Court.

The main argument advanced on behalf of all the accused was that the evidence of the approver Tukaram (P. W. 2) should be discarded because he was on inimical terms with some of the accused and because his testimony was not corroborated in material particulars

by any independent, reliable and legal evidence. It was also argued that the statements of some of the accused, e.g., Bajya, Ganpat and Patiram (Nos. 5, 7 and 8), amounting to confessions could not legally be used against the other accused as evidence either by themselves or in corroboration of the testimony of the approver. It was further contended that on the finding of the Sessions Judge and on the evidence on record the convictions under S. 395, I. P. C., were not correct.

With regard to the first contention it is undoubtedly correct to say that under S. 133, Evidence Act, an accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice: *Govinda v. Emperor* (1); but by a series of judicial decisions the rule as to the necessity of substantial corroboration of this sort of tainted evidence embodied in S. 114, Illus. (b) *ibid*, has become a rule of practice of so universal application that it has now almost acquired the force of law. As observed by Jardine, J., in *Queen-Empress v. Chagan Dayaram* (2) at p. 344 :

"The rule in S. 114 and that in S. 133 are part of one subject, and both are found in most of the great judgments mentioned in our judgments in that case ; and neither section is to be ignored in the exercise of judicial discretion. Illus. (b) is, however, the rule, and when it is departed from, I think the Court should show or that it should appear, that the circumstances justify the exceptional treatment of the case. As I said in *Queen-Empress v. Maganlal* (3) at p. 138, 'it has been held by two eminent Judges, now members of the Judicial Committee of the Privy Council, that it would certainly be unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. These are the words of Couch, C. J., in *Reg v. Imam* (4) and they pervade Sir Barnes Peacock's decision in *Elahee Bukhsh, In re* (5).' It is not enough for a Court to state the rule pro forma and merely as a reason to evade it the Courts must act up to it."

It is next to be considered what sort of corroboration is necessary to make the approver's evidence worthy of credit. The fullest and the most authoritative exposition of the law on the subject in question is to be found in *Rex v. Baskerville* (6) in which the judgment of the

Court of appeal consisting of five eminent Judges was delivered by Lord Reading, L. C. J., wherein the law was laid down in these words :

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see *R. v. Atwood* (7). But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advise them not to convict upon such evidence ; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence : *R. v. Stubbs* (8); *Meunier, In re* (9). 'As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial, and moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, "confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary": *Reg. v. Mullins* (10), per Maule, J. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice: *R. v. Nokes* (11):

"After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *R. v. Stubbs* (8) by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation, as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Parke, B., gave this opinion as a result of twenty-five years' practice; it was accepted by the other Judges, and has been much relied upon in later

(1) A. I. R. 1921 Nag. 39=17 N. L. R. 113.

(2) [1890] 14 Bom. 331.

(3) [1890] 14 Bom. 115.

(4) 3 B. H. C. R. 57.

(5) 5 W. R. 80 Cr.=B. L. R. Sup. Vol. 459.

(6) 1916] 2 K. B. 658=36 L. J. K. B. 28=60 S. J. 696=25 Cox. C. C. 521=30 J. P. 446=115 L. T. 453.

(7) [1788] 1 Leach 464.

(8) 25 L. J. M. C. 16=7 Cox. C. C. 48=1 W. R. 85.

(9) [1894] 2 Q. B. 415=13 Cox. C. C. 15=63 L. J. M. C. 193=12 W. R. 637=71 L. T. 403.

(10) [1848] 3 Cox. C. C. 526.

(11) [1832] 5 C. & P. 326.

cases. In *R. v. Wilkes* (12) Alderson, B., said: "The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence."

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect the accused with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

The tests laid down in the above case were applied with approval by Kotval, A. J. C. in *Kisan Raghujii v. Emperor* (13). In *Sheroo v. Emperor* (14) Kotval, A. J. C. and Kinkhede, A. J. C., also held that before a conviction is based on the statement of an approver the first and foremost essential condition is that the statement must be a trustworthy statement and there must be ample corroboration of the evidence of the accomplice in material particulars which must be independent of the accomplice or of a co-confessing prisoner.

Applying the principles laid down in the above paragraphs to the present case it appears to me to be unsafe to rely solely on the testimony of the approver Tukaram (P. W. 2) and not to raise the presumption against his evidence under S. 114 (b), Evidence Act. The murder was committed on 11th October 1928, and Tukaram was not arrested till 18th October 1928, and he

remained in police custody till 3rd November 1928, when he was remanded with some of the other accused to jail custody. On 12th November 1928, the police again took this man under their care along with some of the accused evidently for the purpose of having his confession recorded, but it was not till 5th December 1928, when the challan was presented that Tukaram made his statement (Ex. P-29), was tendered pardon, made an approver and was at once examined as P. W. 2.

It will, therefore, be seen that in spite of the fact that he was taken out of the jail custody by the police for the express purpose of having his confession formally recorded, Tukaram apparently did not consent to make a confession before a Magistrate, like accused Ganpat (No. 7) and accused Patiram (No. 8) whose confessions (Exs. P-27 and P-28) were recorded by Mr. Mohanlal, Sub-Divisional Magistrate on 28th and 29th November 1928, respectively. It may also be noted that one Tudari, Bhomia and Keoli accused were also put up before the same Magistrate for making confession but they did not make any but complained of ill-treatment at the hands of the police: see Exs. P-9 D and 6 D-1. There is also evidence on the record that the approver Tukaram is on inimical terms with accused Daulat and the brothers Hiraji and Lehram. Unless, therefore, the evidence of Tukaram is corroborated in material particulars by independent evidence and connects individual accused with the crime, I will not consider it trustworthy. In the course of arguments it was not denied that Shiamrao was murdered on the night of 11th October 1928. I will, therefore, proceed to examine the case of each individual accused in order to determine if the evidence on record is sufficient in his case for a conviction for the substantive offence of this murder under S. 302, I. P. C.

Daulat, accused 1.—There is ample reliable evidence of P. W. 12, P. W. 18 and P. W. 19 that this accused was on the most inimical terms with the deceased Shiamrao. The accused himself admits that there were decrees obtained by Shiamrao against him and that in resisting execution of one of these he was convicted under S. 183, I. P. C. The approver Tukaram states that this

(12) [1836] 7 C. & P. 272.

(13) A. I. R. 1922 Nag. 172.

(14) A. I. R. 1925 Nag. 78.

accused took the most leading part in starting the conspiracy to commit the murder and actually gave four blows to the deceased with an axe which caused his death. An axe head Art. H-3 was also recovered from a well on information supplied by this accused. Similarly Art. T-2 a piece of the broken kardora proved to have been worn by the murdered man on the night of the murder and wrenched from his body was also recovered from a field at the instance of this accused. This portion of the kardora is a part of the other portion Art. V-2 which was seized from Shiamrao's house. In his explanation this accused merely stated that the Kardora (Art. T-2) belonged to him but he has failed to account for its possession and for the necessity of burying it underground. I therefore, hold that the evidence of the approver has been sufficiently corroborated by other independent evidence noted above in the case of this accused to connect him with the murder. Looking to the prominent part that he took in the crime the sentence of death passed against this accused by the Sessions Judge was the most appropriate one and is hereby confirmed.

Hiraji and Lehram accused 2 and 3. — These two accused are real brothers. The approver Tukaram states that these accused were also in the conspiracy to murder Shiamrao, and that both of them were present inside the room where Shiamrao was murdered. There is no independent evidence on the record to substantiate this part of the approver's evidence which attempts to connect these men with the crime. No property belonging to the deceased was recovered from them or at their instance. On the principle of law already enunciated above the confessional statements of Ganpat and Patiram (accused 7 and 8) cannot be used against these accused either independently or in corroboration of the evidence of the approver for as remarked at p. 923 of Amir Ali's Law of Evidence, 8th Edition:

"Tainted evidence is not made better by being corroborated by other tainted evidence."

I would therefore, set aside the convictions of these accused and acquit them.

Lehram accused 4. — This is one of the accused who has been acquitted by the Sessions Judge and against whom

the Government has filed an appeal. According to the approver Tukaram this accused was one of the four who did not enter the room but remained in the angan when the murder was committed. As in the case of accused 2 and 3 there is also no independent evidence beyond that of the approver and the confessional statements of accused 7 and 8 against this accused. For the reasons already given in the case of accused 2 and 3, I also hold, though for reasons different from those given by the learned Sessions Judge, that this accused is not guilty of the offence charged against him. I would, therefore, uphold his acquittal and dismiss the Government appeal against him.

Bajya accused 5. — This accused in his statement before the Committing Magistrate as well as before the Sessions Judge has confessed to his having been a party to the conspiracy engineered by accused 1 to kill Shiamrao and also to his having accompanied the other conspirators to the scene of murder and to the part taken by himself as deposed to by the approver Tukaram. But he also stated that he joined the conspiracy because of the threat of death administered to him by accused 1. In the first place even assuming the story of this accused as regards compulsion to be true which, however, is not the case because there is no evidence to support it, his case does not come within the purview of S. 94, I. P. C., which declares that nothing is an offence which is done by a person under circumstances of compulsion specified therein. The very opening words of the section exclude "murder" from its operation. Disagreeing with the learned Sessions Judge I set aside the acquittal of this accused and convict him of murder. As he was a mere hireling on his own admission and took no important part in the actual murder, I sentence him to transportation for life.

Keoli accused 6. — The evidence of the approver Tukaram finds ample corroboration in the statement made by this accused before the Committing Magistrate (Ex. p. 37) although he retracted the same before the Court of Sessions. Tukaram the approver and Guru (P. W. 18) prove that about a month and a half before the murder the deceased Shiamrao did not agree to take

the large amount of debt due by the father of this accused by easy instalments. It is also proved that Arts. O-2, P-2 and Q-2 belonging to the deceased were found tied up in Art. N-2 a piece of angobha belonging to this accused. Art. W-2, a portion of Art. N-2 was also dug out from a portion of the field by this accused. All this evidence is sufficient to hold this accused guilty of the offence of murder and I accordingly uphold his conviction. This accused also took a very leading part in the crime and he gave a blow with an axe on the buttock of the deceased apparently out of sheer spite because the fatal blows were already given by accused 1. It was at his suggestion that after having come out of the house after committing the murder that the whole gang went back into the house and committed theft. Under these circumstances this accused was rightly sentenced to death and I confirm the said sentence.

Ganpat accused 7.—Besides his confession (Ex. p. 27) there are his own statements both in the committing Magistrate's Court and the Sessions Court that he agreed to join in the conspiracy to kill Shiamrao at the instance of Keoli accused for a consideration of Rs. 100., that he did go to the place in pursuance of the conspiracy and was one of those who took their stand in the angan. The approver Tukaram also does not assign to this accused any other part in the affair than what is already admitted by him. Disagreeing with the Sessions Judge I set aside his acquittal and convict this accused of murder and sentence him to transportation for life.

Patiram accused 8.—The case of this accused is exactly like that of Ganpat accused 7 with the only difference that in his statement before the Sessions Judge he pleads compulsion. For the reasons given in the case of Bajya, accused 5, the plea of compulsion even if proved cannot be availed of by this accused. I accordingly convict him of murder and sentence him to transportation for life as he was merely a hireling and took no active part in the murder.

A very ingenious argument was advanced by Mr. Fida Husain to the effect that in the case of three of his clients no common intention to murder

Shiamrao was established, because the evidence of the approver and their own admissions went to show that they had only agreed to accompany the principal conspirators to the scene merely to stand as spectators without any part being assigned to them in the carrying out of the proposed murder. This argument requires no very serious consideration. An effective reply to it is to be found by holding these accused guilty under S. 114, I. P. C., read with S. 302 *ibid.*, for it was not disputed that their admitted participation in the affair brought them within the four corners of the definition of abettors within the meaning of S. 107 *ibid.* They could also be held guilty under S. 34 read with S. 302, I. P. C. *Barendra Kumar Ghose v. Emperor* (15).

This disposes of all the cases so far as the offence of murder under S. 302, I. P. C., is concerned. As to the offence of dacoity under S. 395, I. P. C., I hold that on the evidence on record which I will discuss later on and on the findings of the learned Sessions Judge this offence has not been established.

In para. 8 of his judgment the Sessions Judge states as follows :

"This is not a case in which murder was committed in progress of or in pursuance of the commission of dacoity as for instance for effecting a safe retreat. What the approver has stated is that the intention was that Shiamrao should be murdered that the accused persons left the house after that purpose was accomplished and that they came back to the room to commit dacoity partly because Keoli wanted to remove the bond on which he was liable to pay a debt and partly because it was believed that the crime would be supposed to be the work not of any of the villagers but of those who did not belong to the village. It may be noted here that Keoli in his statement before the Committing Magistrate, has stated that Shiamrao was not attacked while he was on his way to the ghana because it was apprehended that he might manage to escape."

This conclusion of the learned Sessions Judge is perfectly warranted by the evidence on record and the proved circumstances of the case. The very fact that the prosecution was started for two separate offences of murder (S. 302, I. P. C., and dacoity (S. 395, I. P. C.), and not under S. 396, I. P. C., itself indicates that murder was absolutely unconnected with the theft committed

(15) A. I. R. 1925 P. C. 1=51 Cal. 197=52 I. A. 40 (P.C.).

by the murderers after commission of the murder. The learned Government Advocate relied on the following passage appearing at p. 37 of the record in the cross-examination of the approver Tukaram to show that the original conspiracy was to commit dacoity as well and that the conviction under S. 395, I. P. C., was therefore, warranted :

"On Friday Daulat said that he would kill Shiamrao. He said that he would kill also Shiamrao's wife, child and even servants. Some of us then said that to that extent we must not go and that only Shiamrao should be killed and his property should be looted. None of these that were present said that he would not kill Shiamrao."

It will be seen that the statement in the above quotation is very vague and indefinite because it does not say that all the conspirators agreed to the suggestion of murder and loot. The above statement is also not corroborated by any other evidence on the record. Moreover just a little later after the afore-said statement was made the approver also stated as follows :

"It was when the police said after the murder that he has joined in order to take possession of the bond that I came to know that he had joined for that purpose."

The fact that after the murder was committed all the conspirators came out of the house with the idea of dispersing but re-entered the house at the suggestion of Keoli accused to commit theft and thus create evidence that the crime was committed by people living outside the village itself shows that dacoity was not thought of at all by the conspirators in the first instance and that their sole object was only to murder Shiamrao. If it were otherwise it has not been explained why they did not set about ransacking the safe and other contents of the house soon after Shiamrao had been killed. There is no suggestion that they had to leave the room and the house because the inmates of the house had been aroused from sleep and had pursued them.

Under S. 390, I. P. C., theft is "robbery" if in order to the committing of the theft, or in carrying away property obtained by the theft, the offender for that end voluntarily causes or attempts to cause to any person death or hurt etc. Under S. 391, I. P. C., when five or more persons commit robbery it becomes dacoity. The essence of the offence is the inflicting of hurt in order to the com-

mitting of theft. Hurt independent of theft does not amount to robbery. On the evidence in the present case Shiamrao was already killed before the persons responsible for his murder re-entered the house and rifled it of some of its contents on the suggestion of Keoli accused with a definite end in view. Disagreeing then with the Sessions Judge I hold that the offence of dacoity under S. 395, I. P. C., has not been proved in this case, but that those who took part in the theft are liable to be convicted only under S. 379, I. P. C. On the evidence on record I find all the accused whom I have held guilty under S. 302, I. P. C., also guilty under S. 379, I. P. C., and I sentence each of them to rigorous imprisonment for one year, the sentences in each case to run concurrently.

The net result of the decision is as under :

For the net result see statement at p. 104.

The accused Nos. 4, 5, 7 and 8, who had appeared personally at the hearing of the appeals in this Court, have been bound over to appear before the District Magistrate, Betul to hear the result. When they so appear Nos. 5, 7 and 8 will surrender themselves and undergo the sentence passed against them.

Staples, A. J. C.—I have read the opinion of Subhedar, A. J. C., with whom I heard these appeals, and, while agreeing with him that the conviction of Daulat and Keoli under S. 302, I. P. C., should be maintained and the sentences of death confirmed, that the appeals preferred by the Local Government as regards Bajya, Ganpat and Patiram should be allowed and that the acquittals of these persons by the Sessions Judge should be set aside and they should be convicted under S. 302, I. P. C., and sentenced to transportation for life. I would disagree with his view that the convictions of Hiraji and Lehram son of Sakia should be set aside and am of opinion that the conviction of these two appellants also under S. 302 should be maintained. I am further of opinion that the appeal of the Local Government as regards Lehram son of Gangu should also be allowed and his acquittal should be set aside and he too should be convicted under S. 302, I. P. C. As regards the question of the conviction under S. 395, I. P. C., I would

agree with the opinion expressed by Subhedar, A. J. C., that the conviction should be under S. 379, I. P. C., only.

As regards the three persons Hiraji, Lehram son of Sakia and Lehram son of Gangu, Subhedar, A. J. C., following *Rex v. Baskerville* (6) as interpreted by Kotval, A. J. C., in *Kisan Raghuj v. Emperor* (13) has held that there has been no corroboration of the approver's story as regards the identity of these persons and that, therefore, they should be acquitted. It is true that in *Rex v. Baskerville* (6) it has been held that an approver's story should be corroborated not only as regards the facts of the case but also as regards the identity of the accused, but it may be noted that in

accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason.

The rules as regards the corroboration of an approver's testimony should not be interpreted too mechanically, and where there has been a general corroboration of the approver's story the rest of the story should, as a rule, be, I think, accepted unless it can be shown to be false or there are good reasons for disbelieving it. The real test of the evidence of an approver, as indeed of

| No. | Name of accused. | Offence. | Result. | Sentence. | Remarks. |
|-----|----------------------|---------------|-----------|--------------------------|-----------------------------|
| 1 | Daulat | S. 302 I.P.C. | convicted | Death and one year R. I. | Cr. A. No. 28/29 dismissed. |
| 2 | Hiraji | S. 379 | " | " | Cr. A. No. 29/29 allowed. |
| | " | S. 302 | acquitted | " | |
| | " | S. 379 | " | " | |
| 3 | Lehram son of Sakia. | S. 302 | " | " | Cr. A. No. 30/29 " |
| | " | S. 379 | " | " | |
| 4 | Lehram son of Gangu. | S. 302 | " | " | Cr. A. No. 52/29 dismissed. |
| | " | S. 379 | " | " | |
| 5 | Bajya | S. 302 | convicted | transportation for life. | Cr. A. No. 51/29 allowed. |
| | " | S. 379 | " | " | |
| 6 | Keoli | S. 302 | " | one year R. I. | Cr. A. No. 31/29 dismissed. |
| | " | S. 379 | " | death | |
| 7 | Ganpat | S. 302 | " | one year R. I. | Cr. A. No. 53/29 allowed. |
| | " | S. 379 | " | transportation for life. | |
| 8 | Patiram | S. 302 | " | one year R. I. | Cr. A. No. 54/29 " |
| | " | S. 379 | " | transportation for life. | |
| | " | S. 379 | " | one year R. I. | |

that case there was only one accused and I think it is straining the rule as laid down in that case too far to say, as Kotval, A. J. C., appears to hold in *Kisan Raghuj v. Emperor* (13) that where there are several accused there must be corroboration of the approver's story as regards each one of them. To hold so would be, I think tantamount to holding that the approver's story must be corroborated in every detail, which view has been expressly dissented from in *Rex v. Mullins* (10) which has been cited by Kotval, A. J. C., in *Kisan Raghuj v. Emperor* (13). I am of opinion that where there are several accused and the story of the approver has been confirmed on many points and as regards the identity of several of the

any other evidence, is whether it has been believed or not, and when it has been corroborated on many points and has not been shown to be false in any particular it should, I think, be accepted; and when once it has been accepted as a whole, corroboration as regards the identity of each of several accused should not be demanded. This, I think, is the view which has been taken in *Govinda v. Emperor* (1) and in *Queen Empress v. Gobardhan* (16), which has been followed therein. Each case, moreover, must be decided on its own facts, and in the present case I am of opinion that the evidence of the approver Tukaram has been very fully corroborated.

16) [1887] 9 All. 528=(1887) A. W. N. 156.

Tukaram has given a very clear and full story of the whole occurrence and his presence at the time of the murder has been corroborated by the evidence of Mt. Venubai, the widow of the murdered man, Shiamrao. His evidence is further corroborated, as noted by Subhedar, A. J. C., the confessions of two of the accused and by the recovery of property which has been well-identified. As noted above, his statement has not, I think, been shown to be false in any particular, and the allegations of enmity which have been put forward have not been substantiated or, at any rate, the grounds alleged for enmity seem rather slight. These facts will, I think, completely do away with any suspicion that might attach to Tukaram's evidence on account of the facts noted in paras. 11 and 12 of Subhedar, A. J. C.'s opinion. It would also be borne in mind that Tukaram clearly admits his own presence and complicity in the offence and gives the detail that he was taken there to open the safe adding that he did open the safe which is borne out by the statement of one of the other accused.

Another point, I think, which has to be borne in mind is that the confessing accused Ganpat and Patiram have given a very full and clear account which agrees in practically every detail with the story as told by Tukaram. It is true that such confessions cannot be, strictly speaking, corroboration of the approver's evidence as noted by Subhedar, A. J. C., in para. 15 of his opinion; but on the other hand, those confessions cannot be disregarded altogether and as the accused in making those confessions implicate themselves they may, and, in fact, should, be taken into consideration according to S. 30, Evidence Act. In *Govinda v. Emperor* (1) confessions of co-accused have been considered as evidence that can strengthen the evidence of an accomplice and I am of opinion that, at any rate, such evidence must be taken into consideration and cannot be brushed aside merely as tainted evidence. In the present case, as noted above, there is a particularly consistent story told both by Tukaram and these two accused Ganpat and Patiram. I would, in particular, note that as regards the two appellants Hiraji and Lehram son of Sakia, they all agree

that they were two of the four men who entered the room in which Shiamrao was sleeping, while the remaining accused stood outside. They all agree that it was Daulat who struck Shiamrao with his axe and that Keoli gave one blow later. They all agree that it was Lehram son of Sakia who opened the tatta and again they all agree that it was Keoli who brought the key from Shiamrao's person and gave it to Tukaram who opened the safe. It has not been shown, nor has it even been suggested, that there has been any agreement among these three persons Tukaram, Ganpat and Patiram, to tell a concerted story, and the fact, then that they to tell such a particularly clear and consistent story must, I think, carry great weight. As regards Lehram son of Gangu, Tukaram and both accused Ganpat and Patiram agree that he was in the party and he was one of those who stayed outside, and I see no reason why the evidence should not be believed as regards this accused also.

Then, too, I think, such corroboration may be circumstantial, and Kotval, A. J. C. in *Kisan Raghuj v. Emperor* (13) has held this at p. 56 (of 6 N. L. J.). Now in the present case from the evidence of Tukaram it appears that Shiamrao had obtained a decree against Hiraji five or six months ago, that in a criminal case against Shiamrao, Hiraji had given evidence against him and that Lehram's (son of Sakia) wife had beaten Shiamrao's son and they were on bad terms. It also appears that in a case filed by a Gond against Shiamrao, Lehram son of Gangu had given evidence against him and that half of Lehram's sister's field had passed to Shiamrao in satisfaction of a debt. There is thus, at any rate, some evidence on record to show that Hiraji and Lehram son of Gangu were on bad terms with Shiamrao, whilst the other Lehram is Hiraji's brother. As regards any motive for Tukaram implicating these persons falsely, there is, I think, as stated above, no sufficient evidence. Hiraji, before the Committing Magistrate, stated on examination that Tukaram was telling lies through enmity, that he had taken a wife from Ridhora and had been fined Rs. 25 by the panchas that there was enmity on that ground and

also because he had given evidence against Tukaram's brother on a bond and had also given evidence according to which the house of one Sirju Teli had been released from attachment effected by Tukaram. Lehram son of Sakia stated that Tukaram unnecessarily mentioned his name because he had abused him on being asked to make an admission and quarrels took place at times over a field. Lehram son of Gangu has stated that Tukaram implicated him through enmity because he refused to give false evidence in a case against Tukaram's brother and because he did not depose in favour of Tukaram in another case in which Tukaram had been beaten. He has admitted that that case was some five or six years ago. He has added that he did not prepare a cart for Gnu some two years ago and that there was also a quarrel about that. Before the Sessions Judge Hiraji has simply stated on this point that Shiamrao had obtained a decree against him and so they, presumably the prosecution witnesses, spoke against him.

He has added that there was no enmity between him and Shiamrao. Lehram son of Sakia simply stated that Tukaram deposed against him on account of previous enmity, while Lehram son of Gangu stated that Tukaram gave evidence against him because he was tutored by police and on account of previous enmity. No evidence has led in support of their statements but Tukaram has been cross-examined on this point. In cross-examination he stated that Hiraji and his brother Lehram are distant cousins, that they owned separate houses and cultivated land separately. He has admitted that in a criminal case Hiraji gave evidence against Shiamrao and his (Tukaram's) brother Bhaurao about a year ago and that in connexion with the execution of his decree against a Gond Teli Hiraji gave evidence against him and the objection of one Sirju was allowed. He has denied that there was any dispute between him and Hiraji and Lehram about any field or right of way. I can find no statement in Tukaram's cross-examination to bear out the allegation of enmity as regards Lehram son of Gangu, and I am of opinion that the admitted facts as regards Hiraji and

his brother Lehram are quite insufficient to show any such enmity as would be likely to cause Tukaram to give false evidence against him on a murder charge. Further, no reason whatever has been shown why the two accused Ganpat and Patiram should wish to make false statements against Hiraji and the two Lehrs, nor has any enmity even been alleged.

I am of opinion, then that, as the case stands, in view of the corroboration of the approver's story on so many points and as regards the identity of several of the accused and in view of the agreement between his story and the confessions made by two accused Ganpat and Patiram, Tukaram's evidence must be accepted as against Hiraji, his brother Lehram and Lehram son of Gangu also. I do not, however, think that the sentence of death as regards Hiraji and Lehram son of Sakia should be confirmed. It is true that it has been shown that these two did enter the room at the time of the murder with Daulat and Keoli, whilst the others remained outside, but it has not been shown that they struck any blow, and I am of opinion that the lesser sentence only of transportation for life should be imposed. As regards Lehram son of Gangu, the approver as well as the confessing accused Ganpat and Patiram all agree that he remained outside and he also should be sentenced to transportation for life. I would agree with the sentence of rigorous imprisonment for one year which has been suggested by Subhedar, A. J. C., for the offence under S. 379, I. P. C., and would add that that sentence should be passed upon Hiraji and the two Lehrs also as well as the other appellants.

On account of difference the case came before another Judge who delivered the following judgment.

Jackson, A. J. C. — Nine persons were tried by the Sessions Judge, Hoshangabad, for the offences punishable under Ss. 302 and 395, I. P. C. Four only were convicted and sentenced to death for the offence of murder and to transportation for life for the offence of dacoity. The Local Government has appealed against the acquittal of four of the accused, and the four convicted have also appealed. As regards

two of the accused convicted and one of the persons in respect of whom the Local Government has preferred an appeal the Bench which originally heard the case has differed. Subhedar, A. J. C. is in favour of setting aside the convictions of Hiraji and his brother Lehram, sons of Sakia, and of disallowing the appeal by the Local Government as regards Lehram, son of Gangu. Their cases have consequently been referred to me for decision.

The point taken on behalf of the three persons with whom I am concerned is that the evidence against them is that of an uncorroborated approver Tukaram, and the first question I have to consider is whether there is no corroboration of his evidence. Subhedar, A. J. C., has held that the confessions of two co-accused are no corroboration of Tukaram and that the corroboration that there undoubtedly is of Tukaram's evidence as regards other accused is no corroboration of his evidence as regards the three persons whose cases I am now considering. His opinion is based mainly on the judgment of Lord Reading, L. C. J., in *Rex v. Baskerville* (6). Staples, A. J. C., would distinguish that case on the ground that there was only one accused person in it but I do not think that the distinction is a sound one. It seems to me that an approver's story, to be corroborated as regards a particular accused, must be corroborated on some point which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused. That is the view that has been taken by a Bench of this Court in *Govinda v. Emperor* (1) in which the following pronouncement has been made :

"We are in agreement with the view that so long as there is no corroboration by independent evidence regarding a particular accused, the evidence may be termed uncorroborated evidence of accomplices."

I am of opinion that the evidence of Tukaram may be regarded as uncorroborated evidence of an accomplice and may be rejected if the Court thinks fit to apply the rule stated in ill. (b) to S. 114, Evidence Act, that an accomplice is unworthy of credit unless he is corroborated in material particulars. It

has been stated by Subhedar, A. J. C., in para. 8 of his opinion that this rule has become a rule of practice of so universal application that it has now almost acquired the force of law. Even so, there may still be cases in which the rule should not be applied. S. 133, Evidence Act, has not been repealed and cannot be entirely nullified by judicial decisions. The question arising in every case where the uncorroborated evidence of an accomplice has to be considered is whether it can be believed or not. In the present case the decision by a Bench of this Court to which I have already referred is directly applicable. Immediately after the words that I have quoted above comes the following sentence :

"but when the evidence is strengthened by corroboration of other parts of the story, by evidence of several accomplices or by confessions of co-accused, the question whether the maxim should still apply must receive careful consideration."

As pointed out by Staples, A. J. C., Tukaram's evidence has been corroborated as against other accused than Hiraji and the two Lehrans, and has nowhere been shown to be false. It agrees in all important particulars with the confessions made by two of the accused, Ganpat and Patiram. It also agrees with the statements made by two other accused, Bajya and Keoli, in their examination, though there is no confession by these accused formally recorded by a Magistrate prior to the trial. No reference to Bajya or Keoli has been made by either of the learned Judges, possibly by reason of the decision in *Mahadeo Prasad v. Emperor* (17) which makes S. 30, Evidence Act, inapplicable to a case in which the confession of the accomplice appears in his examination in the trial. That ruling would not apply in the present case, as Bajya's and Keoli's confessions were made in the first instance in the Court of the Committing Magistrate and not at the trial before the Sessions Judge.

As regards Hiraji and the two Lehrans, Tukaram's evidence, read with the confessions of the four co-accused, Bajya, Keoli, Ganpat and Patiram, should, I think, be accepted as true. Neither his evidence nor the confessions, it seems to me, can be rejected because they are self-exculpatory and do not im-

implicate the givers to the same extent as the other persons implicated by them. The participation in the crime admitted by them is sufficient to make them fully responsible for the crime. It is urged that Tukaram's evidence should be rejected, because after he had been remanded to jail custody, he was retaken into police custody on 13th November 1928, for the purpose of having his confession recorded, but the confession was not recorded until 5th December 1928. I do not consider that this is a good ground for rejecting his evidence. I cannot find that any question was put to Tukaram or the Circle Inspector Dilawar Husain (P. W. No. 13) or the Sub-Inspector Shiamrao (P. W. No. 17) as to the reasons for the delay in recording Tukaram's confession. I find also from the evidence of the Circle Inspector that Tukaram was not taken back into police custody for the purpose of getting a confession recorded. The object, according to that witness, was to get Tukaram to show where property stolen from the deceased was concealed and generally to get information to assist the police in their investigation.

Another point on which it is sought to discredit the prosecution case is that one Bapu, the brother of the deceased, has not been prosecuted although the deceased's wife Venubai (P. W. No. 5) when she was awakened by the offenders in the commission of their crime had thought that she recognized Tukaram and Bapu. But as regards Bapu her statement is only this:

"I had a faint suspicion that one of those persons was my husband's brother Bapu;" and obviously on such a statement there is no reason to support that there is anything wrong in the fact that Bapu has not been prosecuted. Nor in the circumstances can I attach any importance to the fact that the first information report does not mention the names of Hiraji and the two Lehrams. That report was made by the Kotwal who states in it that he personally does not know and how many the thieves were. It is urged that the motive on the part of the accused persons whose cases I am considering was insufficient. But in sufficiency of motive is not itself a ground for rejecting evidence, otherwise considered trustworthy. There was some motive and the evidence, as I have held,

is sufficient to prove the case against Hiraji and his brother, Lehram, and Lehram son of Gangu.

For the above reasons I agree with the view of Staples, A. J. C., that the convictions of Hiraji and his brother Lehram should be maintained and that the appeal of the Government in respect of Lehram son of Gangu should be allowed and that he should be convicted of an offence punishable under S. 302, I. P. C., as also of an offence punishable under S. 379. The Bench has held that the second offence committed was of theft and not dacoity.

P.N./R.K.

Order accordingly.

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SUBHEDAR, A. J. C.

Bageshwar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 399 of 1929, Decided on 16th January 1930, against order of Dist. Magistrate, Raipur, D/- 11th October 1929 in Crim. Misc. Case No. 2 of 1929.

(a) **Criminal Trial—Evidence — Want of interest in prosecution does not by itself stamp evidence of witness with truth — Evidence must be such as to carry conviction of truth to prudent man.**

It is an elementary principle in the administration of criminal justice that want of interest in the prosecution does not by itself stamp the evidence of a witness with truth. The weight to be attached to the testimony of a witness depends in a large measure upon various considerations, e. g., if on the face of it the evidence is so much in consonance with probabilities and consistent with other evidence, and generally so fits in with the material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may be, his evidence is worthless and should not be relied on in the decision of criminal cases where persuasion of guilt must amount to a moral certainty. [P 109 C 2; P 110 C 1]

(b) **Criminal P. C., S. 203 — Serious discrepancies existing in important eye-witnesses — Trying Magistrate is right in dismissing complaint — In such case District Magistrate has no power to interfere, with order of discharge, under S. 436.**

Where there are serious discrepancies existing in the evidence of the important eye-witnesses for the prosecution it is perfectly within the trying Magistrate's competence to disbelieve these witnesses and hold that there was no *prima facie* case as against the accused and the District Magistrate has, therefore, no power under S. 436 to interfere with the order of dis-

charge which is based on a careful appreciation of the evidence on record : 8 *A. L. J.* 45, *Rel.* [P 110 C 2]

(c) **Criminal P. C., S. 436**—Not misappreciation of evidence, but irregularity or illegality in proceedings should be considered by the District Magistrate in setting aside order of discharge.

Even misappreciation of the evidence by the trying Magistrate will not in law justify the District Magistrate in setting aside the order of discharge which can only be done if there is either irregularity or illegality in the proceedings : 31 *Mad.* 133 ; 18 *A. L. J.* 1135 and *A. I. R.* 1926 *Nag.* 117, *Rel. on.* [P 110 C 2]

S. C. Dutt Chaudhury—for Accused.

Order.—The facts leading to this application for revision are briefly as follows :

The applicant, Bageshwar Bania, is a driver of the taxi car No. 5262. It was alleged that on the afternoon of 25th February last, while taking his car on the Raipur Arang road, the applicant knocked down Kejana, a seven years old grandson of Mt. Ramkuar (P. W. 3), on the road in front of the octroi outpost and caused his death. The map of the scene of the accident is filed as Ex. P-5. After investigation the applicant was challaned by the police for an offence under S. 304(A), I. P. C., before Mr. G. P. Pande, Magistrate First Class, Raipur, for having caused the death of the boy by rash and negligent driving.

Fifteen witnesses were examined for the prosecution at considerable length and the trial lasted for nearly six months. In a very elaborate judgment extending over seven closely written foolscap sheets the learned trying Magistrate carefully analysed and critically discussed the whole of the evidence and came to the conclusion that it failed to establish the identity of the applicant with the driver of the car which caused the death of the boy. An order of discharge was accordingly recorded in favour of the applicant.

On examining the record of the case suo motu the District Magistrate, Raipur, set aside the order of discharge and ordered further inquiry into the case under S. 436, Criminal P. C., by another Magistrate, Mr. Muniruddin. It is against this order that the present application for revision is filed.

As I understand the District Magistrate's order he held the trial to be defective in two respects :

(1) That the trying Magistrate did not visit the scene of the offence which led

to his misappreciation of the evidence of Pitamber (P. W. 5) and Sheikh Lal (P. W. 6), and (2) that the trying Magistrate did not examine the investigating officer at length.

After examining the record carefully and hearing the learned pleader for the applicant, I am quite clear that the order of the District Magistrate is erroneous both on law and facts and should be set aside. It reads more like a special pleading for the prosecution than a balanced judicial pronouncement.

There is no sense in the District Magistrate's suggestion that the visit to the scene of the accident by the trying Magistrate would have either enhanced the worth of the evidence of Pitamber (P. W. 5) and Sheikh Lal (P. W. 6), or explained away the flagrant discrepancies between their testimony inter se and that of Mt. Ramkuar (P. W. 3) on several material points in the case which are detailed by the trying Magistrate in his judgment. The learned District Magistrate should not have imported his own personal knowledge into his judicial order and built a theory of his own that because the outhouses of these witnesses (Pitamber and Sheikh Lal) :

"are not only close to the road but turn in towards the road at such an angle that both Sheikh Lal and Pitamber should have been able to see Bageshwar clearly,"

because both these witnesses positively stated in their evidence that they could and did see the applicant only on reaching the road where the accident took place and not from the outhouses where they lived.

The learned District Magistrate is evidently wrong in starting with a preconceived notion that because Pitamber and Sheikh Lal are independent witnesses and have no "interest in securing Bageshwar's conviction" they have no reason to depose falsely against him. It is an elementary principle in the administration of criminal justice that want of interest in the prosecution does not by itself stamp the evidence of a witness with truth. The weight which is to be attached to the testimony of a witness depends in a large measure upon various considerations, e. g., if on the face of it his evidence is so much in consonance with probabilities and consistent with other evidence, and generally so fits in

with the material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may be, his evidence is worthless and should not be relied on in the decision of criminal cases where persuasion of guilt must amount to a moral certainty.

Neither is the District Magistrate justified in offering an explanation of his own creation in para. 6 of his order in the matter of the evidence of Mt. Ramkuar (P. W. 3). The learned District Magistrate states that :

"in her statement to the police she had said that the car struck the tree immediately after the boy was knocked down."

The inference suggested is that her memory failed her when Mt. Ramkuar deposed before the Court that she did not notice the car striking the tree.

Since no extract of Mt. Ramkuar's alleged statement from the police diary is filed on the record, nor was the alleged statement put to her in the course of her examination as a witness, the learned District Magistrate clearly erred in law in relying upon it for the purpose of explaining away a very material discrepancy between her evidence and that of the other two eyewitnesses for the prosecution, viz., Pitamber (P.W. 5) and Sheikh Lal (P. W. 6). Moreover, in the absence of the police diary before me I have no means to verify if Mt. Ramkuar had even made such a statement to the police.

But if the District Magistrate has relied upon the first information report, Ex. P-1., I can only say that he has misread that document because it is clearly stated therein that:

"on inquiry it was known from Pitamber Dhobi that the driver was driving his car very fast and that he could not stop it when the boy came in front and that he dashed it against a tree and ran away."

The passage just quoted clearly shows that the information as to the car dashing against a tree was conveyed to the police not by the woman, P.W. 3, but by Pitamber (P.W. 5).

The first part of the suggestion by the District Magistrate, therefore, in explaining away the admittedly serious discrepancies in the evidence of the aforesaid three eyewitnesses for the prosecution falls to the ground. Neither is there the slightest justification for

the District Magistrate for offering the other suggestion in explanation of the said discrepancies that "some one has made it worth her while to lie."

Moreover, in the teeth of the unequivocal admission of Mt. Ramkuar that she could clearly see up to a distance of five yards and in the absence of any suggestion by her that she had failed to observe or remember other details because of her being unnerved on account of the sudden and unexpected death of her grandson, the learned District Magistrate, who had no occasion to examine the woman personally, has apparently drawn upon his imagination in putting forward on her behalf certain excuses in para. 6 of his order in an attempt to reconcile her evidence with that of Pitamber (P. W. 5) and Sheikh Lal (P.W. 6). To say the least of it such a procedure on the part of the learned District Magistrate was unfair to the applicant besides being unwarranted in the exercise by him of the powers of revision under S. 436, Criminal P.C.

In the face of the serious discrepancies existing in the evidence of the three important eyewitnesses for the prosecution, viz., Mt. Ramkuar (P.W.3), Pitamber (P. W. 5) and Sheikh Lal (P.W.6), as noticed and rightly criticised by the trying Magistrate in paras. 5 to 12 of his well reasoned judgment, it was perfectly within his competence to disbelieve these witnesses and hold, as he did, that there was no prima facie case against the applicant, and the District Magistrate had, therefore, no power under S. 436, Criminal P. C., to interfere with the order of discharge which was based on a careful appreciation of the evidence on record: *Chandan v. Kallu* (1). Even misappreciation of the evidence by the trying Magistrate which is not made out in the present case would not in law have justified the District Magistrate in setting aside the order of discharge which could only be done if there was either irregularity or illegality in the proceedings: *Lakshminarasappa v. Venkatappa* (2) and *Binderi Dube v. Emperor* (3), cited with approval by this Court in *Sheocharan v. Emperor* (4), (at p. 91 of 21 N.L.R.).

(1) [1911] S A. L. J. 45=9 I. C. 274=12 Cr. L. J. 45.

(2) [1908] 31 Mad. 133=18 M.L.J. 57.

(3) [1920] 18 A.L.J. 1135=59 I. C. 193.

(4) A. I. R. 1926 Nag. 117=21 N.L.R. 88.

The deposition of the investigating officer, Murlidhar Choube (P. W. 2), is recorded at considerable length by the trying Magistrate at pp. 14 to 16 of the record. In para. 5 of his order, beyond indulging in bare platitudes on the value of the evidence of an investigating officer "for getting a frame work of the case" the learned District Magistrate has not stated in what respects the frame work got up in the present case from the examination of Murlidhar (P. W. 2) was defective and how it has failed to "link up" the evidence of the set of witnesses from Kanker with the evidence of Raipur witnesses. It is, therefore, impossible for me to uphold the view of the learned District Magistrate that the trial has been defective or incomplete on account of not examining the investigating officer "at length." I, therefore, hold that there was neither any illegality nor irregularity committed by the trying Magistrate in recording the deposition of the investigating officer which vitiated the order of discharge passed by him.

For the reasons given above I have no hesitation in holding that the decision of the trying Magistrate in discharging the applicant was not only not perverse but absolutely correct, arrived at, as it was, after a full and complete inquiry and a careful consideration of the materials on record and probabilities of the case. I, therefore, set aside the order of the District Magistrate and restore that of the trying Magistrate.

V.S./R.K.

*Order set aside***A. I. R. 1930 Nagpur 111**

JACKSON, A. J. C.

Rangasa and another—Defendants—Appellants.

v.

Hukumchand — Plaintiff — Respondent.

First Appeal No. 71-B of 1927, Decided on 10th October 1929, from decree of First Class 1st Sub-Judge, Khamgaon, D/- 12th September 1927, in civil Suit No. 24 of 1926.

(a) Contract—Court will consider surrounding circumstances to determine true intention of parties to contract.

In order to find out the true intention of the parties to the contract the Court will not only look at the terms of the original

contract but also probe among the surrounding circumstances : 24 Bom. 227 and 30 Bom. 83, Foll. [P 112 C 1, 2]

(b) Contract Act, S. 30—To make contract wagering, there must be common intention of agreement not to demand or give delivery—Subsequent agreement not to demand or give delivery does not make it wagering contract.

To make a contract a wagering contract there must be, from the outset, a common intention of the parties to the contract to make and accept no delivery and to deal only in differences. A subsequent agreement to the effect that buyer has no longer right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering one : 15 C. P. L. R. 58; 29 Cal. 461; A. I. R. 1917 P. C. 101; A. I. R. 1922 Bom. 408 and A. I. R. 1923 P. C. 30, Rel. on. [P 113 C 1]

G. Sitaram—for Appellants.*Chande*—for Respondent.

Judgment.—The defendants Rangasa and Kisan Patel had purchased 1,100 khandis of cotton seed through Salemuhammad Nurmuhammad as brokers for delivery on Pous Sudi 15 Sambat 1982 (1925-26 A. D.). Salemuhammad Nurmuhammad had in turn purchased this quantity of cotton seed from the plaintiff for delivery on the same date. In November 1925 it was agreed between the plaintiff and the defendants that the contract should be treated as one directly between them and on 10th November 1925 the defendants wrote the letter (Ex. P. 6) to the plaintiff and another letter (Ex. P. 7) to Salemuhammad Nurmuhammad. On the date fixed for delivery, which corresponds to 29th December 1925, the defendants did not desire to take delivery as the price of cotton seed had gone down considerably and they agreed to pay to the plaintiff the difference in the prices. They executed an acknowledgment in favour of the plaintiff agreeing to pay Rs. 6,240 on 2nd January 1926 and the plaintiff has now sued to recover that sum with interest thereon at 12 per cent. per mensem.

The defendants had pleaded in the lower Court that they had been induced to execute the acknowledgment through fear and under threats from the plaintiff. They also alleged that the contract was a wagering one, that nothing can be recovered on it by a suit and even that it was agreed between the parties that nothing would be recoverable. The main contention in appeal is that the contract was a wagering one. An at-

tempt has been made to show that the plaintiff did not really step into the shoes of Salemuhammad and take his place as a party to the contract. The defendants' own letters go to show that Salemuhammad was eliminated and the plaintiff and the defendants stood face to face in connexion with the contract originally entered into through Salemuhammad as broker. The pleadings of the defendants equally show that there was a contract between them and the plaintiff; and it seems to me that the only question I have to consider is whether the acknowledgment was executed by the defendants in favour of plaintiff in respect of a wagering contract.

It is alleged by the defendants that all contracts for delivery of cotton seed on Pous Sudi 15, are, by custom of the Khamgaon market, wagering contracts, that is, in no case and in no circumstances is delivery made or accepted. There is only the evidence of one of the defendants Rangasa (D. W. 1) to support this allegation. On the other hand, 11 witnesses have been examined by the plaintiff who are all men engaged in dealing in cotton and cotton seed transactions in the Khamgaon market and they unanimously depose that contracts for delivery on Pous Sudi 15 are not wagering contracts and that it is intended that delivery should be made. As regards what was intended in the particular contract between the plaintiff and the defendants, reference has to be made to the letter (Ex. P. 6) written by the latter to the former. In that letter they say that they will sell the cotton seed if on the fixed date the rate is a good one; and if the rate is not a good one, they would make a deposit with the plaintiff and would be liable for profit or loss. The wording is not altogether clear, but it does seem to provide for delivery to the plaintiff, if the defendants were satisfied that the prevailing rate would give them a profit, but that if they were liable to loss they would simply pay the difference between the two prices. It is urged, however, that the mere form of the contract does not finally determine its nature. That view has been held in *Motilal v. Govindram* (1) and also in *Doshi Talakshi v. Shah*

Ujamsi Velsi (2), in which it was held that the Court will not only look at the terms of the original contract but also probe among the surrounding circumstances to find out the true intention of the parties.

There is evidence to show how the defendants settled other contracts entered into in circumstances similar to those of the one that I am considering. Gokuldas (P. W. 3), Purnaji (P. W. 4), Chotalal, (P. W. 5), who is employed by H. Rawjai and Co., and Bansiralal (P. W. 8), who is employed by Rambax Laxmandas, depose to contracts entered into, in the first place, with Salemuhammad Nurmuhhammad, in which the broker was eliminated, as he was in the contract with the plaintiff, and which became direct contracts with the defendants. Some of these witnesses depose to delivery of the goods contracted for. Gokuldas (P. W. 3) says that delivery was made by storing the goods in the kotha of Rambax Laxmandas which had been taken on rent for the defendants; and delivery in a similar manner is deposed to by Purnaji (P. W. 4) and Bansiralal (P. W. 8). It appears, however, that in none of these cases did the defendants actually take delivery. According to Gokuldas, one of the defendants, Kisan, mortgaged a field to cover the difference in prices and according to Purnaji the other defendant Rangasa gave a mortgage for Rs. 3,000, which again must relate only to the difference. Bansiralal does not say how the matter was eventually settled. The evidence is therefore somewhat inconclusive as to how the defendants settled other contracts for delivery on Pous Sudi 15 in the year in question; but it certainly does not prove that delivery was never intended by either party.

There is also evidence as to the way in which the plaintiff settled other contracts entered into in the year in question. Mohanlal (P. W. 2), who is in the service of Jasraj Shriram, deposes that in the year in question his firm purchased 1450 khandis of cotton seed from the plaintiff, that they resold to the plaintiff 750 khandis before the date fixed for delivery, that they took delivery of 400 khandis and paid the difference on 300 khandis. Again Raichand (P. W. 7) deposes that he had sold 1800

(1) [1906] 30 Bom. 83=7 Bom. L. R. 385.

(2) [1900] 24 Bom. 227=1 Bom. L. R. 786.

khandis of cotton seed to the plaintiff, had repurchased 1,700 khandis from time to time before the due date and delivered in the end 100 khandis. This evidence shows that the plaintiff's dealings did not necessarily contemplate that no delivery would be made or taken.

On the above evidence it seems to me impossible to hold that the contract now before me was a wagering one. It has been held in *Ramratan v. Seth Kanakmal* (3), *Kong Yee Lone & Co. v. Lowjee Nanje* (4), *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji* (5) and *Manilal Dharamsi v. Allibhai Chagla* (6) that there must be a common intention of the parties to the contract to make and accept no delivery and to deal only in differences. In *Bhagwandas Prasram v. Burjorji Ruttonji Bomanji* (5) the Privy Council have decided that there is no wager even if a large portion of the goods contracted for is not delivered. In *Sukdedoss Ramprasad v. Govindoss Chaturbhujadoss* (7) it was held that a subsequent agreement called "patta patti," which means that the buyer has no longer a right to demand delivery and the seller is no longer obliged to give delivery, does not make the contract a wagering one, because until patta patti was made, delivery might have been insisted on. That decision is given, although it is said that there can be little doubt that, even before patta patti was made, a demand for delivery would, among the merchants who deal in such transactions, be considered bad form. On the evidence I cannot hold that there was from the outset no intention on the part of both the plaintiff and the defendants that no delivery should be made and I cannot hold the contract entered into to be a wagering one. That being so, I must dismiss the appeal with costs.

P.N./R.K.

Appeal dismissed.

(3) [1902] 15 C. P. L. R. 58.

(4) [1902] 29 Cal. 461=28 I. A. 239=8 Sar. 101 (P. C.).

(5) A. I. R. 1917 P. C. 101=42 Bom. 373=45 I. A. 29 (P. C.).

(6) A. I. R. 1922 Bom. 408=47 Bom. 263.

(7) A. I. R. 1928 P. C. 30=51 Mad. 96=55 I. A. 32 (P. C.).

A. I. R. 1930 Nagpur 113

Full Bench

MACNAIR, OFFG. J. C., JACKSON AND
SUBHEDAR, A. J. CS.

Badshah Miyan—Appellant.

v.

Pandurang—Respondent.

Second Appeal No. 653 of 1928, Decided on 16th November 1929, against decision of Addl. Dist. Judge, Nagpur, D/- 1st November 1928.

Limitation Act, S. 12—Time for obtaining copy of judgment plus time requisite for obtaining copy of the decree must be excluded.—Overlapping periods, however, to be subtracted from total—Expiry of limitation period prescribed by Sch. 1, Limitation Act before application for decree is immaterial: 7 N. L. R. 67, Overruled.

Where a party applies for a copy of the judgment alone and sometimes later applies for a copy of the decree, the time required for obtaining the copy of the judgment plus the time requisite for obtaining a copy of the decree should be excluded, provided that days on which both copies were being prepared cannot be doubly excluded, from the computation of the period of limitation. It is immaterial whether the period of limitation prescribed in Sch. 1 to the Limitation Act had expired when a copy of the decree was applied for: A. I. R. 1924 Bom. 425; A. I. R. 1925 All. 436; 33 Mad. 256, 21 C. W. N. 217; A. I. R. 1926 Lah. 529; 18 O. C. 74; A. I. R. 1924 Pat. 113; A. I. R. 1921 Sind. 42; A. I. R. 1929 Nag. 264 and A. I. R. 1928 Nag. 131, Rel. on; A. I. R. 1928 P. C. 103, Ref; 7 N. L. R. 67=10 I. C. 866, Overruled. [P 116 C 2]

Abdul Razak and W. B. Pendarkar—for Appellant.

M. R. Indurkar—for Respondent.

Order of Reference.

Macnair, Offg. J. C.—The lower appellate Court rejected the appeal on the ground that it was barred by time. The decree of the lower Court was passed on 20th July 1928. The appellant applied for a copy of the judgment alone on 24th July and obtained the copy on 1st September. On 3rd September 1928 he applied for a copy of the decree which he obtained on 12th October 1928. The appeal was filed on 17th October 1928. The appeal was then in time if the time required for obtaining a copy of the judgment only plus the time required for obtaining a copy of the decree can be allowed to the appellant. It is, however, not contested that the time required for obtaining copies of both documents is approximately the same as the time required for obtaining a copy of the judgment, and if the time allowed

to the appellant is restricted to the time required for obtaining copies of the necessary documents, the appeal must be rejected as barred by time unless the appellant can show that there was sufficient cause for the delay.

In *Parashram v. Likhan* (1) it was held that if a copy of the judgment alone is first applied for it will be necessary for the appellant to explain to the satisfaction of the Court why a copy of the decree was not applied for at the same time: in the absence of a satisfactory explanation, the time taken to obtain a copy of the decree will not be excluded in computing the period of limitation prescribed for the appeal. Drake Brockman, J. C., who decided this case, subsequently held in an unreported case, *Bagma' v. Firm of Jamnadas Potdar* (2), that in such a case the time taken to obtain a copy of decree might also be excluded if both applications were filed within the period prescribed by law for appealing.

I find it difficult to follow the reason for distinguishing a case where the second application is made within the period mentioned in Sch. 1, Limitation Act. Under S. 12 of the Act the time requisite for obtaining necessary copies has to be excluded in computing the period of limitation. It cannot then be said that the period computed in accordance with this direction has expired even if the period mentioned in the schedule has expired. I think, therefore, that the latter decision throws some doubt on the correctness of the former decision. In *Sampat v. Kisan* (3), a single Judge, Kinkhede, A. J. C., took a view opposite to that taken in *Parashram v. Likhan* (1). The learned Judge relied on reported rulings of the Allahabad and Bombay High Courts and on an unreported case of this Court. His attention does not appear to have been directed to the fact that there was a reported ruling of this Court in the opposite sense. The view of Kinkhede, A. J. C., led to the admission of *First Appeal* No. 113 of 1928, *Jaigopal v. Digambar* (3) and other appeals. The recent practice of this Court is to deduct the time taken for

obtaining a copy of judgment plus the time taken in obtaining a copy of the decree.

The question is one on which there should be an authoritative ruling. An appellant should not be left in doubt regarding the time by which his appeal must be filed. The practice of this Court is opposed to the view taken in a published judgment and the Judge who delivered that judgment has subsequently taken a view which I find it difficult to reconcile with it. I consider, therefore, that the question should be considered by a Bench of three Judges. I therefore refer for the decision of that Bench the following question:

"A party to a decided suit applies for a copy of the judgment alone. Some time later, he applies for a copy of the decree. He subsequently appeals. If he is only allowed the time requisite for obtaining a copy of both judgment and decree on a single application, his appeal is barred by time. Does S. 12 authorise the exclusion from the period of limitation the time required for obtaining a copy of the judgment by an application for such copy plus the time requisite for obtaining a copy of the decree by an application for that copy?"

"Is the decision of this question affected by the fact that the period mentioned in Sch. 1, Limitation Act had expired when he applied for a copy of the decree?"

Opinion

Macnair, A. J. C. — The questions referred to this Bench are these:

"(1) A party to a decided suit applies for a copy of the judgment alone. Some time later, he applies for a copy of the decree. He subsequently appeals. If he is only allowed the time requisite for obtaining a copy of both judgment and decree on a single application, his appeal is barred by time. Does S. 12 authorise the exclusion from the period of limitation of the time required for obtaining a copy of the judgment by an application for such copy plus the time requisite for obtaining a copy of the decree by an application for that copy?"

"(2) Is the decision of this question affected by the fact that the period mentioned in Sch. 1, Lim. Act, had expired when he applied for a copy of the decree?"

They involve the interpretation of the following clauses of S. 12, Lim. Act:

"Section 12 (2): In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

Section 12 (3): Where a decree is appealed from or sought to be reviewed, the time re-

(1) [1911] 7 N. L. R. 67=10 I. C. 866.

(2) Second Appeal No. 434 of 1915 decided on 16th October 1916.

(3) A. I. R. 1929 Nag. 264.

quisite for obtaining a copy of the judgment on which it is founded shall be excluded."

If these clauses are literally construed, the result appears to be that the time requisite for obtaining a copy of the judgment plus the time requisite for obtaining a copy of the decree shall be excluded in computing the period of limitation prescribed for an appeal. But it cannot have been intended that days during which both copies were being prepared should be deducted twice. It seems certain that when application is made for both copies at the same time, the period to be excluded is only the period which elapses before both copies are given. It appears, then that when certain days have been excluded in virtue of S. 12 (3), these days are not to be reckoned as time which can be excluded under the provisions of S. 12 (2). If a copy of the judgment is obtained and then a copy of the decree is applied for, the question arises whether the time taken to obtain a copy of the decree can be considered time requisite for obtaining it. The would-be appellant might have applied for a copy of the decree when he applied for a copy of the judgment and thus have enabled the copying of the decree to proceed on days which, as they must be excluded as time requisite for obtaining a copy of the judgment, cannot be excluded as time requisite for obtaining a copy of the decree. It can then be urged with considerable force that, when consecutive applications are made, the applicant, by failing to utilize for obtaining the second copy days which could not be recognised as time requisite for obtaining it, has caused the preparation of the second copy to occupy more than was requisite.

It may, however, be argued with some force that it is not possible to state with certainty what the clauses do mean if literal construction leads to an absurdity, namely, that a deduction of two days should be allowed for each day on which both copies were under preparation; and that for this reason the clauses should be construed literally in all cases where such construction does not lead to an impossible conclusion. It can also be argued that application for copy of the judgment followed by application for copy of the decree is a proper procedure, and the time which

under this procedure is occupied in obtaining both copies may be considered time requisite for obtaining these copies, although had another and more usual procedure been adopted the time occupied would have been less.

The first question referred to this Bench, then, is not free from difficulty, and before attempting to consider the arguments on either side it is necessary to determine whether the point can be considered to be concluded by authority.

I first consider whether the practice of this Court is well defined. In *Parashram v. Likhan* (1), it was held:

"If a copy of the judgment alone is first applied for, it will be necessary for the appellant to explain to the satisfaction of the Court why a copy of the decree was not applied for at the same time; in the absence of a satisfactory explanation, the time taken to obtain a copy of the decree will not be excluded in computing the period of limitation prescribed for the appeal."

Drake-Brockman, J. C., who decided this case, subsequently held in an unreported case *Bagmal v. Firm of Jamnadas Potdar* (2) that in such a case the time taken to obtain a copy of decree might also be excluded if both applications were filed within the period prescribed by law for appealing. With the greatest respect I state my opinion that this distinction cannot be supported. Under S. 12 (2), Lim. Act, the time requisite for obtaining a copy of the decree has to be excluded and it is immaterial that the period of limitation would have expired on a certain date if no application for a copy of the judgment had been made. The ruling in *Parashram v. Likhan* (1) seems to require in all cases a negative answer to the first question referred, but, as applied in *Bagmal v. Firm of Jamnadas Potdar* (2) it permits an affirmative answer in some cases on a distinction which is difficult to follow. After the decision of the latter case this Court was left without clear authority for decision of the question.

The practice of this Court for some time subsequent to these decisions cannot be ascertained, but in recent years it appears to have been in all cases to deduct the time taken for obtaining a copy of the judgment plus the time taken for obtaining a copy of the decree. In *Ramchandra v. Mayaram* (4) it

(4) A. I. R. 1928 Nag. 131.

was held that this was the procedure laid down by S. 12, Lim. Act. In *Sam-pat v. Kisan* (3) this view was followed and several other appeals have been admitted in consequence of this view. Thus the practice of this Court accords with an affirmative answer to the first question, but is not so well defined as to preclude further investigation.

It is, however, highly desirable that unless very strong reason to the contrary exists, the procedure of this Court should be consistent with the procedure in other High Courts. Their Lordships of the Privy Council in *J. N. Surty v. T. S. Chettiar* (5) considered another question relating to the interpretation of S. 12 (2), Lim. Act. Their Lordships stated :

"Even so, however, there would be a difficulty in dealing with the grammatical construction of the words but their Lordships, if they had found a consistent course of practice, would have been disposed to accept the construction put upon them by the High Court of Rangoon. When, however, the matter comes to be examined, it is found that there have been divergencies of opinion in the several High Courts, and that the more prevalent opinion is not that which has been taken by the High Court of Rangoon."

It appears, then, that their Lordships would have accepted a certain construction if most of the High Courts had done so. As it was, they did not accept the construction. In my opinion, then I should deal with this question in a similar manner. If there is a consistent course of practice in the High Courts of this country, a question not free from difficulty regarding the construction of S. 12, Lim. Act, should be decided in accordance with that practice.

Now, it cannot be denied that there is a consistent course of practice in the High Courts of this country ; it has been held by almost every High Court that, when separate applications on different dates are made with respect to the judgment and decree, the total of the periods requisite for obtaining the copies is excluded unless the two periods overlap, in which case the overlapping period is subtracted from the total. The Indian Law Reports containing rulings to this effect :

Timappa v. Manjaya (6), *Ramzan*

(5) A. I. R. 1928 P. C. 103=5 Rang. 302=55 I. A. 161 (P. C.).

(6) A. I. R. 1924 Bom. 425=48 Bom. 433.

Bakhsh v. Muhammad Ishaq (7) and *Silamban Chetty v. Ramanadhan Chetty* (8).

Unauthorized reports indicate that a similar view has been taken in other provinces. I cite *Rajani Kanta Kapali v. Kali Mohan Das* (9), *Rajaram v. Firm Nanhe Mal Lala Mal A. I. R. 1926 Lahore 529 Din Diyal v. Rameshar* (10), *Jadu Nandan Sahay v. Hanuman Sahak* (11) and *Harjimal & Sons v. Dhanpatmal Dewanchand* (12).

We have not been referred to any report other than *Parshram v. Likhan* (1) in which the opposite view has been taken in any province. I consider therefore that the first question should be decided in the affirmative with the proviso that days on which both copies were being prepared cannot be doubly excluded from the computation, in consonance with the practice of all the High Courts of India.

The fact indicated in the second question is not material and the second question must be answered in the negative.

Jackson, A. J. C.—I agree.

Sudhedar, A. J. C.—I also agree.

R.K.

Reference answered.

(7) A. I. R. 1925 All. 436=47 All. 509.

(8) [1910] 33 Mad. 256=21 M. L. J. 152=4 I. C. 301=(1910) M. W. N. 141.

(9) [1917] 21 C. W. N. 217=38 I. C. 66.

(10) [1915] 18 O. C. 74=28 I. C. 366=20 L. J. 159.

(11) A. I. R. 1924 Patna 113.

(12) A. I. R. 1921 Sind 42=15 S. L. R. 16.

* A. I. R. 1930 Nagpur 116 Full Bench

FINDLAY, J. C., MACNAIR AND
JACKSON, A. J. CS.

Marothi—Appellant.

v.

Mt. Sona Bai and others—Respondents.

Misc. Appeal No. 49 of 1928, Decided on 18th December 1929, against decree of Addl. Dist. Judge, Chhindwara, in C. A. No. 3 of 1928, D/- 30th April 1928.

* Civil P. C., O. 21, R. 63—Executing Court deciding that property be sold subject to mortgage or lease—Decision comes within O. 21, R. 63: 22 N. L. R. 94=97 I. C. 178=A. I. R. 1926 Nag. 423, Overruled.

When a claim that attached properties should be sold as subject to a mortgage or lease has

been decided by an executing Court the provisions of O. 21, R. 63 apply to the decision: **A. I. R. 1926 Nag. 423, Overruled; A. I. R. 1922 Pat. 408, and 41 Bom. 64, Expl.; 21 Cal. 563; A. I. R. 1927, All. 593, Rel. on. [P 119 C 1]**

W. R. Puranik—for Appellant.

V. R. Dhoke and M. R. Pathak—for Respondents.

Order of Reference.

Macnair, Offg. J. C.—Certain property was attached in execution. An objection was filed on the strength of a lease executed by the judgment-debtor. The property was ordered to be sold subject to the lease rights. The suit out of which this appeal arises was instituted for a declaration that the property is liable to be attached and sold without reservation of any right in favour of defendant 1 as the lease was a fraudulent transaction.

It was urged in the lower appellate Court that such a suit did not lie. In *Govind v. Dheklu* (1). It was held that an order in an objection case allowing the claim of a mortgagee was conclusive and debarred the decree-holder purchaser from pleading that the mortgage was without consideration and was not properly attested. If this is the case, it is clear that O. 21, R. 63, Sch. 1, Civil P. C., allows the institution of a suit to establish the invalidity of a mortgage. It is not contested that the result would be the same when the objection, as in this case, refers to a lease. The judgment in *Wamandhar v. Kampta Prasad* (2) is, I find, in accordance with the head note which is as follows:

"A claim to have attached property sold as subject to a mortgage is not a claim to property made under R. 58, O. 21, but falls under R. 66, of that order, and a rejection of such a claim is not conclusive under R. 63."

After a careful perusal of this judgment it seems clear that it was not merely held that an executing Court might decline to decide whether a mortgage was valid and simply order that the alleged mortgage should be mentioned in the sale proclamation. If *Wamandhar v. Kampta Prasad* (2) is good law, it follows that the decision that a mortgage was good for the purpose of being entered in a proclamation of sale would not entitle the decree-holder to institute a suit in order to prove that the description in the proclamation of sale was incorrect.

The decision of the question whether the plaintiff was entitled to bring the suit I am considering entails a decision of the question which of the two rulings I have cited is correct. It is necessary then to refer the latter question to a Bench. I frame the question thus: When a claim that attached property should be sold as subject to a mortgage or lease has been decided by an executing Court, do the provisions of O. 21, R. 63, Sch. 1, Civil P. C., apply to the decision?

Opinion.

Macnair, A. J. C.—The facts which led to this reference are set out in the referring order. The question involves the interpretation of O. 21, Rr. 58 to 63, Sch. 1, Civil P. C. As I propose to lay stress on the fact that R. 62, like Rr. 60 and 61, gives directions regarding the disposal of a claim made under R. 58, I quote these rules omitting the proviso to, and Cl. (2) of R. 58 :

"58 (1) Where any claim is preferred to, or many objection is made to, the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit.

"59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

"60. Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

"61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

"62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

"63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the

(1) A. I. R. 1923 Nag. 282=19 N. L. R. 15.

(2) A. I. R. 1926 Nag. 423=22 N. L. R. 94.

right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

It is admitted before the Bench that, where the Court has acted under the provisions of R. 62, the decision that the property is subject to a mortgage or charge in favour of a person not in possession is conclusive, subject to the result of a suit instituted under R. 63. It is contended, however, that Rr. 58 to 62 do not provide for investigation of a claim that the property is subject to a mortgage in favour of a person who is in possession: Rule 58 provides for the investigation of a claim on the ground that the property is not liable to attachment, and a mortgagee is not entitled to argue that the property is free from liability to an attachment. In *Biswanath Patra v. Lingarai* (3), this contention was upheld; but the ruling contains little discussion and does not refer to previous decisions.

It appears clear that R. 62 refers to investigation of a claim preferred under R. 58. A mortgagee who is not in possession, then, can prefer an objection under R. 58. This makes it impossible to hold that a mortgagee in possession cannot do so: in view of the provisions of R. 62, R. 58 must be held to direct investigation of a claim on the ground that all that is liable to attachment is the property subject to a mortgage. This view was taken in *Rajaram Pandey v. Raghubansman Tewary* (4). The Judges who decided that case considered the provisions of the Civil Procedure Code, Act 10 of 1882, but these provisions are reproduced practically without alteration in the new Code. The learned Judges referred to the fact that the provision which is now R. 60 authorizes an order releasing the property, to such extent as the Court thinks fit, from attachment. They held that an order that the property would be sold subject to a mokarari lease effected the release of the property to the extent of the mokarari interest. A claim that the property should be sold subject to a mokarari lease was thus a claim that the property was not liable to attachment so far as the mokarari interest was concerned, and the provision corresponding to the present R. 58 directed investigation of

such a claim. The same view was taken in *Debi Das v. Rup Chand* (5). Ashworth, J., states at p. 910 (of 49 *All.*):

"An objection that attached property is subject to a mortgage is in effect an objection that, inasmuch as the whole bundle of rights inherent in or attached to the property are not liable to attachment or sale in execution of the decree against the judgment-debtor, the property should either be released from attachment or the attachment of the property should only be continued subject to the mortgage. It is not necessary that the objector should ask for release of the property. It is sufficient that he should ask for the continuation of the attachment being made subject to the mortgage."

It was not argued before the Bench that the ratio decidendi of *Wamandhar v. Kampta Prasad* (2), was correct. In that case Hallifax, A. J. C., held that the word "claim" in R. 58 does not include a claim of interest under a mortgage or other mere incumbrance. The reason given for this decision, if I have followed the discussion correctly, is that the Court is bound to decide whether or not any incumbrance should be entered in the proclamation of sale and any investigation into a claim that an incumbrance exists must be taken to be an investigation for this purpose. I respectfully disagree. The fact that the Court has to make an investigation in order to take action under Rs. 66, if any claim under R. 58 is made, does not show that, where such a claim is made, there is no necessity for the investigation directed by R. 58. R. 62 cannot be taken from its context and considered to be an entirely unnecessary direction concerning the procedure to be adopted in drawing up a proclamation of sale. Hallifax, A. J. C., has referred to *Ganesh Krishna v. Damoo* (6) but in that case all that was held was that the particular application with which their Lordships were dealing was not a claim under the provision of the old Code corresponding to R. 58, but was an application that the proclamation of sale should be drafted in a particular manner.

The learned Judges who decided *Ganesh Krishna v. Damoo* (6), considered that an order directing an attachment to proceed free from the mortgage claim was not an order passed under S. 282 of the old Code, corresponding to R. 62. Hallifax, A. J. C., did not refer to this opinion. This opinion does not affect

(5) A. I. R. 1927 All. 593=49 All. 903.

(6) [1917] 41 Bom. 64=36 I. C. 627=18 Bom. L. R. 782.

(3) A. I. R. 1922 Pat. 408=1 Pat. 159.

(4) [1897] 24 Cal. 563.

the decision of the case which led to the reference before the Bench and probably for this reason was not supported in argument before us. But it appears necessary to consider the correctness of the opinion before answering the question referred to the Bench. My respectful opinion is that, if a mortgagee has put forward a claim under R. 58 and the Court has rejected that claim, an order has been made against the mortgagee within the meaning of R. 63. As stated by Ashworth, J., in *Debi Das v. Maharaj Rup Chand* (5), R. 62 confers by implication a duty on the Court to settle the question, when raised of the existence of a mortgage.

I consider, therefore, that R. 58 contemplates a claim that attached property should be sold subject to a mortgage or lease. R. 60 makes provision for a proper order when it is found that the claimant is in possession under a valid mortgage or lease: and provisions of R. 63 apply to the order allowing or disallowing the claim. The answer to the question referred to the Bench is, therefore, in the affirmative.

Findlay, J. C.—I have had the advantage of perusing the opinion of Macnair, A. J. C., and I concur therein.

Jackson, A. J. C.—I agree.

R.K.

Answer in affirmative.

A. I. R. 1930 Nagpur 119

MACNAIR, OFFG. J. C. AND SUBHEDAR,
A. J. C.

Jairam—Appellant.

v.

Jankibai and others—Respondents.

Second Appeal No. 302 of 1927, Decided on 30th October 1929, from judgment of Dist. Judge, Nagpur, D/- 18th February 1927, in Civil Appeal No. 187 of 1926.

(a) C. P. Tenancy Act (1898), S. 41—Voidable mortgage with possession by tenant—Malguzar buying rights of tenant—He is entitled to possession even against mortgagee: 12 C. P. L. R. 127 and 12 C. P. L. R. 134, *Overruled*.

A malguzar who has bought up the rights of an absolute occupancy tenant is entitled to possession as against a mortgagee when the mortgage is voidable at the option of the malguzar: 12 C. P. L. R. 127 and 12 C. P. L. R. 134, *Overruled*; 12 C. P. L. R. 158, *Rel. on*,

[P 121 C 1]

(b) Civil P. C., O. 2, R. 2—Mortgage by tenant with possession—Malguzar suing mortgagee for declaring mortgage as void—Omission to sue him for possession does not

bar subsequent suit against tenant and mortgagee.

Where on the tenant mortgaging his holding to a stranger with possession the malguzar brings a suit against the mortgagee for declaring the mortgage as being void but does not sue to evict him, a subsequent suit by the malguzar against the tenant and the mortgagee for possession is not barred under O. 2, R. 2: 34 All. 172 and 16 N. L. R. 206, *Dist.*

[P 120 C 1]

K. K. Gandhe—for Appellant.

G. S. Bramharakshas—for Respondents.

Order of Reference

Macnair, Offg. J. C.—The plaintiff-respondents are the malguzars of mouza Wadgaon. Defendants 1 to 3 held a field in absolute occupancy right and on 5th February 1918, they executed a mortgage voidable as against the malguzars in favour of the defendant-appellant. The malguzars brought a suit for a declaration that the mortgage was void as against them and obtained a decree to that effect. It seems clear that, as is held in *Nakulsao v. Ramadhinsao* (1), they were entitled to sue for eviction of *Jairam*. Eviction at that time might not have been of great benefit to the malguzars as the tenants might before eviction have been put in possession by the mortgagee, or if not would probably have been reinstated in possession under the provisions of S. 41 (8), C. P. Tenancy Act of 1838. Some years later, the malguzars purchased the rights of the tenants in the field and they now sue for possession of the field. The trial Judge held that as the suit was based on the sale deed, the plaintiffs could get possession only after paying the amount due on the mortgage. In first appeal, however, it was held that as the mortgage is not binding on the plaintiffs, they were entitled to a decree for possession without payment.

In second appeal two arguments which require consideration are advanced. Other grounds of appeal are not pressed. The first is that the suit is barred by O. 2, R. 2, the cause of action, so far as *Jairam* is concerned, has not been affected by the purchase of the tenancy rights, the plaintiffs could have sued for and claimed possession at the time they asked for a declaration: they omitted without the leave of the Court to sue for a relief to which they were entitled in respect of the cause of action,

(1) [1916] 12 N. L. R. 86=34 I. C. 698.

namely that Jairam had taken a mortgage-deed and entered into possession of the field and they cannot now sue for the relief of possession.

I have not been able to discover many decisions on the general question whether or not a plaintiff, who obtains a declaratory decree, can subsequently sue for a relief to which he was entitled when he filed the former suit. In *Bande Ali v. Gokal Nisir* (2), it was held that where the former suit was dismissed on the ground that the plaintiff was not in possession, the plaintiff could bring a subsequent suit for possession. In *Deodhar v. Thakur Nihalsingh* (3), the decision was to the same effect, but stress was laid on the fact that the former suit had been dismissed on a purely technical ground. It is clear that the ratio decidendi of these cases does not entirely apply to a case in which the former suit was decreed; but, in my opinion, it is unnecessary to decide the general question which I have stated. In the first place, the cause of action in the former suit was the execution of the mortgage. It is by no means clear that the plaintiffs were bound to ask for relief arising from the connected cause of action, namely, that the mortgagee had obtained possession. In the next place, the plaintiffs are now suing for a decree for possession which will bind the mortgagors as well as the mortgagee. They could not obtain such a decree when they instituted the former suit and as pointed out, a claim for possession against the mortgagee alone might not, if decreed, have given the plaintiffs what they want, actual possession of the field. In the suit, out of which this appeal arises, it was for the defendants to assert and prove facts showing that the suit was barred. They have not done so, and did not urge before the lower appellate Court that that frame of the suit prevented them from doing so. On these grounds, therefore, I hold that the present suit is not barred by the provisions of O. 2, R. 2, Sch. 1, Civil P. C.

The next ground is based upon a ruling: *Seth Lakhmichand v. Thakur Raghuraj Singh* (4). In that case it was

(2) [1910] 54 All. 172=18 I. C. 154=9 A.L.J. 111.

(3) [1920] 16 N. L. R. 206=47 I. C. 309.

(4) [1899] 12 C. P. L. R. 127.

held that a malguzar, who knew of the mortgage-deed and purchased the rights of the mortgagors with the intention of avoiding the mortgage-deed, was attempting to commit an open fraud although the mortgage was voidable as against him. With the greatest respect I express my dissent from this proposition the mortgagee is deemed to know that the mortgage was voidable at the option of the malguzar; the malguzar could eject him and retain possession of the field if he came to terms with the tenant-mortgagor. The mortgagee takes the risk of the landlord and the tenant coming to terms and depriving him of his security and is not, in my opinion, defrauded if this occurs. Although this ruling was published when the former Tenancy Act was in force. It appears applicable to the question which I have to decide. I, therefore, refer for the decision of a Bench the following question:

"Is a malguzar who has bought up the rights of absolute occupancy tenants, entitled to possession as against a mortgagee when the mortgage is voidable at the option of the malguzar?"

If this question is decided in the negative, the decree of the trial Court must be restored. The plaintiffs have only a right of redemption. If it is decided in the affirmative, the plaintiffs are entitled to possession against the tenants by virtue of their sale-deed and against the mortgagee because they can treat him as trespasser.

Opinion

The question referred for decision to the Bench is this:

"Is a malguzar, who has bought up the right of absolute occupancy tenants, entitled to possession as against a mortgagee when the mortgage is voidable at the option of the malguzar?"

In *Seth Lakhmichand v. Thakur Raghuraj Singh* (4), this question is decided in the negative. The ratio decidendi was as follows: The malguzar had a right to take over the holding at a price to be fixed by the Deputy Commissioner because no notice of the mortgage had been given to him. Had he so taken it over, the mortgagee would have had a charge on the purchase money. The malguzar, however, chose to purchase the holding and to pay the whole price to the tenant, and so allow him to obtain possession from the mortgagee without affording the mortgagee an op-

portunity to recover his debt from the purchase price would be to allow him to commit an open fraud.

The same Judge, Obbard, Offg. J. C., came to the same decision in *Bhagwangir v. Narain Babajee* (5). The learned Judge there stated:

"A surrender by a tenant to the malguzar is absolutely void against previous alienations where the alienation be properly or improperly made. It is a voluntary alienation which is always regarded as fraudulent against bona fide purchasers for consideration."

In *Saiyad Noor v. Ramji Patil* (6), Ismay, J. C., expressed his disagreement with the view taken in these cases, making specific reference to *Bhagwangir v. Narain Babajee* (5). It was pointed out that this view was in direct conflict with the decision in *Diwan Maharajsha v. Abheram Gujar* (7).

In our opinion the view taken by Ismay, J. C., is correct. If a mortgagee takes a mortgage in circumstances which under the law allow a malguzar to avoid it, he does so at his own risk. The Tenancy Acts of 1883-1898 expressly provided that certain transfers should be voidable at the instance of the landlord. This provision gave a malguzar the power to eject the transferee unless he was holding as a licensee of the tenant. There was no fraud in the malguzar exercising the power which was given to him by law. The giving of power to avoid a transfer would be meaningless unless the malguzar could clothe himself with the rights of the tenant and then proceed to eject the mortgagee. We, therefore, answer the question in the affirmative.

P.N./R.K.

Reference answered.

(5) [1899] 12 C. P. L. R. 134.

(6) [1899] 12 C. P. L. R. 158.

(7) [1898] 11 C. P. L. R. 5.

A. J. R. 1930 Nagpur 121

SUBHEDAR, A. J. C.

Hakimia—Applicant.

v.

J. C. Gammon—Non-Applicant.

Civil Revn. No. 18-B of 1929, Decided on 1st March 1929, from decree of Sm. C. C. Judge, Akola, D/- 31st October 1927, in Sm. C. Suit No. 884 of 1927.

Limitation Act, S. 5—Wilful putting off appeal to last date when unexpected contingency prevents appellant from filing appeal—Extension cannot be granted.

An appellant who wilfully leaves the preparation and presentation of his appeal to the

last day of the period of limitation prescribed therefor, is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing his appeal within time : 12 N. L. R. 171, Foll. [P 121 C 2, P 122 C 1]

M. R. Bobde—for Applicant.

Order.—This application for revision of the decree of the Small Cause Court, Akola, has been filed four days beyond the period settled by the practice of this Court, for filing civil revision. The delay is sought to be explained for reasons disclosed in the affidavit of the applicant and which, briefly stated, are that he was suddenly attacked by asthma and had to leave Akola on 20th December 1928 for Delhi, that he was detained at the latter place for treatment and returned back to Akola on 10th January 1929, that on the 11th idem he went to his pleader, Mr. Gupta, and received certified copies of the judgment and decree of the lower Court which the pleader had kept ready, and that he came down to Nagpur immediately on the 12th idem and filed the application for revision on the same day. The applicant prays that under the circumstances stated above the delay be condoned because it was unavoidable.

I, however, find myself unable to accept the suggestion that the delay was unavoidable. The decree of the lower Court was passed on 31st October 1928, and the application for copies was put in, apparently by his pleader, on 3rd November and the certified copy was delivered to him as far back as 26th idem. The applicant has not explained why he took no steps between 26th November till 20th December when he had to leave Akola for Delhi. The delay in the presentation of this application could very easily have been avoided if steps had been taken by the applicant to file the same before the applicant was attacked with serious illness which may have incapacitated him later from taking any action in the matter in time. The learned advocate for the applicant states that from the very beginning the applicant had intended to come down here for filing the revision in the first week of January but that he was prevented from doing so on account of his sudden illness. But as laid down in *Kedarnath v. Zumberlal* (1) an appellant, who wilfully leaves the preparation and presentation

(1) [1916] 12 N. L. R. 171=37 I. C. 503.

of his appeal to the last day of the period of limitation prescribed therefor, is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing the appeal within time.

I, therefore, decline to condone the delay and dismiss the application for revision as filed beyond time.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Nagpur 122

SUBHEDAR, A. J. C.

Punjaji—Applicant.

v.

Jairam and others—Non-Applicants.

Civil Revn. No. 293-B of 1928, Decided on 29th April 1929, from order of Second First Class Sub-Judge, Akola, D/- 29th September 1928.

Civil P. C., S. 2 (2) — Decision finally determining rights of parties — No formal decree—It is still decree and as such appealable.

If a decision really determines the rights of the parties fully and finally, it is in the eye of the law a decree and as such appealable even though the Court giving the decision has not formally embodied its result in the form of a decree: 20 C. L. J. 476 and A. I. R. 1923 Cal 308, *Foll.* A. I. R. 1921 Nag. 108 *Rel. on*; 37 Bom. 480; 28 Bom. 331, *not Foll.* [P 123 C 2]

M. B. Niyogi and G. G. Hatwalne — for Applicant.

Y. R. Dongre — for Non-Applicants.

Judgment.—The facts necessary for the disposal of this application for revision are these; Mt. Zagai was the paternal grandmother of defendant 1 Jairam. On 15th February 1906 she had executed a mortgage of a field in favour of one Udebhan who in Civil Suit No. 678 of 1910, having secured a final decree for sale on the basis of the said mortgage got the field sold in execution of the decree and one Shankar purchased it. By successive transfers the field ultimately came in possession of defendants 2 to 5.

After attaining majority defendant 1 filed Suit No. 122 of 1927 against defendant 2 to 5 for possession of the aforesaid field on the ground that his grandmother had no right to mortgage it and that the decree obtained on the basis of that mortgage and the subsequent sales were not binding on him. The plaintiff in the present suit had supplied funds to defendant 1 for the purpose of that litigation and in considera-

tion thereof defendant 1 had given an agreement to the plaintiff, the principal terms whereof were that defendant 1 would not compromise that suit with defendants 2 to 5, and that when the suit was successful he would convey the field in dispute to the plaintiff for Rs. 100. In default of his carrying out the terms of the agreement defendant 1 had agreed to pay to the plaintiff Rs. 1,000 by way of damages.

The present suit, out of which this application for revision arises, was filed by the plaintiff in the Court of the Subordinate Judge, First Class, No. 2, Akola, to recover Rs. 1,300 as damages from the defendants on the allegation that contrary to the terms of the agreement these defendants had compromised the Suit No. 132 of 1927 and caused him loss of the field which was worth Rs. 1,200. The plaintiff also claimed a charge upon the field for the amount claimed and costs of the suit.

Defendants 2 to 5 resisted the plaintiff's claim on the ground that on the facts alleged the plaintiff had no cause of action against them. Upon the pleadings the following preliminary issues were settled for trial:

(i) Whether the plaintiff has any cause of action in this suit against any of the defendants?

(ii) Whether the plaintiff's suit for damages is maintainable to any extent in this Court?

The lower Court held that as defendants 2 to 5 were not parties to the agreement executed by defendant 1 in plaintiff's favour on the basis of which the present suit was brought, and even assuming that these defendants had knowledge of the said agreement and compromised the suit they were in no way liable to the plaintiff's claim and it, therefore, held that as against these defendants "the plaintiff's suit should fail." It further held that the suit was maintainable against defendant 1 only "for reasonable compensation for work done and the costs incurred" by the plaintiff in Suit No. 132 of 1927.

The plaintiff has filed the present application for revision of the aforesaid findings of the lower Court on the following grounds:

(1) "That in view of the allegations in the pleadings and the relief claimed by the plain-

tiff the defendants 2 to 5 could be impleaded as defendants in the suit.

(2) That the lower Court is wrong in holding that there is no cause whatsoever against defendants 2 to 5.

(3) That the view of law and the reasoning adopted by the lower Court is not sound.

(4) That in the absence of any specific issue the discussion of the lower Court regarding champertous or invalid transactions was quite irrelevant."

On behalf of defendants 2 to 5 a preliminary objection has been raised that the present application is not maintainable against that part of the lower Court's order which relates to the finding that these defendants are not liable in any way to the plaintiff's claim. It is argued that the order sought to be revised is, in the eye of the law, a decree coming within the definition of that term as given in S. 2 (2), Civil P. C., for the reason that :

"it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

It is, therefore, contended that so far as the said order has resulted in the virtual discharge of defendants 2 to 5 from the suit, the aggrieved plaintiff should have preferred an appeal against it to the proper Court instead of coming up to this Court to have it revised under S. 115, Civil P. C. It is also contended that the order complained of is "a rejection of the plaint" so far as these defendants are concerned and comes within the purview of the definition of decree and should, therefore, have been appealed against.

The learned advocate for the applicant very candidly conceded that so far as defendants 2 to 5 are concerned, the finding of the lower Court on the first preliminary issue undoubtedly conclusively determines the rights of the parties to all the matters in controversy in the suit and it is, therefore, fully covered by the definition of a decree. It was, however, contended on the authority of *Vamanacharya v. Govind*, A. I. R. 1924 Bom. 33, *Sakharam v. Sadashiv Balshet* (1) and *Kaluram Pirchand v. Gangaram Sakharam* (2), that because no decree was formally drawn up by the lower Court as a result of its finding, the applicant was precluded from preferring an appeal under S. 96, Civil P. C.

(1) [1913] 37 Bom. 480=19 I. C. 894=15 Bom. L. R. 382.

(2) [1914] 53 Bom. 331=23 I. C. 605=16 Bom. L. R. 67.

which alone gives the aggrieved party a right of appeal. According to the view taken by the Bombay High Court in the above cases the drawing up of the decree or the omission to do so must be taken as conclusive on the question whether the Court has in fact passed or not passed a decree, and that where no formal decree has been drawn up no appeal could be brought under Ss. 96 or 97, Civil P. C.

On the contrary the view of the Calcutta High Court is that if a decision really determines the rights of the parties fully and finally, it is in the eye of the law a decree and as such appealable even though the Court giving the decision has not formally embodied its result in the form of a decree : *Kamini Debi v. Promotho Nath* (3), *Naimuddin v. Imani Mondal*, A. I. R. 1923 Cal. 308. The Calcutta view has been followed by this Court in *Pandurang v. Gayabai* (4), where it is laid down that :

"a finding, unless it operates in the eye of the law as a decree, will not be a decree merely because the Judge chooses to make use of a printed form entirely inapplicable to that finding";

and that :

"conversely, the absence of a formal decree will not make an adjudication any the less a decree, if in point of law the adjudication operates as a decree."

Following the view of the Calcutta High Court and this Court, I hold that the applicant in this case should have preferred an appeal to the proper Court against that part of the order which decided that defendants 2 to 5 were not liable to his claim. The present application for revision is, therefore, entirely misconceived and cannot be entertained. So far as the finding on the second issue is concerned, the applicant has no case in revision either. He will have his remedy of attacking that finding by way of appeal when the case is finally decided as between himself and defendant 1.

The applicant's learned advocate has, at the close of the arguments, filed a petition praying that the application for revision filed in this Court, if held untenable, be returned to him to be presented as an appeal to the District Judge, Akola, to which Court the appeal lay from the decision of the lower Court.

(3) [1914] 20 C. L. J. 476=27 I. C. 317=19 C. W. N. 755.

(4) A. I. R. 1921 Nag. 108=17 N. L. R. 66.

No precedent has been cited in support of his prayer, but under the peculiar circumstances of the case, I order that the certified copy of the order of the lower Court filed in this Court be returned to the applicant to enable him to file the same with the memorandum of appeal that he may choose to file in the Court of the District Judge, Akola. It will be open to the District Judge, Akola, to determine for himself whether the time spent in this Court in the prosecution of this application should or should not be allowed to the applicant under S. 14, Lim. Act. The result is that the application for revision fails and is dismissed with costs. Pleader's fee Rs. 25.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 124

KINKHEDE AND STAPLES, A. J. CS.

Mt. Goura—Appellant.

v.

Shriram—Respondent.

Second Appeal No. 619 of 1926, Decided on 9th February 1929, against appellate decree of Dist. Judge, Chhindwara, D/- 29th September 1926.

(a) C. P. Tenancy Act (1 of 1920), S. 5—If nearest heir fails to take up tenancy landlord is entitled to re-enter.

In the case of an absolute occupancy tenant if the nearest heir fails to take up the tenancy the malguzar thereupon is entitled to re-enter and the whole line of more remote heirs need not be exhausted before the malguzar can claim to come in : 2 C. P. L. R. 6; 16 C. P. L. R. 55 and 2 N. L. R. 101, *Ref.* [P 126 C 1]

(b) C. P. Tenancy Act (1 of 1920), S. 1—Absolute occupancy right is tenant right.

The inevitable consequence of placing the holder of an absolute occupancy right in the category of a "tenant" is to make his enjoyment of the tenant right subject to the acceptance by him of the responsibilities attaching to that right in so far as they may be incidental to his position as such tenant towards his landlord under the general law which must govern the relations of landlord and tenant: 6 N. L. R. 6, *Ref.* [P 127 C 1]

(c) Landlord and Tenant—Ejectment—Suit for—If interest of landlord as paramount owner jeopardised by wrongful entry of trespasser landlord can sue independently of tenant.

Where a defendant to a landlord's suit for ejectment does not claim to hold the land as a transferee from or even as a licensee under, the tenant lawfully entitled to possess the land but claims adversely to him and where the person in whom the right to the tenancy lawfully vests for the time being, does not acquiesce in such possession, or support it, he is

liable under law to be ejected by the landlord as a trespasser, quite independently of the tenant, if it be shown that his interest as landlord and paramount owner is, or is likely to be, jeopardised by such wrongful entry of the trespasser into possession; the very continuance of the trespass on the land against his will, i. e., after he has signified his intention to treat him as a trespasser, ought to give the landlord a right to institute a suit for ejectment : 1 N. Nag. L. R. 124; A. I. R. 1922 Nag. 216, *Ref.* [P 128 C 2]

M. B. Niyogi and V. R. Dhoke—for Appellant.

B. K. Bose and M. R. Bobde—for Respondent.

Order of Reference.

Findlay, J. C.—An interesting and important question relating to the Tenancy Law of these provinces arises in the present case. The present long drawn out litigation is concerned with a suit to recover possession of absolute occupancy and occupancy fields described in para. 2 of the plaint. The original male-holder was one Govinda, as shown in the genealogical table contained in the judgment dated 22nd March 1926, of the Subordinate Judge, First Class, Chhindwara. After Govind's death, his mother Mt. Hiria succeeded to the property and remained in possession until 1920.

I may say here that we are only now concerned with the absolute occupancy fields. Defendant 1, Mt. Goura, is the sister of the deceased Govinda, while defendant 2 Jairam is Goura's son. After Hiria's death, they remained in possession of the property, and the malguzar plaintiff sued for their ejectment on the ground that they were not the next reversioners of Govinda on the death of Hiria. Hallifax, A. J. C., in *Mt. Goura v. Shriram* (1), remanded the case for retrial for reasons which are clear from his judgment, and, in para. 7 thereof, the following dictum appears:

"The decision that the malguzar can eject Jairam because there are nearer heirs than Jairam in existence will be seen to be impossible if it is considered what the decision would have been if a nearer heir than Jairam but not the nearest, had taken possession and Jairam had sued to eject him: the malguzar is merely the last reversioner and comes after Jairam."

Superficially, the dictum would seem to imply the success of the appellants in this appeal, but both the lower Courts have, in their subsequent judgments, advanced reasons why the view

(1) A. I. R. 1926 Nag. 265.

in question should not be regarded as necessarily binding on them.

An interesting and able argument has been advanced by the counsel on either side in this Court on the question involved. On behalf of the appellants it has been urged that an absolute occupancy tenant occupies a quasi proprietary position: cf. *Ragho v. Sadoo* (2). It has been suggested, therefore, that an absolute occupancy tenant is practically recognized as the proprietor of his land; that, therefore, the landlord cannot come in until the whole line of heirs is exhausted and that, until the latter eventuality happens, the malguzar's right cannot arise.

On behalf of the respondent it has been urged that the nearest heir Bhagchand is still alive; that he had not claimed the tenancy, that the nearer heir excludes the more remote and that, therefore, succession cannot open afresh again in favour of a more remote heir. It would certainly, from one point of view, seem anomalous that, if Bhagchand had entered on the tenancy and had then proceeded to attempt to transfer his right therein in any manner not provided for in S. 6, sub-S. (1), C. P. Tenancy Act, 1920, under such circumstances, the present respondent would have been entitled to come in, as laid down in the subsequent subsections. It must not be forgotten, moreover, that the malguzar is in a wholly different position from the reversioner who has, at the moment, no interest and who may never succeed. The landlord has, from the first, a potential and an actual proprietary interest in the land in question, and it is possible, from this point of view, to argue that the landlord's right to re-enter at once arises. I find it difficult, however, to believe that Hallifax, A. J. C., in the remarks he made in para. 7 of his judgment referred to, meant to go the length that the language used might superficially imply, for, if that had been so, it is difficult to understand that he should have remanded the case. Obviously, if that had been his final conclusion, the plaintiff's suit should have been dismissed forthwith.

I, therefore, refer to a Bench consisting of J. C. and First A. J. C., the following question:

"In the case of an absolute occupancy tenant

if the nearest heir fails to take up the tenancy is the malguzar thereupon entitled to re-enter, or must the whole line of more remote heirs be exhausted before the malguzar can claim to come in?"

Opinion.

Kinkhede, A. J. C.--The question noted below, which is a mixed question of the Tenancy Law relating to an absolute occupancy holding and Hindu Law, has been referred to a Bench for decision by an order of reference dated 10th October 1928. It runs as follows:

"In the case of an absolute occupancy tenant if the nearest heir fails to take up the tenancy, is the malguzar thereupon entitled to re-enter or must the whole line of more remote heirs be exhausted before the malguzar can claim to come in?"

A few undisputed facts need be stated in order to understand the real position of the parties in this litigation which gave rise to this reference. The plaintiff-respondent is the malguzar of the village in which one Govinda held some land in absolute occupancy tenant right; he died an unmarried minor in 1900, and left behind him Mt. Hiria his own mother and Mt. Godha his stepmother. The present defendant-appellants are respectively, Mt. Godha's daughter and daughter's son and thus became the step-sister and stepsister's son of the last propōitus Govinda. Out of them the appellant Jairam is a bhinna gotra sapinda or a bandhu of Govinda. The absolute occupancy tenant right devolved according to the Tenancy Law in force in 1900 on his mother: Mt. Hiria who was entitled to succeed to him, under his personal law, namely, the Hindu Law, to the exclusion of his stepmother. Mt. Ghodha, stepsister Goura and stepsister's son Jairam. Thus Mt. Ghodha died in 1915 without inheriting any tenant right from her stepson and consequently transmitted no tenant right to the defendants.

Mt. Hiria died in June 1920 and as a necessary consequence thereof Mt. Hiria's life-estate in the absolute occupancy tenant right of her son came to an end with her death. The absolute occupancy tenant right which was in her hands, for the time being, devolved on Bhagchand who has been found by the Courts below to be the nearest sapinda of Govinda, under the provisions of the new Tenancy Act of 1920 which has not abrogated the rule of Hindu Law that "to the nearest sapinda the inheri-

tance next belongs." The appellant Jairam, who was admittedly a bhinna gotra sapinda could, under the Hindu Law, lay no claim to the absolute occupancy tenant right of Govinda in front of the sagotra sapinda of the propositus. But ever since Mt. Hiria's death, the appellants have managed to hold exclusive possession of the land in dispute in their own right and adversely to Bhagchand, and the latter having been excluded from possession and enjoyment of the right which devolved on him, for more than two years from the date of exclusion, must be held to have lost his remedy of a suit to recover possession of the holding from the present defendant-appellants, in view of S. 104 of the new Tenancy Act of 1920 read with Art. 1, Sch. 2 of the said Act.

Taking advantage of the situation thus brought by the failure on Bhagchand's part to take up the tenancy which devolved on him, the plaintiff-respondent commenced the present suit to eject the defendants as trespassers from the land in suit on 3rd January 1924. The defendant-appellants have contested the plaintiff's right to sue on several grounds, but the defence failed in the Courts below. Hence they came up in second appeal. The question on which the decision of this second appeal hinges, and which is referred to the Bench, is whether the failure of the nearest heir of an absolute occupancy tenant to take up the tenancy gives the landlord a right of immediate re-entry into possession, or he must wait until the whole line of the more remote heirs is exhausted.

My answer to the first part of the question is in the affirmative and that to the second is in the negative. My reasons are as follows:

Halsbury's Laws of England, Vol. 18, para. 767, has the following statement of law on the point of the relation of landlord and tenant and how it is created or arises:

"For the full establishment of the relation of landlord and tenant it is necessary that the tenant should enter on the property: until entry he has no estate, but only a right of entry which is known as an *inter esse termini*."

Paragraph 860 of the same volume also contains the following statement of the law on the question of entry under lease:

"In order to secure the full legal benefit of the lease, the lessee must perfect his title by entry. Until then he has no estate in the land, but only a right, which is known as an *inter esse termini*. The right is assignable, and it can be released by the lessee to the lessor."

The lessee may perfect the lease by entry at any time during the term, and this is not prevented by the death of the lessor. If the lessee dies before entry, entry may be made by his personal representatives or his assigns."

The above quotations will show that a lessee's entry on the property is of the essence for the establishment of the relation of landlord and tenant and for entitling the latter to the full legal benefit of the lease. It, therefore, follows that the lessee has to take up the tenancy by entry into possession.

The same principle must also apply where the lessee's interest devolves on his death upon his heir. It is in consonance with this principle that it was ruled in *Bukharia v. Jugal Kishore* (3), that a person on whom the tenant right devolves on succession, has to enter upon the land, in other words, he has to take up the tenancy. The C. P. Tenancy Act defines "a tenant" as a person who holds land of another. Therefore, in order that the heir may become a tenant under his landlord, he must have the estate in the land and not merely a right *inter esse termini*. He must hold the land of the landlord. The aforesaid case also points out that under the Tenancy Act a tenant right is to devolve as if it were land; but the person on whom it devolves has, whether he be a minor or not, certain things to perform as a condition of his tenancy, and if he is a minor, someone must take up the holding on his behalf. If the holding is unoccupied, the tenancy will not be preserved for a minor merely because being a minor he was unable to occupy it or pay rent.

The principle on which this case proceeds, is in my opinion sufficiently wide so as to apply to all tenancies in general without distinction. I see nothing in the C. P. Tenancy Law relating to absolute occupancy holding which militates against it. The case *Mt. Janki Bai v. Mt. Bana Bai* (4), also follows the same principle. It makes the position still clearer by holding further that the person upon whom the right devolves is

(3) [1887] 2 C. P. L. R. 6.

(4) [1902] 16 C. P. L. R. 55.

not bound to accept the tenancy but if he does accept it he must do so subject to its burdens. The principle underlying in *Bukharia v. Jugal Kishore* (3), was quoted with approval in *Kisan v. Raghunath* (5), and acted upon so as to hold one coheir bound by an ejectment decree passed in a suit brought solely against his coheir, on the ground that the latter alone had taken up the tenancy. The following observations occurring at p. 103 will bear this out:

"It seems to me that tenants must together with the rights which they enjoy accept the responsibilities attaching to those rights.

If a coheir neglects to have his name entered in the jamabandis, if he takes no ostensible part in the cultivation of the holding and if his very existence is not brought to the knowledge of the landlord, he cannot be heard to complain if an order for ejectment or an order for sale of the holding is passed behind his back."

So, an acceptance of the tenancy by the heir to whom the same comes by descent is absolutely necessary for the establishment of the relationship of landlord and tenant between him and the landlord even under the C. P. Tenancy Act. The appellants rely upon the case of *Ragho v. Sadoo* (2), as laying down a different rule for an absolute occupancy tenant in view of the history of the acquisition or creation of that right as given therein. The view that the right of an absolute occupancy tenant is a proprietary right and not a tenant right cannot in my opinion be sustained in view of the repeated legislation which classified the holder of that right in the category of a "tenant" as defined in the Tenancy Act, and not of a "proprietor" in the sense in which that word is used in the Land Revenue Act or under general law governing rights of proprietorship or ownership. The inevitable consequence of thus placing the holder of an absolute occupancy right in the category of a "tenant" is to make his enjoyment of the tenant right subject to the acceptance by him of the responsibilities attaching to that right in so far as they may be incidental to his possession as such tenant towards his landlord under the general law which must govern the relations of landlord and tenant. The failure, therefore, on the part of Bhagchand to take up the absolute occupancy tenancy in this case when it devolved

on him on Mt. Hiria's death in 1920, prevented the coming into being of the relationship of landlord and tenant as such between them. This left intact the landlord's right to eject the defendants as trespassers on the holding, as will be seen from the following discussion of the legal principles.

The next question is what is the effect of a failure to discharge the responsibility which the law imposes on a person inheriting a tenant right or in whom the tenant right vests for the time being, of entering into possession of the tenancy. If one person is in actual occupation of land and another person who is entitled to the possession enters on the land, the entry vests the possession in the person entitled, and makes the other person a trespasser. Possession acquired by such an entry is called constructive possession as by virtue of such entry the person entitled is deemed to have been in possession from the time when his right of entry accrued and to remain in possession although he does not continue in actual possession: see Halsbury's Laws of England, Vol. 27, para. 1500. A person having the right to the possession of land acquires by entry the lawful possession of it, and may maintain trespass against any person who being in possession at the time of entry wrongfully continues in the land. A trespass is an injury to a possessory right, and the proper plaintiff in an action of trespass to land is the person who is in actual or constructive possession: see Halsbury's Laws of England, Vol. 27, para. 1498. The underlying principle seems to be that if land is in the possession of a tenant, the tenant and not the landlord is the proper plaintiff to sue for trespass committed in respect of the land.

The application of these principles to the proved facts of this case gives rise to the conclusion (and I think it is the only conclusion deducible) that Bhagchand, on whom the right to possess the land had descended, having failed to enter, had not acquired any lawful possession over it as a tenant of the holding, which acquisition alone would have precluded the plaintiff from exercising his right, as the paramount owner, to eject the defendants, who were trespassers on Bhagchand's lesser interest as a tenant. Bhagchand, after the lapse of

(5) [1906] 2 N. L. R. 101.

the two years' limitation prescribed by the Tenancy Law, made it impossible for himself to sue to eject the defendants as trespassers, or, in other words, to maintain action of trespass in his own right against them. The position brought about by this inaction is practically in the nature of a dead-lock. The land is usurped by persons who are not the nearest heirs. The nearest heir has made it impossible for himself to sue to eject them. The landlord's rent remains unrealized, and a trespasser cultivates the land and enjoys the produce. He cannot accept rent at the hands of the cultivators without prejudicing his own interests as landlord because if he were to accept any rent from the trespassers in possession that would give rise to the inference that either the old tenancy continued, or, a new tenancy was created in their favour, and that their trespass was condoned. To allow such a state of things to happen is to put premium on trespass, encourage lawlessness on the part of the remoter heirs and even enable them to force themselves on the landlord against his will, and thus bring about a dead-lock in the beneficial enjoyment of the rights of the landlord or the proprietor of a village. Where the landlord's rights thus stand in jeopardy, by reason of the lawless action of a trespasser the law cannot be so unreasonable as to deny him the right to sue to put an end to such a dead-lock by ejecting the trespasser.

A landlord does not as such take a tenancy holding, by succession or inheritance from the tenant; he is the paramount owner, and as such he is the person in whom the ultimate residue or reversion, if I may call it, vests. He is, therefore, interested in seeing that his larger interest, as the ultimate owner, and landlord for the time being, in land owned by him, but which is styled a tenancy holding, is not jeopardised by any acts of trespass or depredations by wrongdoers who squat on it. I think, it is one of the elementary principles of law that a landlord is entitled to see that the smaller interest of a tenant, whether carved out of his larger interest by contract, or, secured by the statute, while it subsists and is capable of devolution and lawful enjoyment, is enjoyed, by none but the person, in whom the tenant right vests for the time being, or

to whom, the tenancy law of the province entitles the tenant to transfer it without reference to the landlord, consistently with the personal law of the original tenant. This principle ought to hold good even where the tenancy is taken up once but the tenant is subsequently neglectful of his rights and the trespasser inducts himself into possession by reason of such negligence.

This is the principle on which this Court's decisions in *Sahasram v. Sheonath* (6) and *Allibhai v. Shamrao* (7), proceed. I think the proposition of law laid down in them holds good and applies fully to the facts of this case. It, therefore, follows that where a defendant to a landlord's suit for ejectment, does not claim to hold the land as a transferee from, or even as a licensee under, the tenant lawfully entitled to possess the land, but claims adversely to him, and where the person in whom the right to the tenancy lawfully vests for the time being, does not acquiesce in such possession, or support it, he is liable under law to be ejected by the landlord as a trespasser, quite independently of the tenant, if it be shown that his interest as landlord and paramount owner is, or is likely to be jeopardised by such wrongful entry of the trespasser into possession; the very continuance of the trespass on the land against his will, i.e., after he has signified his intention to treat him as a trespasser, ought to give the landlord a right to institute a suit for ejectment.

The failure on the part of Bhagchand to take up the tenancy, which devolved on him by succession, within a reasonable time, was, in itself, sufficient to give the plaintiffs a cause of action to sue for ejecting the defendants as trespassers. The fact that, Bhagchand remained inactive or was indifferent in regard to matter of maintaining an action of trespass against the defendants, for two years, and thus lost his remedy of a suit to recover possession, furnished an additional link to the plaintiff's cause of action which was otherwise complete. I am also of opinion that even apart from these failures on the part of Bhagchand the landlord had an independent right to maintain a suit in ejectment against a trespasser.

(6) [1915] 11 N. L. R. 124=31 I. C. 303.

(7) A. I. R. 1922 Nag. 216=18 N. L. R. 82.

The plaintiff could not be nonsuited on the mere ground that the defendant Jairam happens to be a bhinna gotra sapinda, or a more remote heir of Govinda, the propositus. The vesting of the tenancy in Bhagchand made him a fresh stock of descent for purposes of succession. I do not know if the defendants or any of them would be entitled to succeed him in case of his death. The defendants could not thus by their very act of trespass, give themselves the legal estate in the land as against the landlord, nor could the tenant right be made thereby to vest in them, or, in any of them. Much less can, the mere fact that defendant Jairam is a bhinna gotra sapinda of the last male-holder of the absolute occupancy tenant right be a good defence to the landlord's action in ejectment. The defendants were rightly regarded and ejected as trespassers upon the land.

In the view I take of the general law governing the relation of landlord and tenant, which, in my opinion, does not militate against the provisions of the special local tenancy law, it appears unnecessary for me to go into the difficult question as to whether, and, if so, how far S. 28, Lim. Act, might extinguish Bhagchand's tenancy. It is also unnecessary to consider the further aspect of the question whether the extinction would enure for the plaintiff's benefit, and enlarge his rights as landlord by giving him a right of re-entry on the land or how far with a combination of the doctrines of extinction underlying that section and of escheat, his right as a landlord would gain further strength for the purpose of ejecting a trespasser from his own land on the ground that a subordinate tenure, which had been created, has vanished.

My answer to the reference, therefore is that the mere fact that one of the defendants is a remoter heir of the propositus is no valid defence to the landlord's suit for ejectment against them. Basing as the plaintiff did his cause of action upon the failure of Bhagchand to take up the tenancy, in his capacity of the nearest heir of the last absolute occupancy tenant Govinda, he was entitled to re-enter on the land as against the trespassers, and that it was not necessary for him to wait until the whole line of remoter heirs was exhausted.

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Staples, A. J. C.—I approve of the opinion recorded by Kinkhede, A. J. C. I think the landlord has a right to eject the defendants in the case.

v.B./R.K. *Reference answered.*

A. I. R. 1930 Nagpur 129

MACNAIR, OFFG. J. C.

Mohammad Khan—Defendant—Appellant.

Mt. Fatma Bai—Plaintiff—Respondent.

Second Appeal No. 426 of 1929. Decided on 11 October 1929, from order of Addl. District Judge, Nagpur, D/- 18th February 1929, in Misc. Judicial Case No. 16 of 1929.

Limitation Act, S. 12—According to practice of Nagpur High Court copying time begins to run from date on which correct information is supplied.

According to practice of Nagpur High Court in the case of an application for copy of the judgment and decree, time begins to run not from the date on which application compliance with which owing to wrong information given in it, is impossible is made but from the date on which correct information is supplied: S. A. No. 227 of 1929 of Nagpur, and Misc. Judicial Case No. 25 of 1928 of Nagpur, Rel. on. S. A. No. 573 of 1928 of Nagpur, Ref. . . [P 129 C 2]

W. B. Pendharkar—for Appellant.

Order.—Mohammad Khan filed an appeal in the Court of the Additional District Judge, Nagpur: this appeal was dismissed on the ground that it was barred by time and that the appellant was not entitled to any extension of the period of limitation under S. 5, Limitation Act. In second appeal it is urged that the appeal was not time barred. Mohammad Khan applied for a copy of the judgment and decree of the first Court on 11th August 1928 and was told to appear on 18th August 1928. On 13th August 1928 it was found that the information given in the application was wrong: no steps for the preparation of the copy were taken until 18th August 1928 when the appellant appeared and furnished the required information. What is urged before is that the interval, 11th August 1928 to 18th August 1928, or at least the interval 13th August 1928 to 18th August 1928 should be held part of the time requisite for obtaining the copy.

It is the practice of this Court that copying time begins to run from the date on which correct information is supplied. This has been so held in *Ashroba*

v. *Bajirao* (1) and in *Madhorao v. Collector* (2) If an opposite view were held, it would be possible for the appellant to delay filing an appeal by putting in application for copies, compliance with which was not possible.

I am referred to a decision of Findlay, J. C., in *Rajaram v. Dayaram*. (3) The decision in that case appears to be based on the consideration that the applicant should have been informed by the copying department that his application was incorrect but was not so informed. There is no considered finding that the time necessary for obtaining copy begins to run when an application, compliance with which is impossible, is made. I therefore hold that time did not commence to run till 18th August 1929.

I have next to consider whether the appeal should be admitted after the period of limitation on the ground that any act of the copying department prevented the appellant from filing the appeal within time. It was not the duty of the copying department, when on 13th August 1928 the application was found to be incorrect, to give any notice to the applicant who was expected to appear within a few days. The failure of the applicant to furnish correct information in his application then had the natural result that copying time did not commence till 18th August 1928. Again had the copying staff acted improperly it would still be necessary for the appellant to show that their action prevented the filing of an appeal in time. The applicant received the copy in ample time to enable him to appeal: probably he was careless and thought that the time for copying would be allowed from the day on which he first presented his application. It is admitted that if the time for copying began to run from 18th August 1928 the appeal is barred by time. I hold therefore that the appeal was rightly dismissed. The second appeal is therefore dismissed.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 130

SUBHEDAR, A. J. C.

Abdulla—Appellant.

v.

Ambadas—Respondent.

Second Appeal No. 240-B of 1927, Decided on 28th March 1929, from decree of Addl. Dist. Judge, Akola, D/- 10th February 1927, in Civil Appeal No. 262 of 1926.

(a) Evidence Act, S. 91—Provisions of S. 91 are not applicable to permission granted under C. P. Municipal Act, S. 114.

The provisions of S. 91 are not applicable to permission granted by municipality under S. 114 for connecting the private drain with the municipal drain. [P 132 C 1]

(b) Tort—Negligence—Contributory—Suit by *P* against *D* to restrain from discharging filthy water into kachcha drain passing in front of *P*'s house—*D* using the drain with permission of municipality—Nuisance due mainly to contributory negligence of municipality in not making pucca drain and in not cleaning existing one—*P* is not entitled to relief claimed.

Where *P* sues *D* claiming injunction against him to restrain him from discharging filthy and waste water from his house into kachcha drain passing in front of *P*'s house, he is not entitled to the relief claimed where *D* uses the kachcha drain belonging to the municipality with its permission and the nuisance is due mainly to the contributory negligence of the Municipal Committee in not making a pucca drain or asking *P* to do it in front of his house or at least in not cleaning the existing one with the result that the water flowing into it stagnated in front of *P*'s house: 42 *Mad.* 703, *Dist.* [P 132 C 1]

G. G. Hatvalne—for Appellant.

D. T. Mangalmurti—for Respondent.

Judgment.—The following rough sketch showing the situation of the houses of the parties in the town of Akola will facilitate the comprehension of the present controversy :

(*Vide p. 131 for the sketch.*)

The plaintiffs instituted the suit, out of which this second appeal arose, claiming injunction against the defendants to restrain them from discharging filthy and waste water from their houses and latrines into a kachcha drain, which passed in front of the houses of the parties alongside the public road. It was alleged that this foul water stagnated in front of the plaintiffs' house and caused nuisance to the plaintiffs.

The defence was that the kachcha drain belonged to the Municipal Committee and was used with its permission by the defendants to discharge their waste water into it, and that if the dirty

(1) Second Appeal No. 227 of 1929.

(2) Misc. Judicial Cases No. 25 of 1923 decided on 17th April 1929

(3) Second Appeal No. 573 of 1923.

water of the nali stagnated in front of the plaintiffs' house it was because the Municipal Committee or the plaintiffs did not take care to clean that portion of it which lay in front of the plaintiffs' house. It was denied that fetid refuse from the latrines flowed into this nali and that the stagnated water caused any nuisance to the plaintiffs.

In dismissing the plaintiffs' suit the trial Court recorded the following findings :

(a) that the water from the defendants' houses that flowed in the nali was not the foul water from the latrine but other kind of waste water which was, however, not uncontaminated :

(b) that this water did stagnate in front of the plaintiffs' house and caused nuisance ;

(c) that the plaintiffs were guilty of contributory negligence because they did not build the nali in front of their house pucca and that neither they nor the Municipal Committee cared to have

on various grounds some of which are identical with those taken in this second appeal, but their application for review was rejected. The case for the appellants was very ably and vehemently argued by Mr. G. G. Hatvalne, pleader, but after giving my best consideration to the case, I do not see my way to interfere with the concurrent decision of the two lower Courts. It was argued that the absence of pleadings and an issue on the point whether the Municipal Committee authorized the defendants to construct the pucca nali in front of their houses and connect it with the drains inside their premises so as to allow filthy water to flow into the former has very seriously prejudiced the plaintiffs. In my opinion this complaint is not justified. For the reasons given by the learned Additional District Judge in his order rejecting the review and with which I fully agree, it is clear that the point was specifically raised in the pleadings by the defendants and denied

Public Road

| Plaintiff's house | Umarkhan's house | Road | Bismilla's house | Lane | Defendant 1's house | Defendant 2's house |
|-------------------|------------------|------|------------------|-------|---------------------|---------------------|
| | 19' | 22' | 42' | 8'-6" | 46' | 33' |

this portion of the nali cleaned so as to allow the stagnant water to flow down ;

(d) that the defendants have not exceeded the reasonable user of their own property and caused any nuisance to the plaintiffs directly ;

(e) that the defendants had a right to discharge this dirty water in the public drain because they were permitted to do so by the Municipal Committee which allowed them to construct pucca nali in front of their houses ; and

(f) that the defendants did not, for the above reasons, commit any actionable wrong.

Against the dismissal of their suit the plaintiffs appealed to the Court of the Additional District Judge, Akola, who concurred in all the aforesaid findings of the trial Court and dismissed the appeal. Before filing their second appeal here, the plaintiffs had filed an application in the lower appellate Court for a review of the judgment appealed against

by the plaintiffs in their rejoinder, and evidence was also called by the parties on this question and a definite finding given by the trial Court in the last portion of his judgment in these words :

" The Municipal Committee by asking defendants to construct a pucca street drain and allowing defendant 2 to join the same for the discharging of surplus water permitted the defendants to discharge water. Thus the question of a right in a tax-payer to discharge his water in the street gutter is immaterial for the case."

It is significant to note that the plaintiffs, who were the appellants, did not put forward this complaint in any of their grounds of appeal before the lower appellate Court, and it is, therefore, clear that their complaint is not well-founded. It was next contended that since S. 114, Municipal Act requires permission for connecting a private drain with the municipal drain to be in writing and since no such written permission has been placed on the record by the

defendants such a permission could not legally be proved by the evidence of D. W. No. 3, Mr. Pande, the Sanitary Inspector. This argument is indeed very plausible but has no force for the simple reason that the provisions of S. 91, Evidence Act are not shown to be applicable to such permissions granted by the Municipal Committee. It was also argued that the evidence of the Sanitary Inspector should not be believed when there are documents on the record to show that the Municipal Committee itself took exception to the connecting of the defendants' private drain to the public drain. But an effectual reply to this argument is that the Courts below have chosen to accept one set of evidence in preference to another on a simple question of fact and it is outside the scope of this Court, sitting in second appeal, to interfere in such matters.

The most important contention advanced on behalf of the plaintiffs was that assuming that the Municipal Committee gave the permission to the defendants to connect their private drain to the public drain, still on the principle laid down in the case of *Rama Rao v. Martha Sequeira* (1) the plaintiffs had a good cause of action against the defendants for the removal of the nuisance on the findings that the defendants' action was causing serious discomfort to them. But the facts of the present case as found by the Courts below are different from those of the *Madras* case relied on by the learned pleader for the appellants. In the present case, the nuisance is due mainly to the negligence of the Municipal Committee in not making a pucca drain or asking the plaintiffs to do it in front of the plaintiffs' house, or at any rate not cleaning the existing one with the result that the water flowing into it stagnates in front of the plaintiffs' house. Para. 5 of the lower appellate Court's judgment discusses the evidence which shows that water from houses other than the defendants' houses also flows into the municipal drain and contributes to the nuisance complained of by the plaintiffs. In the *Madras* case the nuisance was from the very inception of the construction of the latrine in question and there were

no contributory causes for it as is found in the present case and for this reason the principles laid down in the *Madras* case are inapplicable for the decision of the present case. Concurring with both the Courts below that the plaintiffs have failed to establish a cause of action against the defendants, I uphold the decree appealed against and dismiss this appeal with all costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 132

SUBHEDAR, A. J. C.

Vithal—Appellant.

v.

Laxman—Respondent.

Second Appeal No. 298-B of 1926, Decided on 11th April 1929, from decree of First Addl. Dist. Judge, Akola, D/- 28th April 1926, in Civil Appeal No. 63 of 1926.

Grant — Jagir — Managing jagirdar has right to collect available profits and sue co-jagirdars for unpaid rents of home farm.

A managing jagirdar has a right to collect the available profits and to make them available for distribution among the co-jagirdars and consequently a suit for the assessed rental of a home farm due from co-jagirdar is maintainable : 13 C. P. L. R. 48, Ref. [P 133 C 1]

W. R. Puranik and *W. B. Pendharkar*—for Appellant.

M. R. Bobde and *M. B. Niyogi*—for Respondent.

Judgment.—The parties to the suit out of which this second appeal arises are jagirdars of Babhulgaon in the Akola District. The plaintiff, as the manager of the jagir, brought an action for the recovery of the rent of two fields which were once part of the jagir home farm but which had been allotted to the defendant in 1902 at the family partition and have since been in his exclusive possession. In addition to the rent for the years 1922-23, 1923-24 and 1924-25 the plaintiff also claimed interest at two per cent per mensem on the arrears and costs of the suit. The defendant admitted that the assessed rental was due from him but pleaded that as the practice in the past was to adjust this amount in the accounts of the general profits of the jagir the suit filed was not maintainable. The trial Court decreed the claim in full but the lower appellate Court modified the decree by disallowing interest and costs.

(1) [1919] 42 Mad. 796=27 M. L. J. 224=10 M. L. W. 147=52 I. C. 921=(1919) M. W. N. 618.

Both sides are apparently dissatisfied by the decree of the lower appellate Court because the plaintiff has filed this second appeal claiming interest and costs, while the defendant has filed cross-objections claiming dismissal of the suit.

On the facts found, viz., that the practice pleaded by the defendant was proved, that the defendants' notice inviting plaintiff's attention to this practice was served on the plaintiff a day before he filed the present suit and that no demand was ever made by the plaintiff, I think the lower appellate Court was perfectly justified in holding that the plaintiff was not entitled to the interest claimed and costs of the suit. It is likewise clear that the defendant's objection that the suit was maintainable was untenable. My attention was drawn to the case of *Lachmanram v. Munnalal* (1) which states that in the absence of any agreement between the parties a suit by a lambardar against a cosharer to recover compensation for the use and occupation of sir and khudkasht land is not maintainable. It was argued that the principle of the above case applied to the present one and that the plaintiff's suit should be dismissed. But inasmuch as the liability to pay the assessed revenue was not denied in the pleadings in the present case the suit was rightly held to be maintainable, because the plaintiff as the managing jagirdar had a right to collect all the available profits to make them available for distribution among the co-jagirdars.

The appeal and the cross-objection fail and are dismissed, each party bearing his own costs in this Court. Costs incurred in the lower Courts will be paid as directed by the lower appellate Court.

V.B./R.K.

Appeal dismissed.

(1) [1900] 13 C.P.L.R. 48.

A. I. R. 1930 Nagpur 133

SUBHEDAR, A. J. C.

Mangilal—Applicant.

v.

Laxmanappa—Non-Applicant.

Civil Revn. No. 68-B of 1928, Decided on 30th April 1929, from judgment of Second Class Sub-Judge, Murtizapur, D/- 17th December 1927, in Civil Suit No. 381 of 1927.

Civil P. C., S. 24 (4)—Transfer of suit from Small Cause Court to regular side—Judge trying suit has same powers in awarding compensation as Small Cause Court—Civil P. C., S. 35-A.

Where a suit instituted in the Court of Small Cause is subsequently transferred to the regular side, the Judge trying the suit must be deemed to have the same powers as the Small Cause Court possessed in the matter of awarding compensation under S. 35-A. [P 134 C 1]

G. G. Hatvalne—for Applicant.

W. R. Puranik—for Non-Applicant.

Order.—The plaintiff had filed a suit against the defendant in the Small Cause Court, Akola, to recover Rs. 514-14-0 on the allegation that the defendant had purchased cotton from him but had not paid the price. The suit was subsequently transferred to the Court of the Second Class Sub-Judge, Murtizapur. The defence was that the full price was paid soon after the cotton was purchased and that the plaintiff by false representation had bolted away with the Tak patti which the defendant had tendered for plaintiff's signature. The defendant also claimed compensation under S. 35-A, Civil P. C., against the plaintiff for having brought the suit.

After an elaborate trial the learned Sub-Judge found the defendant's version to be true and dismissed the plaintiff's suit holding it to be absolutely false and frivolous and awarded Rs. 100 as compensation to the defendant.

The plaintiff comes up here in revision and it is contended on his behalf that the lower Court has not taken a correct view of the evidence on record and wrongly held the plaintiff's claim as false. I have read the evidence myself and am satisfied that the lower Court has properly appreciated it and arrived at a correct finding. The facts and circumstances proved in the case warrant the conclusion that the plaintiff's claim was false and frivolous and I see no reason to differ from the lower Court in its estimate of compensation that has been awarded to the defendant under S. 35-A, Civil P. C.

It was also argued that the lower Court had no jurisdiction to pass an order for compensation under S. 35-A, Civil P. C., because the jurisdiction conferred upon it for trying Small Cause Court cases was only up to Rs. 200 and it was not empowered by the High Court to award compensation under the said section. This contention is, how-

ever, groundless. The suit was for the recovery of Rs. 514-14-0 and was originally instituted in the Small Cause Court, Akola, subsequently it was transferred to the Subordinate Judge, Second Class, Murtizapur and was tried as an ordinary Civil Suit. But under S. 24 (4), Civil P. C., the lower Court was for the purposes of this suit a Court of Small Causes and must be deemed to have possessed the same powers as the Court from which the suit was transferred to it possessed. If the Small Cause Court, Akola, had the power, as it admittedly had, to pass an order under S. 35-A, Civil P. C., the lower Court must be deemed to have had a like power. I overrule this objection. The application for revision fails and is dismissed with costs. Pleader's fee Rs. 25. P.N./R.K. *Revision dismissed.*

A. I. R. 1930 Nagpur 134 (1)

JACKSON, A. J. C.

Nathmal Marwari—Decree-holder—Appellant.

v.

Chainsingh—Judgment-debtor — Respondents.

Second Appeal No. 251-B of 1928, Decided on 4th October 1929, from decree of Dist. Judge, Akola, D/- 1st August 1928, in Civil Appeal No. 75 of 1928.

(a) Pensions Act (23 of 1871), S. 3—Sum payable by Government as compensation for forest dues is grant of money or land revenue and not pension—Civil P. C. S. 60.

A sum payable by the Government as compensation for forest dues in respect of Jagir land taken over by the Government for forest purposes is not a pension but a grant of money or land revenue and is not exempted from attachment. [P 134 C 2]

(b) Civil P. C., S. 53—Decree simply against son but really against assets of father deceased—Compensation in respect of forest dues becoming due after death of father received by son can be attached.

Where a decree is passed simply against the son but is really against the assets of the father deceased, the compensation in respect of forest dues from Government becoming due after the death of the father and received by the son is liable to attachment in execution of the decree: 6 Mad. 1 (P.C.) Rel. on. [P 134 C 2]

W. B. Pendharkar—for Appellant.

V. R. Rajwade and *V. N. Bapat*—for Respondents.

Judgment.—The question is whether a sum payable to the respondent, a judgment-debtor, by the Government,

as compensation for forest dues in respect of jagir land taken over by the Government for forest purposes, is exempt from attachment. The learned District Judge has held that the sum is exempt from attachment under S. 11, Pensions Act, 1871. But that section only applies to pensions given for certain reasons and this sum is not paid as for any of those reasons and does not appear to be a pension, but a "grant of money or land-revenue" within the meaning of S. 3.

The respondent argues that, the decree not being against him personally but only against the assets of his father in his hand, the sum now in dispute is not liable to attachment under the decree. It is true that the decree is simply against the respondent; but the judgement shows that the decree was to be against the assets of the deceased. The sum in dispute became due for payment after the death of the respondent's father; but I am of opinion that it is still liable to attachment under the appellant's decree. In *Muttayan Chettair v. Sangili Vira Pandit* (1) it was held that the defendant was liable for the debts due from his father to the extent of the assets which descended to him from his father, and all the right and interest of the defendant in the zamindari which descended to him from his father became asset in his hand. In the present case, the right to receive payment annually in respect of land taken over by Government is clearly part of the right and interest in the family estate that descended to the respondent from his father. I allow the appeal and set aside the order of the lower appellate Court. I fix pleader's fee at Rs. 25/4.

P.N./R.K.

Appeal allowed.

(1) [1883] 6 Mad 1=9 I. A. 128=4 Sar. 354 (P.C.).

A. I. R. 1930 Nagpur 134 (2)

SUBHEDAR, A. J. C.

Ramprasad—Applicant.

v.

Kodu—Non-Applicant.

Civil Revn. No. 156 of 1928, Decided on 2nd March 1929, from order of 2nd Class Sub-Judge, Gadawara, D/- 5th March 1928, in Execution Case No. 641 of 1927.

(a) Civil P. C., O. 21, R. 92—Decree-holder absent on date of confirmation of sale—It is doubtful if his presence is necessary and sale must be confirmed under O. 21, R. 92, even in his absence.

On the date fixed for confirmation of sale held in execution of a decree, it is doubtful if the presence of decree-holder is necessary. The Court cannot therefore dismiss the case simply for the reason that the decree-holder does not appear. He must confirm the sale under the mandatory provisions of O. 21, R. 92. [P 135 C1]

(b) Civil P. C., S. 151—Execution—Application dismissed for default can be restored.

The Court has inherent powers under S. 151 to restore to the file the application for execution dismissed for default : *A. I. R. 1922 Nag. 267, Foll.* [P 135 C 2]

J. Sen—for Applicant.

Order.—This application for revision is directed against the order dated 5th March 1928, passed by the Subordinate Judge, Second Class, Gadawara, in execution case No. 641 of 1927, refusing to restore the execution proceedings to file which were dismissed by him for default of the applicant decree-holder on 17th December 1927. Briefly stated the facts are that in civil suit No. 615 of 1915 the applicant had obtained a decree against the non-applicant for Rs. 75 as far back as 12th November 1915, and that in spite of repeated applications for execution, satisfaction of the decree could not be obtained by the applicant. The last application for execution was made by the applicant on 1st April 1927, and a one-third share of a house belonging to the non-applicant was attached and sold for Rs. 76, the applicant himself being the purchaser. The order sheet of the execution proceedings, dated 12th November 1927 shows that the case was adjourned to 17th December for confirmation of the aforesaid sale on which date the decree-holder not appearing the case was dismissed for default. I doubt if the applicant's presence on that day was at all necessary. The Court was bound to confirm the sale under the mandatory provisions of O. 21, R. 92, Civil P. C.

However, on 23rd December 1927, an application was put in for restoration of the execution proceedings to file on the ground that the applicant was prevented from appearing in Court on 17th December as he was required to attend upon his sister-in-law who was then lying dangerously ill and who in

fact died the next day. It was also stated that since 12 years had elapsed from the date of the passing of the decree the applicant's remedy for taking out fresh execution was barred. An affidavit in support of the allegations in the position was also filed by the applicant. The learned Subordinate Judge did not disbelieve the affidavit and he also conceded that under the authority of *Harlal v. Narayan* (1) the Court had inherent powers under S. 151, Civil P. C., to restore to the file the application for execution which was dismissed for default.

In spite of this the learned Subordinate Judge refused to set aside the dismissal for the reason that the applicant being a resident of Gadawara should have been more careful and should have engaged a pleader to put in appearance on his behalf. The lower Court further thinks that because the applicant's sister-in-law did not die on 17th December 1927 but died the next day, the applicant could very well have attended the Court at the hearing. The learned Judge also finds fault with applicant's negligence in not putting in his application for restoration the very next day after the dismissal of the case.

I regret I am unable to appreciate the reasons summarized above which led the learned Subordinate Judge to pass the order of refusal to set aside the dismissal which is the subject of this revision application. On the facts disclosed in the application and the affidavit which have not been disbelieved by the lower Court, this was pre-eminently a case in which the inherent powers vested in a Court for doing bare justice to the parties should have been exercised in favour of the applicant. I, therefore, accept the revision and setting aside the orders of the lower Court dated 5th March 1928 and 17th December 1927, restore the execution proceedings to file and direct the lower Court to proceed to dispose of them according to law. The non-applicant will pay the applicant's costs in this Court. Pleader's fee Rs. 15.

P.N./R.K.

Revision allowed.

(1) *A. I. R. 1922 Nag. 267=18 N. L. R. 152.*

A. I. R. 1930 Nagpur 136

SUBHEDAR, A. J. C.

Pochanna—Applicant.

v.

Pochanna—Non-Applicant.

Civil Revn. Appln. No. 164-B of 1928, Decided on 25th April 1929, from decree of Second Class Sub-Judge, Basim, D/-10th April 1928, in Civil Suit No. 241 of 1926.

(a) Civil P. C., S. 115—Court having jurisdiction to decide matter before it—High Court will not interfere with its order however wrong it may be on facts or law.

Simply because the Court takes a wrong view on the facts or law, it cannot be said to have acted with any illegality in the exercise of its jurisdiction. Thus if the Court has jurisdiction to decide the matter before it the High Court will not interfere with its order however wrong it may be on facts or law.

[P 136 C 2]

(b) Civil P. C., O. 34, Rr. 2 and 3—In Central Provinces notice of application to make preliminary decree final must be given—If one is given and not served, Court has jurisdiction to set aside final decree passed *ex parte*.

So far as the Courts in the Central Provinces are concerned the practice of issuing notice of an application for making the preliminary mortgage decree final is firmly established and if a notice is issued and not served it will surely give the Courts jurisdiction to set aside an *ex parte* decree on the basis of non-service of such a notice.

[P 136 C 2]

G. G. Hatvalne—for Applicant.

S. A. Ghadgay—for Non-Applicant.

Order.—The preliminary decree for foreclosure passed against the defendant on 11th October 1926 was made final on 6th August 1928 *ex parte* the defendant. On 30th February 1927, the defendant filed an application for setting it aside on the ground that he was not served with notice. The plaintiff alleged that though the defendant was present in village he had refused to accept the notice and the application was barred by time as the defendant had knowledge of the proceeding of the final decree on 28th June 1927. The lower Court held that the defendant was not served and that the application was in time because the defendant came to know of the passing of the final decree only on 29th September 1927, when the warrant for possession came to be executed. It, therefore, set aside the *ex parte* decree.

Against this order the plaintiff has come up to this Court in revision on the following grounds :

“1. That the lower Court having found that the plea of the defendant was absolutely false was wrong in holding that the defendant did not refuse the notice on 28th June 1927.

2. That the lower Court had clearly misapprehended and misconceived the evidence of the plaintiff's witnesses and has come to a wrong conclusion.

3. That the lower Court ought to have held the defendant's application for setting aside the final decree beyond time.

4. That the lower Court has wrongly exercised its jurisdiction in setting aside the final decree.

5. That the order of the lower Court has caused much loss and trouble to the plaintiff.

I will deal with the fourth ground first of all, because if it is held that the lower Court did not exercise its jurisdiction wrongly then this Court will not interfere with the order of the lower Court howsoever wrong it may be on facts or law. It cannot be denied that the lower Court had jurisdiction to entertain the application for setting aside the *ex parte* decree. It had therefore power to decide the matter before it rightly or wrongly. Simply because it may have taken a wrong view of the facts or law it cannot be said to have acted with any illegality in the exercise of its jurisdiction. It was next argued that since the issue of a notice a final decree is not obligatory under law, the fact that one was issued in this case and not served would not confer any right on the defendant to have the *ex parte* decree set aside and the lower Court therefore exceeded its jurisdiction in setting aside the final *ex parte* decree. But so far as the Courts in these provinces are concerned the practice of issuing notice is firmly established and if a notice is issued and not served it will surely give the Courts jurisdiction to set aside an *ex parte* decree on the basis of non-service of such a notice. I hold, therefore that there was no illegal exercise of its jurisdiction by the lower Court.

The first two grounds merely challenge pure findings of fact which cannot be revised by this Court under S. 115, Civil P. C. The third ground is misconceived. The lower Court has clearly found that the defendant came to know of the passing of the *ex parte* decree one day prior to the presentation of the application for setting it aside and,

therefore, the application was clearly within time.

The application for revision fails and is dismissed, pleaders fee Rs. 15.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 137

SUBHEDAR, A. J. C.

Chandulal—Defendant—Applicant.

v.

Motilal Bansilal—Plaintiff—Non-Ap-
plicant.

Civil Revn. No. 256-B of 1928, De-
cided on 15th April 1929, against order
of Sm. C. C. Judge, Akola, D/- 23rd
April 1928, in Sm. C. S. No. 3960 of
1927.

Provincial Small Cause Courts Act, S. 17
—Proviso to S. 17 is mandatory.

Proviso to S. 17 is mandatory and it is a
condition precedent to the granting of a new
trial that the applicant should, when present-
ing the application, either deposit the amount
or give security : 2 N. L. R. 23 ; 18 Cal. 83 ;
28 All. 470 ; 33 All. 425 ; 9 Bom. L. R. 883 ;
43 Mad. 579 (F.B.) ; 1 P. L. T. 323 ; 62 I. C.
103 ; A. I. R. 1922 U. B. 18, *Rel. on.*

[P 137 C 2]

G. G. Hatwalne—for Appellant.

G. V. Deshmukh—for Respondent.

Order.—The plaintiff had sued the
defendant in the Small Cause Court,
Akola, to recover damage in respect of
forcible removal by the defendant of
certain bags of grain belonging to the
plaintiff. The defendant through Mr.
Chandorkar, pleader, contested the suit.
On 20th January 1928 certain witnesses
were examined including the defendant
and case was adjourned to 17th April
1928 at the request of the parties for
further evidence. On 17th April 1928
the defendant and his pleader both re-
mained absent and for want of time the
case could not be taken up that day or
even the next day. On 19th April 1928
plaintiff examined 3 witnesses and
closed the case, the defendant remain-
ing absent. Judgment was delivered on
23rd April 1928 against the defendant.
On 25th April 1928 the defendant filed
an application for setting aside the ex
parte decree, but gave the necessary
security required by S. 17, Provincial
Small Cause Courts Act on 23rd June
1928 when notice was issued to the
plaintiff to show cause against the ap-
plication.

In showing cause the plaintiff's
pleader stated that inasmuch as no secu-

rity was given by the applicant at the
time when he presented the applica-
tion, the ex parte decree could not be
set aside. It was also stated that on
the merits the application was also un-
tenable. The lower Court upheld both
the contentions of the plaintiff non-ap-
plicant and dismissed the application.
The defendant has, therefore, come up
to this Court in revision. It is con-
tended by the applicant's learned pleader
that the proviso to S. 17, Provincial
Small Cause Courts Act is directory and
the Courts have got full discretion in
allowing the security to be taken at any
time before the application is heard and
disposed of. But as far back as 1905 it
was held by this Court in *Umrao Jiwan*
v. Mannumain (1) that the aforesaid
proviso was mandatory and that it is
a condition precedent to the granting of
a new trial that the applicant should,
when presenting the application, either
deposit the amount or give security.
The same view has been followed in
Calcutta, Allahabad, Bombay, Madras,
Patna and Upper Burma : *Jogir Ahir v.*
Bishen Dayal (2) *Jagan Nath v. Chet*
Ram (3), *Chhotey Lal v. Lakhmi Chand*
Magan Lal (4), *Somabhai v. Wadilal*
(5) *Assan Mohamed Sahib v. Rahim*
Sahib (6), *Ram Charitar Ram v.*
Hakim Khan (7), *Bishun Dayal v. Sheo*
Tahal Sahu (8) and *Ram Bilas Tarbeni*
Ram v. Jai Singh (9).

It is, therefore, clear that the majority
of the High Courts take the view that
the proviso to S. 17, Provincial Small
Cause Courts Act is mandatory and
must be strictly complied with, and that
an applicant has got no option of mak-
ing the necessary deposit or giving
security at any subsequent stage of the
proceedings. The lower Court was,
therefore, right in holding that the de-
fendant's application was untenable for
the reason that he did not furnish the

(1) [1902] 2 N. L. R. 23.

(2) [1891] 18 Cal. 83.

(3) [1903] 28 All. 470 = 3 A. L. J. 318 = (1906)
A. W. N. 93.

(4) [1916] 38 All. 425 = 34 I. C. 113 = 14
A. L. J. 549.

(5) [1907] 9 Bom. L. R. 883.

(6) [1920] 43 Mad. 579 = 38 M. L. J. 539 = 11
M. L. W. 543 = 55 I. C. 977 = (1920)
M. W. N. 375 (F.B.).

(7) [1920] 1 Pat. L. T. 323 = 56 I. C. 810 =
(1920) P.H.C.C. 203.

(8) [1921] 62 I. C. 103.

(9) A. I. R. 1922 U. B. 18 = 1 U. B. R. 117.

security at the time of its presentation. On the merits too I agree with the lower Court that the applicant had failed to make out a sufficient cause for the setting aside of the ex parte decree. The application for revision, therefore, fails and is dismissed with costs. Pleader's fee Rs. 15.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 138

MACNAIR, OFFG. J. C., AND JACKSON,
A. J. C.

Atmaram Bhawant—Applicant.

v.

Collector of Nagpur—Non-Applicant.

Misc. Petn. No. 14 of 1929, Decided on 20th July 1929, from order, D/- 29th January 1929, reported in A. I. R. 1929 P. C. 92.

Civil P. C., S. 152—Appeal to Privy Council—Decree of lower appellate Court substantially altered restoring that of lower Court—Clerical error in record can only be rectified by His Majesty in Council.

Where in appeal to the Privy Council the decree of the lower appellate Court is substantially altered and that of the lower Court restored, since the decree to be executed is the decree of the Privy Council, any clerical error on the face of the record can only be corrected by His Majesty in Council: A. I. R. 1914 P. C. 65, *Ref.* [P 138 C 1]

S. A. Ghadgay—for Applicant.

Order.—The applicant desires this Court to take certain steps with reference to a decree of His Majesty in Council. On a reference made to the Additional District Judge, Nagpur, the applicant was awarded a certain sum as compensation for land acquired by Government. On appeal to this Court this sum was substantially reduced; the applicant appealed to the Privy Council and it was directed that the order of the District Judge should be restored.

The first request of the applicant is that a clerical error apparent on the face of the record may be corrected. It is clear from the opinions expressed by their Lordships of the Privy Council in *Abdul Majid v. Jawahir Lal* (1) that the only order which can now be executed is the order of His Majesty in Council; the order can then be amended only by His Majesty in Council. We add that the Solicitors of the applicant have addressed the Legal Adviser's Department of the India Office asking for a statement in writing regarding the al-

leged clerical error in order that the error should be rectified. We consider that the only course open to the applicant is the one which his Solicitors proposed to take, namely, to ask His Majesty in Council to rectify the error.

In view of certain circumstances connected with the procedure of the applicant's Solicitors we record our opinion regarding the existence of the alleged error. Notice was sent to the Collector, but he has apparently considered it unnecessary that Government should be represented. The order sheet of the Land Acquisition Officer (vide p. 6 of the paper-book) shows that the award was announced on 5th November 1919. S. 16, Land Acquisition Act lays down that the Collector may take possession of the land as soon as the award is made. The 5th November 1919, then might well be taken as the date from which interest was allowed; after that date the applicant might not be able to make any use of the land as his possession could be disturbed at any moment. Government has not chosen to oppose this application by pointing out any possible reason why interest should commence from a date subsequent to the delivery of the order; if there was any reason, it ought to have appeared in the order. We are, therefore, of opinion that 1921 was entered owing to a clerical error and that the Judge intended to enter "dated 5th November 1919."

The next request of the applicant is that an addition should be made to the order regarding costs passed by this Court on the ground that there is an accidental omission. For the reasons given above the addition cannot now be made by this Court.

We mention, however, that it is clear that costs were incurred by the appellant in the appeal with reference to the examination of witnesses; it appears that the omission to enter these costs in the record of costs incurred by the appellant was an accidental omission.

The applicant next asks that his costs of the appeal to the Privy Council incurred in the Judicial Commissioner's Court may be ascertained. He does not appear to be aware that certificate to the effect that he has incurred an expense of Rs. 1,562-7-0 in this connexion was prepared by the Registrar of this Court on 14th April 1927. If he desires

(1) A.I.R. 1914 P.C. 66=36 All. 350 (P.C.).

to challenge the completeness of this certificate, he must do so in a separate proceeding.

The last prayer of the applicant is that this Court should transmit the order of His Majesty in Council to the Court which passed the first decree with suitable directions in order that the last named Court may execute the order. We have ascertained from the applicant that he desires transmission of the order as it stands. We see no objection to this course and direct transmission of the order together with a copy of the certificate of the Registrar to which we have referred.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Nagpur 139 (1)

MACNAIR, OFFG. J. C.

Anand—Appellant.

v.

Pandurang—Respondent.

Second Appeal No. 172 of 1928 Decided on 18th April 1920 against decree of Dist. Judge, Nagpur, D/- 8th December 1927, in Civil Appeal No. 15 of 1926.

C. P. Tenancy Act (11 of 1898) Ss. 34 (5) and 35 (4)—Holding left uncultivated without payment of rent for more than two years—Holding is deemed to be surrendered—Execution of decree by malguzar by ejectment of tenant—No right of forfeiture could exist which could be waived.

Where a tenant leaves his holding uncultivated and without paying its rent for a period of more than two years his tenancy is deemed to have been surrendered under S. 35 (4). The malguzar cannot at his option treat the tenancy as still subsisting and make the tenant liable for the rent of the subsequent years. There is no right of forfeiture in such cases which the malguzar can waive and hence it cannot be urged that the malguzar by applying in execution for ejectment of the tenant waived his right of forfeiture. [P 139 C 2]

K. V. Deoskar—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—The plaintiff sued for a declaration that the defendant's occupancy tenure of certain fields has come to an end and that the defendant is not entitled to possession of these fields. There are findings of fact that the tenant left his holding uncultivated and the rent of it unpaid for a period of more than two years before the Tenancy Act of 1920 came into force.

The only point which is urged before me is that the malguzar by applying in execution for ejectment of the tenant waived his right of forfeiture. In my

opinion there was no right of forfeiture which the malguzar could waive. S. 35 (4), Ten. Act of 1898 states that the tenant in the circumstances I am considering shall be deemed to have surrendered his holding. By this provision the tenant escapes liability for rent after the time at which the surrender is deemed to have taken place. The malguzar cannot at his option treat the tenancy as still subsisting and make the tenant liable for the rent of subsequent years. He can, of course again lease the land to the tenant but it is clear that he has not done so in this case.

No other ground is urged and the appeal is dismissed. Costs on appellant.

R.K.

Appeal dismissed.

* A. I. R. 1930 Nagpur 139 (2)

SUBHEDAR, A. J. C.

Tretanath—Defendant 2—Appellant.

v.

Ajodhyaprasad and another—Plaintiff and Defendant 1—Respondents.

Second Appeal No. 551 of 1928, Decided on 28th January 1930, from decree of Dist. Judge, Raipur, D/- 4th October 1928, in Civil Appeal No. 33 of 1928.

*** (a) Transfer of Property Act, S. 68 (b)—Vendee of mortgagor cannot be made personally liable for mortgage money.**

Applying the definition of mortgagor as contained in S. 58 (a) to the same word occurring in S. 68 (b) it is clear that the purchaser from the mortgagor of the mortgaged property cannot be made personally liable for the mortgage money under the latter section: 34 *All.* 63 (*P. C.*); 28 *Mad.* 208 and 27 *M.L.J.* 494, *Dist.* [P 141 C 2]

*** (b) Mortgage—"Substituted security"—Doctrine of, enunciated.**

The rule of "substituted security" is based upon the principle that the property mortgaged has taken another shape not by the tortious action of a party who was a stranger to the original contract but by the voluntary action of the mortgagor himself as by taking another property on partition or by operation of law as in the case of (1) compensation money obtained in respect of the mortgage property under the Land Acquisition Act or (2) surplus sale proceeds of the mortgage property left over, after satisfaction of the prior mortgage debt or (2) pre-emption price obtained on sale of the mortgaged holding under the provisions of the C. P. Tenancy Act. The doctrine of "substituted security" does not extend to cases of wrongful conversion of the mortgage security by a person other than the mortgagor, though he may be an assignee of the equity of redemption: 1 *I. A.* 106 (*P.C.*) and 12 *N. L. R.* 90, *Ref.* [P 142 C 1]

* (c) Transfer of Property Act, S. 58—Contract of mortgage is essentially personal one—Assignment of equity of redemption does not create personal liability on part of assignee.

The contract of mortgage is essentially a personal one between the mortgagor and the mortgagee. The covenant to pay does not run with the land, so that the mere fact of the assignment of the equity of redemption will not create a personal liability on the part of the assignee. Again, a person who is not bound by the contract of mortgage or personally liable under it, is not bound to preserve the mortgage property. The person acquiring the equity of redemption whether by sale or adverse possession is not bound to pay Government revenue to preserve it from sale, but on the other hand he may purchase it himself at the auction sale free from the mortgage: 31 *All.* 63 (P. C.); 30 *Mad.* 67 and 39 *Mad.* 959, *Rel. on.*

[P 142 C 1]

H. S. Gour and D. N. Chowdhry—
for Appellant.

M. B. Kinkhede and K. V. Deoskar—
for Respondent.

Judgment.—The facts leading to this second appeal are shortly these. On 29th April 1920 a mortgage deed for Rs. 500 carrying interest at Rs. 2-8-0 per cent per mensem was executed by defendant 1 in favour of the plaintiff. The mortgage property consisted of a dwelling house situate at Mouza Arang, Tahsil and District Raipur. Defendant 2 purchased this house for Rs. 300 on 16th June 1930. The plaintiff alleged that in 1923 defendant 2 removed the roof and the fittings of the house and the mortgage security was thus diminished. He accordingly filed the present suit for a personal decree against defendant 2 for Rs. 1,600 due on the mortgage or in the alternative for a foreclosure decree against the mortgaged property.

Defendant 1 admitted the claim but defendant 2 denied the mortgage in suit and alleged that it was bogus, collusive and fraudulent and was executed subsequent to his own purchase but was antedated. He denied the removal of the roof and other fittings but admitted that about two years after his purchase the roof of the house had fallen down and that he had effected no repairs since.

In the elaborate judgment the trial Court found against defendant 2's contentions and passed a personal decree against him for Rs. 1,600 and costs and this was confirmed by the learned District Judge in appeal. Defendant 2 has, therefore, filed the present second appeal.

The first three grounds of appeal are

argumentative and challenge pure finding of fact concurrently arrived at by the two Courts below regarding the binding character of the plaintiff's mortgage. It was also argued that the lower appellate Court has not given any decision on issue 1 regarding the execution and the passing of the consideration under the bond sued upon. But in para. 6 of the trial Court's judgment on a review of the entire evidence adduced in the case issue 1 was decided in the affirmative and against the appellant. This finding was not expressly challenged in the grounds of appeal in the lower appellate Court and was not probably objected to at the hearing of the appeal, and therefore the lower appellate Court did not expressly consider the point. Having however, heard the learned counsel for the appellant I see no reason to differ from the finding of the trial Court that the execution and the mortgage bond and the passing of the consideration thereunder have been satisfactorily established. As to the bogus nature of the transaction the two Courts below have elaborately discussed the evidence adduced in the case and arrived at a finding adverse to the appellant. In view of the dictum laid down by their Lordships of the Privy Council in *Ramji Patel v. Kishoresingh* (1) this finding of first appellate Court upon a question of fact has now become final and cannot be challenged in second appeal.

The next point argued was that the Courts below were wrong in passing a personal decree against the appellant under S. 68 (b), T. P. Act. The section in question runs as follows:

“(a) The mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only :

(b) Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor.”

It was argued by Dr. Gour, the learned counsel for the appellant, that the word “mortgagor” in the said section is not intended to mean a subsequent purchaser of the mortgaged property and that no decree for the “mortgage money” could therefore be passed against such a person. Reliance was placed for the appellant on the case of *Jamna Das v.*

(1) A. I. R. 1929 P. C. 190=25 N. L. R. 121=56 I. A. 280 (P.C.).

Ramautar Pande (2). But the case is not a direct authority for the decision of the point in issue in the present case. That was a case in which the personal liability of a mortgagor under S. 90, T. P. Act was sought to be enforced against the purchaser of the mortgaged property and it was held that it could not be done within the wording of the said section.

On behalf of the respondent, Rao Bahadur Kinkhede, advocate, relied on two cases cited by the trial Court in para. 9 of its judgment in support of the view that the present case came within the purview of S. 68 (b), T. P. Act. But in my opinion none of these cases is in point. In the first case *Aiyappa Reddi v. Kuppusami Reddi* (3) the action was brought by a mortgagee to recover damages alleged to have been caused to him by the defendant's wrongful act in cutting down certain trees which were comprised in the mortgage security and on account of which the mortgage could not recover the whole of the mortgage debt by the sale of the residue of the mortgaged property. The defendant in this suit was merely a tenant-in-common of the mortgaged property and was in no sense a representative of the mortgagor entitled to redeem the mortgage. The suit was, moreover, not one filed to enforce a claim under S. 68 (b), T. P. Act, for the mortgage money due under the mortgage.

The second case relied on is that of *Ramakrishna Chetty v. Vivvati Chengu Aiyar* (4). The head-note of this ruling is very misleading. The facts of the case are not at all clearly stated in the judgment but from a summary thereof given by the reporter it appears that defendant 5, who was the appellant in the High Court, was the purchaser of the equity of redemption at a rent sale. He had cut and carried away trees on the mortgaged property "for the value of which he was sought to be made liable." Before suit, however, the mortgaged property had passed from his hands and he had, therefore, no right left to redeem the mortgage at the date of the suit. Whether the suit out of which the appeal arose was to enforce the mortgage

or merely to recover damages for the waste of the mortgage security committed by defendant 5, is not at all clear but from the fact that this defendant was held personally liable only for the value of the trees cut and removed by him and not for the mortgage-money, it is obvious that S. 68 (b), T. P. Act, did not come into play in the decision of this case which must be taken to have been decided under the general law of Torts.

The definition of a mortgagor is contained in S. 58 (a), T. P. Act and applying that definition to the same word occurring in S. 68 (b) of the Act it is clear that defendant 2 cannot be made personally liable for the mortgage-money under the latter section. I therefore hold that the decision of the Courts below in passing a decree for the mortgage-money against defendant 2 personally under S. 68 (b), T. P. Act are clearly wrong and should be set aside.

Rao Bahadur Kindhede also wanted to support the personal decree passed by the lower Courts against the appellant by asking me to apply to the present case the doctrine of "substituted security" as laid down by their Lordships of the Privy Council in *Bajinath Lall v. Ramodeen Chowdry* (5). His contention was that because the appellant removed the materials of the mortgaged house and converted them into money the mortgage lien fastened upon the money thus obtained by the appellant in substitution of a part of the mortgage security. The Courts below having found the existing mortgage building to be worth Rs. 500 a personal decree for the balance due on the mortgage was therefore claimed here on the basis of this argument. On the authority of *Vishwanath v. Shankerlal* (6) it was further submitted that no new cause of action arose for such a relief and the plaintiff's claim was within time under Art. 132, Sch. 1, Lim. Act.

This argument is indeed very plausible but is certainly untenable. It is clear to me that the doctrine of "substituted security" as explained by their Lordships of the Privy Council in the case cited has no application to the facts found in the present case. The rule is evidently based upon the principle that

(2) [1912] 34 All. 63=13 I. C. 304=39 I. A. 7 (P.C.).

(3) [1905] 28 Mad. 208.

(4) [1914] 27 M. L. J. 494=33 I. C. 321.

(5) 1 I. A. 106=21 W. R. 233=2 Suther 942 • Sar. 333 (P. C.)

(6) [1916] 12 N. L. R. 90=31 I. C. 704.

the property mortgaged has taken another shape not by the tortious action of a party who was a stranger to the original contract but by the voluntary action of the mortgagor himself as by taking another property on partition or by operation of law as in the case of (1) compensation money obtained in respect of the mortgage property under the Land Acquisition Act or (2) surplus sale proceeds of the mortgage property left over, after satisfaction of the prior mortgage debt or (3) pre-emption price obtained on sale of the mortgaged holding under the provisions of the C. P. Tenancy Act.

I cannot accept as correct the contention of the learned advocate for the plaintiff-respondent that a purchaser of the equity of redemption is a representative-in-interest of the mortgagor for all purposes either with reference to the original mortgage contract or in relation to the mortgaged property. The contract of mortgage is essentially a personal one between the mortgagor and the mortgagee. For instance the covenant to pay does not run with the land, so that the mere fact of the assignment of the equity of redemption will not create a personal liability on the part of the assignee: *Jamna Das v. Ram Autar Pande* (2). Again, a person who is not bound by the contract of mortgage or personally liable under it, is not bound to preserve the mortgage property. It has been held that the person acquiring the equity of redemption whether by sale or adverse possession is not bound to pay Government revenue to preserve it from sale, but on the other hand he may purchase it himself at the auction sale free from the mortgage: *Renga Srinivasa Chari v. Gnanaprakasa Mudaliar* (7) and *Punugu Subbiah v. N. Rami Reddi* (8) at pp. 963-4.

In my opinion the doctrine of substituted security does not extend to cases of wrongful conversion of the mortgage security by a person other than the mortgagor, though he may be an assignee of the equity of redemption. I therefore hold that the value of the materials of the mortgaged house tortiously removed by the appellant cannot be treated as substituted security in

his hands entitling the plaintiff mortgagee to get a personal decree against him in the present suit which is admittedly one to enforce the mortgage.

Even though a claim for damages arising out of the tortious act of a purchaser of the equity of redemption could legally be joined with a claim to enforce the mortgage which I think is doubtful the periods of limitation for these two separate causes of action will undoubtedly be different. The claim for damages arising out of Tort would be governed by Art. 48 or 49, of the Limitation Schedule, while the one to enforce the mortgage would fall under Art. 132. On plaintiff's own admission the materials of the mortgaged house were removed by the appellant in April 1923 and therefore the present suit having been filed on 29th July 1927 the plaintiff's claim for damages is clearly barred by limitation: *Tafazul Khan v. Mohamad Bakshi Khan* (9).

The result is that the decree appealed against is set aside and in lieu thereof decree for the amount claimed will be substituted in terms of O. 34, R. 2, Civil P. C., fixing the time for redemption six months hence. As the appellant has not wholly succeeded in appeal I order that each party should bear his own costs of the present appeal. The orders for costs passed by the lower Courts will not be disturbed.

V.S./R.K. *Decree modified.*

(9) [1919] 52 I. C. 360.

* A. I. R. 1930 Nagpur 142

MOHIUDDIN, A. J. C.

Jagatram—Appellant.

v.

Pitai—Respondent.

Second Appeal No. 615 of 1927, Decided on 3rd January 1930, against decree of Addl. Dist. Judge, Bilaspur, D/-12th August 1927, in Civil Appeal No. 44 of 1927.

* Limitation Act, S. 28—Expression "the right to such property" includes right to joint possession also.

The expression "the right to such property" in S. 28 includes the right to joint possession also. A person whose right to recover joint possession is extinguished under Art. 47, cannot therefore elude the operation of Art. 47 by framing his suit as one for damages of his share of the produce as the right to claim damages is not separate from the right to claim

(7) [1907] 30 Mad. 67.

(8) [1916] 39 Mad. 959=20 M. L. J. 331=33 I. C. 325=(1916) 1 M. W. N. 239.

possession or joint possession. A. I. R. 1921 Mad. 24, Rel. on. [P 143 C 2]

G. R. Deo—for Appellant.

B. G. Pandit—for Respondent.

Judgment.—This appeal arises out of a suit which the respondent Pitai had filed on 12th August 1926, against the appellant, for the recovery of his share of village profits, and for his share of the produce from 8.26 acres of khudkast land, which though sold to the respondent, remained in the possession of the appellant. The Court of first instance passed a decree for Rs. 236-4-0 on account of respondent's share of the produce for the years 1923-24, 1924-25 and 1925-26, and for Rs. 33-15-5 on account of village profits. The appellant Jagatram filed an appeal in the Court of Additional District Judge, Bilaspur and challenged the correctness of the decree of the first Court regarding Rs. 236-4-0, which was calculated on the same basis as mesne profits, for the share of the respondent in the Khudkast land. The appeal was dismissed on 12th August 1927.

The appellant had eight annas share in mouza Parsoda, out of which he sold six annas to the respondent Pitai, by means of a registered sale deed dated 13th August 1917. There was some dispute between the parties in the year 1921 about the home-farm lands which the respondent claimed on account of his purchasing six annas share in the village, and action under S. 145, Criminal P. C., was taken, at the instance of the local police, in the Court of Sub-Divisional Magistrate, Mungeli, who passed an order on 23rd February 1922 :

"concerning the home-farm lands comprised within six share of mouza Parsoda"

and declared that the appellant Jagatram was in possession of the fields and was entitled to retain such possession until ousted by due course of law. No suit for the recovery of the khudkast fields, which were comprised in the order dated 23rd February 1922 was instituted, and this suit for the recovery of mesne profits or cultivating profits or damages for the years 1923-24, 1924-25 and 1925-26 was filed on 12th August 1926.

The lower appellate Court in para. 5 of its judgment has observed that though the claim for Khas possession is barred under Art. 47, Sch. I, Lim. Act, the claim for joint possession is not barred

and therefore there is no bar to the claim for damages. The order under S. 145, Criminal P. C., was passed on 23rd February 1922, and the unsuccessful party ought to have filed a suit under Art. 47, Lim. Act, on or before 23rd February 1925 to recover the property, comprised in the order. No such suit was filed in this case, and therefore the respondent's right to possession was extinguished under S. 28, Lim. Act. On failure of the unsuccessful party to sue to get rid of the order within three years under Art. 47, Lim. Act, the person in possession acquired a title to the property under S. 28, Lim. Act. The expression "the right to such property" in S. 28, Lim. Act, as pointed out in *Atchamma v. Bapiay* (1), must include the right to joint enjoyment also. As the right to possession was extinguished, the right to claim joint possession was also gone.

The right to claim damages is not separate from the right to claim possession or joint possession and therefore the respondent had no subsisting right to claim his share of the produce of those fields, whose possession he could not recover. The respondent cannot elude the operation of Art. 47, Lim. Act, by framing his suit as one for damages of his share of the produce. Though in this case the right of the respondent was extinguished in 1925, the extinguishment takes effect retrospectively, and therefore he cannot maintain a suit for recovery of his share of the produce derived by the appellant from the land, before the extinguishment of the right. The claim is not maintainable and is accordingly dismissed. The appeal is allowed, pleader's fees Rs. 15. The respondent will get his costs on Rs. 38-15-5 in the first Court, and will pay the costs incurred by the appellant in this Court and the Courts below on Rs. 236-4-0.

P.N./R.K.

Appeal allowed.

(1) A.I.R. 1921 Mad. 24=41 Mad. 131.

A. I. R. 1930 Nagpur 143

MOHIUDDIN, A. J. C.

Bansidhar and others—Appellants.

v.

Bairagi and another—Respondents.

Second Appeal No. 229 of 1928, Decided on 23rd December 1929, against decree of Dist. Judge, Hoshangabad. D/- 31st January 1928.

(a) C. P. Tenancy Act (1920) S. 96—
"Trees."

The word "Tress" in S. 96 does not refer to palas trees only but refers to all trees on which lac can be propagated. [P 144 C 2]

(b) C. P. Tenancy Act (1920) Sch. 2, Art. 1—Trees do not constitute holding or portion of holding—Non-exercise by tenant of his right under S. 96 to propagate lac for more than two years does not extinguish it.

Trees do not constitute holding or a portion of a holding and therefore the period of limitation laid down in Art. 1 does not apply to them. Where therefore tenant does not exercise the right under S. 96 to propagate lac for more than two years and malguzar propagates lac during that period, the tenant's right is not extinguished. [P 144 C 2]

J. Sen—for Appellants.

A. V. Khare—for Respondents.

Judgment.—This appeal arises out of a suit which the plaintiffs, who are the malguzars of mouza Dangarhai had filed in the Court of Sub-Judge, First Class, Hoshangabad, against the defendants, who are the tenants of the same village, for a declaration that they have a right to propagate lac on kusum trees which stand in defendants' occupancy fields, and that the defendants have no such right. The defendants disputed the malguzars' right to grow lac on kusum trees in their holding and relied on S. 96, C. P. Tenancy Act, in support of their right. The plaintiffs also urged that the defendants' right if any, was extinguished under Art. 1, Sch. 2, Tenancy Act, because the plaintiffs were in adverse possession from 1920 upto August 1926.

The Court of first instance held that the defendants were in possession of the trees in question, that this suit for mere declaration maintainable, that S. 96, C. P. Tenancy Act applied to kusum and other trees so far as the right to propagate lac on those trees was concerned, that there was no extinction of defendants' right, and dismissed the suit. The plaintiffs had filed an appeal in the Court of District Judge, Hoshangabad, and the appeal was dismissed on 31st January 1928.

The following two grounds were presented for consideration in this Court :

"(1) That the lower appellate Court has not properly construed S. 96, C. P. Tenancy Act. That on a correct interpretation, it ought to have held that the word trees in the holding occurring in the section after Palas trees must by necessary implication mean and include only Palas trees.

"(2) That the lower appellate Court erred in

thinking that the rule limitation laid down in Art. 1, Sch. 2, was not applicable to the case."

It was argued on behalf of the appellants that the expression "trees in the holding" at the end of para. 1, S. 96, Tenancy Act, referred only to palas trees which were specified just before and in the same sentence, and was not intended to include kusum and other trees. It is quite clear from a perusal of S. 96, that by that section the tenant was given the same right in palas trees in his holding which we already had in the holding and in addition to this, the right to propagate lac on trees in the holding and to take the produce thereof was also conferred on him. The word "trees" at the end of the paragraph do not refer to palas trees only but refer to all trees on which lac can be propagated.

It was next contended that the right to grow lac on kusum trees was barred under Art. 1, Sch. 2, Tenancy Act, as the defendants did not exercise that right for more than two years, after it was conferred on them by Act 1 of 1920. Art. 1, Sch. 2, Tenancy Act, lays down a period of limitation for possession of a holding by a person claiming to be a tenant from which he has been dispossessed or excluded from possession by any person. Holding, as defined in S. 2 (4) of the Act, means a parcel of land held by a tenant of a landlord under one lease or one set of conditions; and land, as defined in sub-S. (6) of the same section, means land which is let or occupied for agricultural purposes or for purposes subservient thereto, and includes the sites of buildings appurtenant to such land. Trees do not constitute a holding or a portion of a holding, and therefore the period of limitation laid down in Art. 1, Sch. 2 will not apply to them. The malguzar cannot acquire the right of propagating lac on the trees, in the holding of a tenant, by propagating lac for more than two years on those trees. Art. 1, Sch. 2, Tenancy Act does not apply to kusum trees, and therefore the right of the defendants to propagate lac has not been extinguished. The appeal therefore fails and is dismissed with costs. Pleader's fees Rs. 50.

P.N./R.K.

Appeal dismissed.

[Handwritten signature and stamp]

A. I. R. 1930 Nagpur 145

PRIDEAUX, A. J. C.

Punamchand Amarchand Marwadi—
Appellant.

v.

*Emperor—Opposite Party.*Criminal Appeal No. 27-B of 1928,
Decided on 12th September 1928.**Criminal P. C., S. 237—Accused charged
with substantive offence only—Conviction
for abetment is legal if on facts both
charges could be sustained**

A person charged with substantive offence may be convicted of abetment although the offence of abetment was not separately charged against him provided on the facts charged the two charges, namely, the commission of the substantive offence and abetment could be framed: 23 *M. L. J.* 722, *Rel. on*; 33 *Mad.* 264 and *A. I. R.* 1927 *Cal.* 63 *cf.* [P 148 C 1]

*H. S. Gour—for Appellant.**G. P. Dick—for the Crown.*

Judgment.—In Civil Suit No. 266 of 1924 on the file of the Sub-Judge No. 2, Yeotmal, Udebhan son of Madhoji sued Mt. Tulja wife of Narayan, and Nenuram son of Jogidas Marwari, on a contract alleged to have been entered into with the plaintiff by defendant 1 for the sale of her two fields Survey Nos. 9 and 42 of mouza Kotamba. These fields were said to be inherited by the woman on the death of her mother Mt. Mukti. She was to sell for Rs. 1,100 and was alleged to have executed a souda-chitti on 24th February 1924, having received Rs. 1,000, and agreeing to execute the sale deed within a month. She failed to do so. She was said to have executed a bogus sale-deed in defendant 2's favour on 12th April 1924, of the same fields. The plaintiff sued for specific performance of the contract of sale on payment of Rs. 100, the balance of the consideration.

For defendant 1 it was contended that on the death of her father Zingu, who owned the fields Survey Nos. 42 and 9, about 27 years ago his widows Deoki and Mukti enjoyed this land till their death. Deoki sold Survey No. 42 to Narayan and Tukaram 18 years ago and Mukti, i. e., defendant 1's mother, sold Survey No. 9 to Bhagoo Bhamti about 25 years ago. Defendant 1 was the sole heir of her father Zingu on the death of his widows and defendant 2 fraudulently got a sale deed from her on 12th April 1924, without giving her any

writing about the agreement to give her Survey No. 9. One Punamchand who attested that sale deed undertook to fight out a litigation with defendant 2 and to give Survey No. 9 to defendant 1 and in order to do so he obtained thumb marks of defendant on blank papers. It was denied that defendant 1 ever entered into any contract of sale of the fields with the plaintiff or executed the souda-chitti, dated 24th February 1924 or received any consideration.

For defendant 2 it was denied that defendant 1 executed the souda-chitti. It was said to be antedated, bogus, fraudulent and fabricated after the sale-deed to defendant 2 to defraud him. Punamchand was said to have created it in the name of the plaintiff, his servant having himself attested defendant 2's sale deed. Defendant 2 further contended that he was a bona fide purchaser for value without notice of the alleged contract of sale in plaintiff's favour and that as such the contract could not be enforced as against him.

The suit was tried on the following issues:

"1 (a) Did defendant 1 agree to sell the fields in suit to plaintiff for valid consideration as per plaint?

(b) If so, did defendant 2 know of it at the date of his sale-deed?

(c) Is the transaction under the souda patrak dated 24th February 1924, a real genuine one?

"2 (a) Is the souda chitti dated 24th February 1924, antedated, bogus, fraudulent and fabricated to defraud defendant 2 as alleged?

(b) Is it obtained by one Punamchand under misrepresentation and fraud and under the circumstances alleged by defendant 1 in the plaintiff's name as alleged?

(c) Is the agreement under the souda chitthi in suit with plaintiff for an inadequate consideration as alleged?

"3 (a) Is defendant 2 a bona fide purchaser of the property from defendant 1 without notice of the alleged agreement of sale with plaintiff?

(b) If so, can the plaintiff's agreement of sale be enforced by superseding defendant 2's sale-deed in suit?

"4. Is the plaintiff's claim not maintainable for not including the relief of possession as alleged?

"5 Should the agreement of sale in suit be specifically enforced?

"6. To what relief, if any, is the plaintiff entitled?"

The Judge in his judgment, referring to the evidence adduced by the plaintiff, writes:

"It clearly reveals the fraudulent nature of the transaction embodied in the souda-patrak. It exposes Punamchand Marwari completely, though he had taken all care to screen himself

in order to finance and fight out the litigation as a third uninterested party. This he obviously did as he had attested the sale-deed in favour of defendant 2. I have carefully considered the evidence adduced to prove that the date 25th February 1924, of the death of Mukti mother of Tulja, in the register of births and deaths for Kotamba maintained at the Police Station, Babulgaon, was false and fabricated later on."

The Judge found that the fields were worth Rs. 5000 to Rs. 6000 and that the consideration of the agreement of sale was grossly inadequate. The entry of 25th February 1924, was genuine. He found on issue 1 (a) and (c) in the negative and the whole of issue 2 in the affirmative. Dealing with issue 1 (b) and issue 3 (a) and (b) the Judge found that defendant 2 was the purchaser of the fields from Tulja for value, and further that he had no notice of the alleged agreement to sell in the plaintiff's favour, and that the agreement of sale could not be specifically enforced. The plaintiff's claim was dismissed with costs. This judgment was dated 30th November 1925.

The Judge on 1st December 1925, suo motu took proceedings under S. 476, Criminal P. C., for offences under Ss. 463, 467, 471, 191 and 192 and 196, I. P. C., in respect of the souda-chitti dated 24th February 1924, filed by Udebhan, the plaintiff in Civil Suit No. 266 of 1924. Notices were issued to Udebhan, Laxman, Bahiru, Bholchand and Punamchand. Those proceedings resulted in an order dated 22nd July 1926, the Sub-Judge finding that the non-applicants committed the offences mentioned above, namely, under S. 109 read with Ss. 467 and 471, and under S. 193 read with S. 191, I. P. C., and that the non-applicant Udebhan had also committed an offence under S. 423. The Judge held that Punamchand had brought into existence a false souda chitti, and ordered the complaint against the four persons to be tried.

Punamchand, Laxman, Bahiru and Udebhan came to this Court in Civil Revisions Nos. 182-B to 185-B of 1926 against the order of the District Judge, Amraoti, who rejected an application made to him against the complaint laid. The four civil revisions were rejected here. Bholchand had died and, therefore, did not come to this Court.

The criminal case was committed to the Court of Sessions. Laxman, a plea-

der's clerk, was given a pardon and Udebhan, Bahiru and Punamchand were sent to stand their trial before the Court of Sessions. The trial resulted in the conviction of Udebhan and Bahiru under S. 467, I. P. C., they being given three months' rigorous imprisonment each, and in the conviction of Punamchand under the same section, he being sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 4,000 or in default to further rigorous imprisonment for one year. Against that conviction the present appeal has been filed.

Before entering into the legal objection raised to the appellant's conviction I will deal with the arguments advanced on the merits of the case. Much time was spent to establish the unreliability of the entries in the Kotwar's book and the police station register as regards the date of the death of Mukti, mother of Mt. Tulja. But it is unnecessary to go into this in any detail, for I agree with the opinion expressed by the trial Court in para 10 of its judgment that it would be unsafe to rely upon the entries in Exs. P-8 and P-14. And the recital in Ex. P-17 tends to show that Mt. Mukti died on 25th February 1924. But even if that has not been established, and the woman died on 22nd February, we have the approver's story that the souda chitti was not executed until the month of May 1924. The conviction really depends on the approver's statement and its corroboration in material particulars. Much of his story is admitted by the defence. Tulja seems now to have been got at, but in the civil suit it is clear that she admitted that she gave a blank paper to Punamchand with the thumb-impression on it, being told that the paper would be used to write the plaint on which the suit was intended to be brought. She denied then executing the souda-chitti in favour of Udebhan and said it was false and fraudulent. In her present statement she also states, though siding with the present appellant Punamchand, that he took her thumb-mark on four blank papers, and denies that she executed the souda-chitti. It seems to me that the story of the approver as regards the blank paper with her thumb-impression on it has been sufficiently corroborated.

There are other circumstances in the case which leave little doubt as to Punamchand's guilt. His story is that he had a ten annas eight pies share in the sale taken in the name of Nenuram, Nenuram and Pannalal owing the balance, and he has called evidence to show that this was the case, and that entries showing this transaction were entered in the books of Hiralal. This is denied by Nenuram, and Pannalal states that Punamchand had no interest in that transaction. But taking it for granted that this was the case, it does not follow that Punamchand then held the souda-chithi dated February, that year executed in the name of his servant Udebhan. And it further seems that because Nenuram and Pannalal denied Punamchand's interest in Nenuram's sale-deed that the false souda-chitthi was called into being. It is very unlikely that there should have been any sale in the name of Nenuram alone if the property could already be claimed by Punamchand from his servant Udebhan. The sale-deed itself states that the property had not been sold nor was it encumbered by Tulja. It has to be remembered that Punamchand was an attesting witness to that document, and I find it hard to believe that he would, by that attestation, agree to a sale to Nenuram alone, though he and Pannalal might have had a share in it, when in reality the property, which it is evident he was very anxious to obtain, was in his power to obtain by virtue of a civil suit in the name of the nominal transferee Udebhan. All the circumstances point to the truth of the approver's story, that Mt. Tulja was not present when the souda-chitthi was prepared and that the document was antedated.

It seems to me that it has been established that the false souda-chitthi was executed at Yeotmal and not at Kotamba. Reliance is placed on the evidence of witnesses 2, 3 and 4 for the defence who testify to the dharwar chitthi. The story of that dharwar chitthi and its assignment by Chunnilal to the appellant seems to have been carefully manufactured to meet a case like the present arising out of the transaction. I think that the approver's story is true and that the souda-chitthi is a forgery.

The charge under which the appellant has been convicted is one under S. 467,

viz., forgery of a valuable security. An elaborate legal argument has been addressed to me by the learned counsel for the appellant, contending that though his client might be guilty of an abetment of forgery he cannot be punished for the offence of forgery itself, nor can he be punished for the abetment without being charged with that specific offence; and that at least the case must go back to enable the Sessions Court to charge the accused with abetment of forgery. Now, the case is that though the appellant did not actually with his own hand scribe the false document, yet he had it made and was present when it was prepared. I am referred to the case of *Padmanabha Panji Kannaya v. Emperor* (1) and *Hulas Chand Baid v. Emperor* (2), which lays down that the effect of the recent amendment of S. 238, Criminal P. C., by the insertion of sub-S. 2-A therein, specifically mentioning the case of an "attempt" to commit an offence, is that S. 238, Criminal P. C., does not justify a conviction for abetment without a separate charge therefor, and it is argued that the defective charge cannot be changed here. But it seems to me that S. 238, Criminal P. C., provides for conviction for a minor offence where evidence is insufficient to prove a graver offence. S. 114, I. P. C., lays down that whenever any person is present when the act or offence, for which he would be punishable in consequence of the abetment, is committed, he shall be deemed to have committed such act or offence.

Section 238, Criminal P. C., expressly provides that when a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged. The test seems to me to be that all the legally necessary elements of the offence of which the accused is convicted are also necessary elements of the offence with which the accused was charged. The graver charge gives the accused notice of all the circumstances going to constitute the minor charge of which he may be convicted; and it seems to me immaterial in the present case whether the accused was tried for a substantive offence or abetment. S. 236,

(1) [1910] 33 Mad. 264=20 M. L. J. 81=5 I. C. 145=7 M. L. T. 79.

(2) A. I. R. 1927 Cal. 63.

Criminal P. C., lays down that where there is doubt as to what offence has been committed, the accused may be charged with having committed 'all or any of such offences, or he may be charged in the alternative with having committed some one of the said offences; and in which case, under S. 237, of that Code, if the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S. 236, he may be convicted of the offence which he is shown to have committed, although he was not charged with it. Sundara Aiyar, J., in *Subbaya v. Emperor* (3), after referring to *Padmanabha Panji Kannaya v. Emperor* (1), the case relied on by the appellant states:

"I do not think that the learned Judges, who decided the case: *Padmanabha Panji Kannaya v. Emperor* (1), intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. The question is what were the facts charged? If on those facts two charges could be framed namely, the commission of the principal offence, and the abetment, then by virtue of provisions of S. 237, the accused may be convicted of the offence of the abetment though it was not charged separately against him. The Act lays down no specific provision with respect to the question decided here. But the principle is laid down in Ss. 226 and 237."

In the present case, not only did the accused instigate the forgery of the souda-chitthi but he was present when the forgery was made, and it seems to me that the appellant is the real person, and the actual writer may have been the abettor; and appellant being present he is guilty of the principal offence. I think that in the present case the accused could have been convicted under S. 464/114 on the present charge.

I confirm the conviction. As to the sentence it is argued that it is severe. But here we have the case that not only did the accused make a false document but that a suit was filed thereon, and under these circumstances I do not think the punishment inflicted, viz., that of three years' rigorous imprisonment and a fine of Rs. 4,000, can be deemed excessive. The appeal is dismissed. The appellant's bailbond is cancelled and he is sent to Yeotmal.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1930 Nagpur 148**

SUBHEDAR, A. J. C.

Kondia—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 6-B of 1929, Decided on 22nd April 1929, from decision of 2nd Addl. Sess. Judge, Akola, D/-19th September 1928, in Criminal Appeal No. 261 of 1928.

Criminal P. C., S. 110 — Testimony of police officer that person is by habit thief only matter of opinion and hearsay—Such evidence is inadmissible under S. 110.

The testimony of a police officer that a person is by habit a thief is inadmissible in evidence against a person against whom proceedings are instituted under S. 110 when such evidence is only a matter of opinion and hearsay. This fact, however, is not sufficient to set aside the order passed against him under S. 110 when the latest incident is coupled with two previous convictions on charges of his belonging to, and associated with, a gang of habitual thieves and robbers: 43 *Mad* 450, *Rel. on.*

[P 148 C 2, P 149 C 1]

*G. G. Hatvalne—*for Applicant.*G. P. Dick—*for the Crown.

Order.—The applicant, who has had two previous convictions under S. 401, I. P. C., has been bound over by the Sub-Divisional Magistrate, Akola, under S. 110 (a) read with S. 118, Criminal P. C., to be of good behaviour for a period of one year. This order was passed on 7th August 1928. It was sought to be revised under S. 125, Criminal P. C., by the District Magistrate, Akola, who, however, refused to interfere in the matter. An appeal was then filed by the applicant to the Court of the Additional Sessions Judge, Akola, but it was also rejected and he has, therefore, come up to this Court in revision.

It is contended on behalf of the applicant that there is no evidence except that of the police officers to prove that the applicant was by habit a thief, and therefore in the absence of more reliable evidence no order under S. 110, Criminal P. C., should have been passed against him. It is also argued that the testimony of these police officers is only a matter of opinion and hearsay, and therefore was not admissible as a piece of evidence.

Having myself read the evidence of the police officers (P. Ws. 1, 2, 6, 7 and 8) the remarks made by the learned pleader for the applicant with regard

(3) [1912] 23 M. L. J. 22=15 I. C. 85=(1912) M. W. N. 725.

to the legal character of their evidence are perfectly true in the light of the observations to be found in the case of *K. Ranga Reddi v. Emperor* (1). I, therefore, agree that the whole of this evidence was inadmissible and legally insufficient to prove that the applicant was by habit a thief.

But as the learned Government Advocate rightly contended that is not enough to discharge the order passed by the Sub-Divisional Magistrate against the applicant. It is admitted that the applicant has had two previous convictions under S. 401, I. P. C., though a long time has elapsed since the last conviction. The latest incident that happened at the shop of Mt. Badji (P. W. 3) which has been believed in by all the three lower Courts coupled with the two previous convictions on charges of his belonging to and associated with a gang of habitual thieves and robbers, is, in my opinion, enough to warrant the passing of the order for binding the applicant over to be of good behaviour. I accordingly uphold the order sought to be revised and dismiss this application for revision.

P.N./R.K.

Order upheld.

(1) [1920] 43 Mad. 450=38 M. L. J. 97=11 M. L. W. 331=55 I. C. 722=(1920) M. W. N. 398.

A. I. R. 1930 Nagpur 149

MOHIUDDIN, A. J. C.

Ramdularey—Accused—Applicant.

v.

Manohar—Complainant—Non-Applicant.

Criminal Revn. No. 344 of 1929, Decided on 28th November 1929, from decision of Dist. Magistrate, Bilaspur, D/- 29th July 1929, in Criminal Appeal No. 105 of 1929.

Cattle Trespass Act, S. 22—Compensation cannot be awarded in absence of loss and unless specifically claimed—Sentence of imprisonment under S. 22 in default of compensation is illegal.

Compensation under S. 22 cannot be allowed in the absence of loss alleged or proved. The Magistrate cannot award it arbitrarily at his own sweet will. The complainant must make a specific claim about it. Further the Magistrate can only award compensation for illegal seizure of cattle and cannot impose fine. He is also not competent under S. 22 to pass sentence of imprisonment and thus when he passes a sentence of imprisonment in default of payment of compensation, the sentence is illegal. [P 149 C 2]

S. T. Bhawe—for Applicant.

Order.—The applicant Ramdularey was convicted under S. 22, Cattle Trespass Act, by Mr. C. F. Cleophas, Magistrate, Second Class, Bilaspur, and was ordered to pay Rs. 140-13-0 as compensation. He filed an appeal in the Court of District Magistrate, Bilaspur, who reduced the compensation, for the loss caused by the seizure or detention from Rs. 70-6-6 to Rs. 20 and ordered that: "in default of these payments, the accused shall suffer simple imprisonment for one month."

The only ground pressed by the learned pleader for the applicant runs as follows:

"The lower appellate Court erred in allowing under S. 22, Cattle Trespass Act, compensation Rs. 20 to the complainant in the absence of any loss alleged or proved."

The contention is correct and must prevail. There is no allegation either in the complaint dated 1st September 1918 or in the statements made by Manohar on 1st September 1928, 18th September 1928 and 4th May 1929 that any loss was caused by the seizure or detention. The law has provided a summary and expeditious mode of recovering compensation under S. 22, Cattle Trespass Act, for loss caused by such seizure and detention, but it cannot be awarded arbitrarily at the sweet will of the Magistrate, unless the complainant makes a specific claim about it. No such claim was made in this case. The complainant, not having claimed any compensation, was not entitled to any. The order passed by the District Magistrate awarding Rs. 20 as compensation is wrong and illegal and is hereby set aside.

The use of the word "fine" in para. 3 of the judgment of the lower appellate Court is also wrong. No fine can be imposed under S. 22, Cattle Trespass Act, and a Magistrate can only award compensation for illegal seizure of cattle. The learned District Magistrate has also passed the following order:

"In default of these payments, the accused shall suffer simple imprisonment for one month."

A sentence of imprisonment in default of payment of compensation is illegal. A Magistrate is not competent to pass a sentence of imprisonment under S. 22, Cattle Trespass Act. As laid down in S. 23 of the same Act,

the compensation, fines and expenses mentioned in S. 22, may be recovered as if they were fines imposed by the Magistrate. The order about the payment of fines paid and expenses incurred by the complainant in procuring the release of cattle and about the Court costs is upheld, and the order about "reasonable compensation" is set aside. The amount if already paid will be refunded to the applicant.

P.N./R.K.

Order set aside.

A. I. R. 1930 Nagpur 150 (1)

MACNAIR, A. J. C.

Mathuraprasad—Applicant.

v.

Narendra Singh and others—Non-Applicants.

Criminal Revn. No. 410 of 1929, Decided on 5th December 1929, from order of Addl. Sess. Judge, Jubbulpore, D/-23rd July 1929.

Criminal P. C., S. 439—Complaint enquired into by two Magistrates and dismissed—Sessions Judge refusing to take action in revision—High Court will interfere only if there is strong probability that further enquiry will result in conviction.

Where a complaint is dismissed under S. 203 but under directions of the Sessions Judge an enquiry is again made into the case by another Magistrate with the result that no sufficient grounds are made to commit him to sessions trial and where the Sessions Judge refuses to revise the order, there must be very strong reasons for the High Court to interfere and it will interfere only if there is a very strong probability that further enquiry would result in a conviction: 26 All. 564, *Rel. on.* [P 150 C. 2]

*Forbes—*for Applicant.

Order.—A man named Patali Dhait was found lying dead in a railway line, the head being completely severed from the body, on 5th September 1927. The police considered the advisability of charging the non-applicants with causing his death but decided to take no action. The applicant Mathuraprasad, brother of deceased, filed a complaint against the non-applicants. This complaint after investigation was dismissed under S. 203, Criminal P. C. The Sessions Judge directed further enquiry into the case and a full inquiry was made by another Magistrate, Mr. Dewey. Mr. Dewey considered there were no sufficient grounds for committing the accused to sessions trial. The applicant applied to the Sessions Judge for

revision of this order but his application was unsuccessful. He has now applied to this Court asking that further enquiry should be ordered.

In *Fattu v. Fattu* (1), Knox, J., remarked that, where an accused person had been discharged and the Sessions Judge directed a commitment, the High Court should be most unwilling to interfere. It is obvious that, where the Sessions Judge refused to take action, this Court should require even stronger grounds before deciding to interfere. The offence in this case was committed two years ago. There have been enquiries before two Magistrates and interference in this Court would be proper only if there was a strong probability that further enquiry would result in a conviction. There is no special reason for holding that the evidence of the witnesses, who have been disbelieved by the experienced Magistrate who heard them, is, in reality, convincing. It is not of great consequence that the Magistrate has laid excessive stress on contradictions which are, perhaps, not material. Satola made a statement at an early stage, but this is not a strong guarantee that his statement is true. Evidence about hearing cries in the night is of a nature which renders it open to doubt. None of the witnesses appear to be above suspicion. The evidence of Col. Oxley throws great doubt upon the prosecution case. I see no reason to think that Mr. Dewey was wrong in thinking that there was no really credible evidence to support the prosecution case: there is certainly no reason for interference by this Court. This application is dismissed.

P.N./R.K.

Revision dismissed.

(1) [1904] 26 All. 564=1 A. L. J. 292=(1904) A. W. N. 125.

A. I. R. 1930 Nagpur 150 (2)

MACNAIR, A. J. C.

Emperor

v.

Chotekhan and others—Non-Applicants.

Criminal Rev. No. 452 of 1929, Decided on 10th January 1930, case reported by Sessions Judge, Jubbulpore, under S. 438, Criminal P. C.

Criminal P. C., S. 340—Deputy Commissioner appointing Public Prosecutor to defend accused—Public Prosecutor though not member of bar held to have been so appointed by accused—Criminal P. C., S. 4 (r).

The District Magistrate considering it possible that the complaint against two Government Officials was a false one, made in consequence of the accused performing their duty, directed the Prosecuting Inspector to defend the accused. The trying Magistrate allowed the Prosecutor to so defend the accused.

Held: that though the Public Prosecutor was not a member of the Bar it could not be held that he was not a person appointed by the accused with the permission of the Court to defend them though it was desirable that they had made such appointment: *A. I. R. 1926 Bom. 218, Ref.* [P 151 C 1, 2]

V. Bose—for the Crown.

Judgment.—The Sessions Judge, Jubbulpore, reports the case under S. 438, Criminal P. C. A complaint of criminal trespass and assault was filed against two Government Officers. The District Magistrate, considering it possible that this complaint was a false one made in consequence of the accused performing their duty, directed the Prosecuting Inspector to defend the accused. The trying Magistrate in an order dated 13th November 1929 allowed the Prosecuting Inspector to appear for the defence: the Magistrate recognized that the direction of the District Magistrate did not override the necessity of permission of the Court. The pleader for the complainant objected to his appearance and the Sessions Judge made a reference to this Court, expressing the opinion that the order of the District Magistrate was *ultra vires*; he stated that it was doubtful whether the time of the Public Prosecutor should be utilized in defending cases.

It is not for this Court to decide how a Prosecuting Inspector should be employed. The only question I have to consider is whether the Inspector, who is not a member of the Bar, was rightly allowed by the Court to defend an accused person. S. 340, Criminal P. C., states that an accused may be defended by a pleader. S. 4 (r) of the same Code states that "a pleader" included any person appointed by the permission of the Court to act in a proceeding. The definition of "pleader" was recently considered by the Bombay High Court in *Emperor v. Dorabsha Bomanji* (1). The words are general, and I can see no reason for holding that the Prosecuting

Inspector was not a person appointed by the accused with the permission of the Court to defend them, though it is desirable that they had made such appointment. There is no reason for interference by this Court. The case is returned to the trying Magistrate.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 151

MOHIUDDIN, A. J. C.

Chaganlal—Applicant.

v.

Mt. Dhaina—Non-Applicant.

Civil Revn. No. 431 of 1929, Decided on 31st January 1930, against order of Sub-Judge, Second Class, Hoshangabad, D/- 27th June 1929.

Civil P. C., O. 23, R. 1—Application for permission to withdraw suit with liberty to institute fresh suit should be allowed to be heard in presence of all parties concerned.

Where plaintiff applies for permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit, the Court should allow such application to be heard in presence of all the parties concerned and should not grant the permission in their absence: 44 Cal. 451. *Foll.* [P 151 C 2]

J. Sen—for Applicant.

Order.—This is an application under S. 115, Civil P. C., filed by Chaganlal who was a defendant in Civil Suit No. 240 of 1928, against the order dated 27th June 1929, passed by Mr. Abdul Latif Khan, Sub-Judge, Hoshangabad, in this case the plaintiff filed an application on 27th June 1929, under O. 23, R. 1, Civil P. C., for permission to withdraw the suit, with liberty to institute a fresh suit in respect of the subject matter of the suit, and the Court granted the necessary permission, though the defendants were absent on that date and had no notice of the said application. It is now contended that the *ex parte* order, which was passed without giving an opportunity to the applicant to contest the application for withdrawal, is wrong and ought to be set aside, and reliance is placed on *Rajendra Lal Sur v. Atal Bihari Sur* (1), in which case, under similar circumstances, a Divisional Bench of the Calcutta High Court, held that the plaintiff's application ought to have been heard in the presence of all the parties concerned. I am in respectful agreement with the view expressed in

(1) A. I. R. 1926 Bom. 218=50 Bom. 250.

(1) [1917] 41 Cal. 451=30 I. C. 939=25 C.L.J. 455.

Rajendra Lal Sur v. Atal Bihari Sur (1) set aside the order passed on 27th June 1929, and remit the case to the Court below in order that the application of the plaintiff may be heard in the presence of all the parties concerned. The non-applicant did not put in an appearance in this Court and therefore I do not pass any order about costs incurred in this Court.

P.N./R.K.

Revision allowed.

A. I. R. 1930 Nagpur 152

FINDLAY, J. C.

Abdul Karim—Applicant.

v.

Ratilal Gujrati—Non-Applicant.

Civil Revn. No. 189 of 1929, Decided on 7th January 1930, from order of Small Cause Court Judge, Nagpur, D/- 6th February 1929, in M. J. C. No. 164 of 1928.

Civil P. C., O. 17, Rr. 2 and 3—Rr. 2 and 3 are mutually exclusive—On date fixed for final disposal of suit Court taking plaintiff's evidence and passing decree *ex parte*—Application to set aside decree is competent.

Rules 2 and 3 are mutually exclusive. R. 3 contemplates the presence of parties and only deals with a case where such party being present has failed to produce his evidence or to take any other steps laid down in the rule. R. 2 applies in the case of the absence of a party or parties whether or not time has been granted them to do any of the acts laid down in R. 3.

Where on the date fixed for final disposal of a suit the Court after taking plaintiff's evidence passes a decree *ex parte*, an application by the defendant to set aside *ex parte* decree is competent: 41 *Mad.* 286, *Foll.*; *Civil Revn.* No. 58 of 1903, *Diss. from.* [P 152 C 2]

Samiullah Khan—for Applicant.*M. R. Bobde* and *S. R. Bobde*—for Non-Applicant.

Order.—I have heard counsel for parties in the present revision application. The suit, small cause one, was, on 19th July 1928, fixed for final disposal on 2nd October 1928. The plaintiff appeared and two of his witnesses were examined and a decree was passed *ex parte*. On 9th October 1928, the defendant applied for setting aside the *ex parte* decree. The lower Court held that the case terminated "practically" under O. 17, R. 3, Civil P. C., and therefore, was of opinion that the application did not lie.

I have been referred by the counsel for the non-applicant to the decision of

Drake-Brockman, J. C., in Civil Revision No. 58 of 1909, decided on 29th July 1909. In the said case the learned Judicial Commissioner held that where a case fell under both Ss. 157 and 158 (corresponding to Rr. 2 and 3, O. 17, Civil P. C., 1908), the Court ought to proceed under S. 158. If that view be accepted, then clearly the application for setting aside the *ex parte* decree did not lie. With all respect, however, I am wholly unable to agree with the learned Judicial Commissioner in the view he has laid down in this matter. It seems to me that R. 3 clearly contemplates the presence of the parties and only deals with the case where such party being present has failed to produce his evidence or to take any other steps laid down in the rule in question. R. 2 in the nature of things applies in the case of the absence of a party or parties, whether or not time had been granted them to do any of the acts laid down in R. 3. In other words, it seems to me clear that these two rules are mutually exclusive. I find myself in full agreement with the view of Ayyar and Sastriyar, JJ., in *Pichamma v. Sreeramulu* (1), in this connexion and, in view of the reasoning contained in the judgment in question, I do not think it necessary to discuss the matter further at length. In my opinion, therefore, the application for setting aside the *ex parte* decree did lie.

I may add that both the clerk of Court and the Judge of the Small Cause Court have been guilty of extraordinary carelessness in not noticing that there had been an omission to sign and verify the plaint. This omission should be rectified before the case is allowed to go further. In the circumstances it would appear to be obviously one of bona fide case. The order, of which revision is sought, is accordingly set aside and the case is remanded to the lower Court for disposal of the application, dated 9th October 1928, on the merits with advertence to the above remarks. Costs incurred in this Court will follow the event. I fix Rs. 10 as pleader's fees.

P.N./R.K.

Case remanded.

(1) [1918] 41 *Mad.* 286=34 *M. L. J.* 21=13
I. C. 566=1918 *M. W. N.* 92 (F.B.).

A. I. R. 1930 Nagpur 153

SUBHEDAR, A. J. C.

Bagmal Kisandayal Ginning Factory and others—Plaintiffs - Appellants.

v.

Municipal Committee, Akot—Defendant—Respondent.

Second Appeal No. 245-B of 1929, Decided on 21st November 1929, from decree of First-Addl Dist. Judge, Akola, D/- 10th August 1929, in Civil Appeal No. 62 of 1929.

(a) C. P. Municipalities Act (2 of 1922), S. 68 (9)—Civil Court can consider legality of tax in spite of its being imposed in pursuance of its notification in Gazette—Berar Municipal Law, S. 44 (9).

Section 44 (9), Berar Municipal Law and S. 68 (9), C. P. Municipalities Act, do not oust the jurisdiction of a civil Court to determine if a particular tax purporting to be imposed under those enactments is illegal or ultra vires even when the tax is levied in pursuance of notification published in the Government Gazette: 15 N. L. R. 42, *Expl.*; 8 N. L. R. 107; A. I. R. 1922 Nag. 10; 35 Cal. 359 and A. I. R. 1928 Lah. 53, *Rel. on.* [P 155 C 2]

(b) C. P. Municipalities Act (2 of 1922), S. 66 (2) and (4)—Power to vary tax under S. 66 (4) is not dependent upon imposition of maximum under sub-S. (2).

It is not obligatory upon the Local Government to fix any maximum under S. 66 (2) and, if none is fixed, the Municipal Committee is still competent to effect variation under S. 66 (4): A. I. R. 1927 Nag. 102, *Rel. on.* [P 157 C 1]

M. V. Joshi and S. B. Gokhale—for Appellants.

M. B. Kinkhede and M. R. Bobde—for Respondent.

Judgment.—This is a second appeal by the plaintiffs who carry on the trade of ginning and pressing cotton within the limits of the defendant, Municipal Committee of Akot, and whose suit for a declaration and injunction against the defendant committee has been dismissed by the two lower Courts. The facts concerning this litigation are very elaborately stated in the judgments of the two lower Courts, but for the purposes of this second appeal they may shortly be stated as under. The defendant committee came into existence long before 1898 and was originally governed by the Berar Municipal Law of 1886 till 15th February 1924, since when it is governed by the C. P. Municipalities Act (2 of 1922) as applied to Berar. Under the provisions of the said Municipal Law the defendant committee had imposed a tax under S. 41 (1) (a) (b) on professions

and trades by Hyderabad Residency Order Notification No. 98, dated 14th March 1899, according to which the tax was levied at the rate of one and a quarter percent on the taxable portion of the estimated income of a trader upto a maximum of Rs. 500. It is admitted that the imposition of this tax was legal and that the tax at this rate was willingly paid by the plaintiffs up to 1st August 1908.

It is alleged that on 27th October 1907, the defendant committee passed a resolution making an invidious distinction between assesseees carrying on trade of ginning and pressing cotton and those carrying other trades within the limits of the municipality and without following the procedure laid down in the Municipal Law illegally altered the mode of assessing the tax on factory owners by introducing a novel method of assessing the tax on the outturn of bales and bojas from their factories irrespective of the assesseees' profits or losses by fixing the rate at 8 pies per boja of 10 maunds and 10 pies per bale. This new method of assessment was published as Notification No. 1063 in the C. P. Gazette of 13th July 1908. It is alleged that this assessment was ultra vires of the defendant committee, but the plaintiffs continued to pay this new tax under a mistake of law up till the year 1928.

By another resolution dated 2nd September 1925, it is alleged, that the defendant committee further desired to vary this tax by raising it to 72 pies per boja of 14 maunds and 78 pies per bale, and that in spite of the plaintiff's objection the committee finally sanctioned the change by resolution dated 30th October 1926, and published a notification to that effect in the C. P. Gazette dated 17th September 1927, making the increased tax leviable from the date of the notification. According to the plaintiffs this variation was also ultra vires of the defendant committee.

After serving a notice upon the defendant committee on 13th January 1928, the plaintiffs brought a suit in the Court of the Second Class Subordinate Judge No. 1, Akola, for a declaration: (1) that the imposition, assessment and recovery in 1928 by the defendant from the plaintiffs of the tax on the professions and trades by Notification No. 1063, dated 13th July 1908, was illegal and ultra

vires of the defendants; (2) that the variation effected by the defendant committee in the rates by the subsequent notification dated 17th September 1927 was also illegal, arbitrary and ultra vires of the defendant, and (3) for a permanent injunction restraining the defendant committee from assessing and collecting any tax from the plaintiffs otherwise than at the rates and on the principles laid down in the Notification No. 98, dated 17th March 1899. In the alternative it was prayed that the tax be recovered as per rates fixed by the Notification No. 1063, dated 13th July 1908.

The defendant committee resisted the suit on various grounds. It was contended that the original tax imposed under Notification No. 98, dated 17th March 1899, commonly known as 'Dhandepatti,' was abolished so far as the factory owners were concerned and the new tax imposed on them legally S. 41 (1) (a) (b), Municipal Law of 1886, and that, since in the notice served upon the defendant committee, prior to the institution of the suit, no mention as to the illegality of this tax was made, the plaintiffs' suit was not maintainable. It was asserted that under the new Act the defendant committee had full authority to vary the tax originally imposed in 1907, that the action of the municipality in the matter of fixation or variation of the tax was not arbitrary or illegal, and that the tax itself was not exorbitant. It was also contended that since the tax was levied in each instance in pursuance of notifications published in the Government Gazette, it was conclusive evidence that the tax was legally imposed and that the Court had no jurisdiction to declare it otherwise.

Both the Courts below dismissed the plaintiffs' suit holding that the tax and the variation thereof in question were neither arbitrary nor exorbitant nor illegally imposed, and that so far as the imposition of the tax of 1907 was concerned the notice given by the plaintiffs being defective the suit in respect of it was not maintainable. Although the trial Court held that the suit was not barred either under S. 44 (9), Berar Municipal Law or S. 68 (9), C. P. Municipalities Act, the lower appellate Court has given no clear finding on this point. Against the dismissal of their suit the

plaintiffs have come up in second appeal.

Before dealing with the arguments advanced on behalf of the appellants it is convenient to dispose of two preliminary points as to the non-maintainability of the present action raised by Rao Bahadur M. B. Kinkhede, learned advocate for the respondent. The first objection is that, since the notice (Ex. P-1) given by the plaintiffs to the defendant did not challenge the legality of the original tax imposed in the year 1908, the suit was barred under S. 48 (1), C. P. Municipalities Act, or that at any rate the Court must take the imposition of that tax to be valid and decide the question of the legality or otherwise of its variation in 1927 on that basis.

The appellants, however, submitted that the relief of the declaration claimed in respect of the tax of 1908 was merely ancillary to the main relief of injunction and, therefore, the suit came within the purview of sub-S. (3), S. 48, C. P. Municipalities Act and was not barred, and that at all events if this relief for declaration could be regarded as distinct, it might not be granted by the Court.

It appears to me that on account of the defect in the notice it was rightly held that no relief could be granted to the plaintiffs in regard to the first declaration claimed. But apart from the question of want of notice this declaratory relief could not also be granted to the plaintiffs, because of the proviso to S. 42, Specific Relief Act, inasmuch as the plaintiffs did not claim, although they were able to do so, the further relief of refund of the amount of the alleged illegal tax admittedly paid by them in 1928 and in previous years.

I am, however, quite clear that for the purpose of deciding the legality or otherwise of the variation effected in 1927, the question of the competency of the defendant to impose the tax of 1908, will have to be determined and it will not be taken for granted that the imposition of the said tax was intra vires of the defendant committee. The next objection is that the trial of the question of the legality or otherwise of the assessment of the tax and its variation is barred under S. 44 (9), Berar Municipal Law and S. 68 (9), C. P. Municipalities Act both of which in effect lay

down that a notification of the imposition of a tax or its variation shall be conclusive evidence that the tax or its variation have been imposed in accordance with the provisions of the Municipal Law or Act. It was, therefore, argued on the authority of *Taher Ali v. Municipal Committee, Khamgaon* (1), that since the imposition of the tax and its variation were duly notified as prescribed, the Court is precluded from holding otherwise than that the taxes have been legally imposed.

On the other hand reference was made by the counsel for the appellants to S. 53, Berar Municipal Law (corresponding to S. 84 (3), C. P. Municipalities Act), which contains much more restrictive provisions than those to be found in S. 44 (9) *ibid* by enacting that:

"No objection shall be taken to any valuation or assessment nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than in this law is provided."

It was argued that in spite of the above drastic provisions this Court in *G. I. P. Ry. Co. v. Amraoti Municipality* (2), held that S. 55, Berar Municipal Law of 1886, does not oust the jurisdiction of the civil Courts to try the question whether a particular tax, which purports to have been imposed under that law, has any legal existence. This principle was followed in *Municipal Committee, Malkapur v. Amrit Waman Dalal* (3), where it was very clearly laid down that when the levy or assessment of any tax by a Municipal Committee purporting to be made under the authority of the Berar Municipal Law is alleged to be *ultra vires*, the civil Court has jurisdiction to entertain a suit for the refund. In this case the Court also followed the law enunciated in *Chairman of Giridih Municipality v. Srish Chandra Mozumdar* (4), where the Calcutta High Court had to deal with a case under the Bengal Municipal Act, 3 of 1884, S. 116 of which has almost the identical wording of S. 53, Berar Municipal Law.

On a careful reading of *Taher Ali's* case (1), it does not appear to me that the principle enunciated in *G. I. P. Ry.*

Co. v. Amraoti Municipality (2) and *Municipal Committee, Malkapur v. Amrit Waman* (3), were in any way dissented from or overruled. All that was decided in the case was that S. 44 (9), Berar Municipal Law protects defects or omissions occurring in matters provided for by other sections: such as those relating to the constitution and the meeting of committees, besides defects in the procedure under S. 44 and precludes a Court from holding otherwise than that the tax has been imposed in accordance with the said Municipal Law. It was not held in that case that the section deprived a civil Court of its jurisdiction to determine whether the imposition of the tax was *ultra vires* of the municipal authority imposing it. In a very recent case reported as *District Board, Sialkot v. Sultan Muhammad Khan* (5), the Punjab High Court had to deal with a case, under the District Boards (Punjab) Act, 20 of 1883, S. 31 (7) of which is identical in terms with S. 44 (9), Berar Municipal Law, and it was held that a civil Court had jurisdiction to determine whether the imposition of a tax is illegal or *ultra vires* in spite of the provisions of the aforesaid section. I, therefore, hold that S. 44 (9), Berar Municipal Law and S. 68 (9), C. P. Municipalities Act, do not oust the jurisdiction of a civil Court to determine if a particular tax purporting to be imposed under the said enactments is illegal or *ultra vires*.

The first point argued for the appellant is that the imposition of the tax of 1908 was *ultra vires* of the defendant committee for the reason that the tax was imposed not on persons carrying on trade or profession but on articles of trade dealt with by the assesses in the course of their trade and that, therefore, it could not be called a tax which the defendant committee could legally impose under S. 41 (1) (a) (b), Berar Municipal Law of 1886.

The argument is indeed very plausible but is certainly untenable. It is not contended that the tax imposed upon the appellants in the year 1899 did not fall under S. 41 (1) (a) (b) of the Berar Municipal Law, because it had to be paid out of the income accruing to them from the trade of ginning and pressing cotton which they were following. After

(5) A. I. R. 1928 Lah. 53=9 Lah. 340.

(1) [1919] 15 N. L. R. 42=46 I. C. 682.

(2) [1912] 8 N. L. R. 107=16 I. C. 449

(3) A. I. R. 1922 Nag. 10=18 N. L. R. 121.

(4) [1908] 35 Cal. 859=7 C. L. J. 631=12 C. W. N. 703.

the abolition of this tax, which was probably insufficient to meet the growing needs of the defendant, the tax now in dispute was introduced under Ex. D.-34 which is reproduced here:

"The 13th July 1908. "No. 1063. With reference to S. 44, sub-Ss. (7) and (8), of the Berar Municipal Law, 1886, it is hereby notified that the Municipal Committee of Akot, in the Akola District, has with the sanction of the Chief Commissioner, directed the imposition, with effect from the 1st August 1908, of a tax on the ginning and pressing of cotton under S. 41 (1) (a) (b) of the said law, to be levied from all persons carrying on, within the limits of the Akot Municipality, the trade of ginning cotton or pressing the same into bales by means of steam or mechanical process, at the following rates:—

(1) For each boja of ten maunds ginned
... 8 pies.

(2) For each bale of fourteen maunds pressed
... 10 pies.

The tax is payable in one instalment on the 1st August each year".

It is urged that the words "a tax on the ginning and pressing of cotton" appearing in the said notification leave no room for doubt that the tax was imposed directly upon these articles of trade which was not warranted by the terms of S. 41 (1) (a) (b) of the Berar Municipal Law. In other words the contention is that the imposition of this tax came within the purview of S. 41 (1) (B) of the said law and was invalid because of the want of previous sanction of the Chief Commissioner and of the Governor General in Council.

It could not be denied that the appellants came within the class of persons who could be taxed under S. 41 (1) (a) (b), Berar Municipal Law. It is also admitted that defendant committee had substantially complied with all the formalities of S. 44 *ibid* in introducing the tax in dispute: a resolution proposing the tax was passed under sub-S. (1), the class of persons to be taxed, the rate of tax and system of assessment to be adopted was clearly indicated in the notice published under sub-S. (2), sanction of the Government was obtained under sub-S. (6), the proposal was finally adopted by the committee under sub-S. (7) and the notification of the imposition of the tax was ultimately published under sub-S. (9) of the section.

The notification is undoubtedly not very happily worded but on a careful reading of the whole of it, it is abundantly clear that the tax is to be levied from all persons carrying on the trade of gin-

ning and pressing cotton within the limits of the Akot Municipality at the rates and in the manner specified therein. The words "on the ginning and pressing of cotton" occurring immediately after the word "tax" are indeed superfluous. The tax is expressly levied under S. 44 (1) (a) (b), Berar Municipal Law and any defect of form in the notification is fully protected by S. 48 of the said law which declares that no tax imposed under that law shall be invalid "merely for defect of form". Though "the system of assessment" may not be palatable to the appellants it cannot be challenged by them as illegal. I have, therefore, no hesitation in holding that the imposition of the above tax was not ultra vires of the defendant committee. It may not be out of place here to note that a tax imposed by the Basim Municipal Committee on identical lines but without any limitation of a maximum was held by this Court as perfectly legal in *Dy. Commr., Akola v. Gurupratapsingh* (6).

It only remains to consider if the variation of this tax effected in 1928 was in any way invalid. The argument on behalf of the appellants on this matter is twofold. Firstly, it is contended that assuming that the tax was invalid ab initio it was rendered perfectly legal by sub-S. (6) added by Government of India Notification No. 58-I, dated 22nd January 1924, when S. 66, C. P. Municipalities Act was applied to Berar, but that the same could not be varied because of the prohibition to that effect contained in sub-S. (7) *ibid*. But since I have already held that the tax was legally imposed under S. 44 (1) (a) (b), Berar Municipal Law of 1886 corresponding to S. 66 (1) (b), C. P. Municipalities Act, sub-Ss. (6) and (7) do not at all come into play in the present case and this contention therefore fails.

Secondly, it is urged that since admittedly no maximum was fixed by the Local Government under sub-S. (2), S. 66, C. P. Municipalities Act and as the power to vary a tax conferred on the defendant committee under sub-S. (4) *ibid* had to be exercised "within the limits imposed under sub-S. (2)" aforesaid the variation effected was ultra vires. It is difficult to uphold this argument. S. 66 (2) provides that:

(6) A. I. R. 1927 Nag. 102=22 N. L.R. 153.

"the Local Government may, by rules made under this Act, regulate the imposition of taxes under this section, and impose maximum amounts or rates for any tax."

The word used in sub-S. (2) is "may" and not "shall" and therefore it is not obligatory upon the Local Government to fix any maximum and, if none is fixed, it cannot be said that the variation of a tax authorised by sub-S. (4) could not at all be effected by the Municipal Committee. As I read the two subsections, it is clear to me that the power to vary a tax is not dependent upon the imposition of a maximum by the Local Government under sub-S. (2), S. 66, C. P. Municipalities Act. I hold therefore that the variation in the tax of 1908 effected by notification dated 17th September 1927 was not ultra vires of the defendant committee. The result is that the appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 157

PRIDEAUX AND KINKHEDE, A. J. C's.

Municipal Committee, Khandwa—Appellant.

v.

Radhakisan Jarkisan and others—Respondents.

First Appeal No. 27 of 1926, Decided on 20th November 1928, against decree of First Addl. Dist. Judge, Nimar, D. - 6th February 1926.

(a) C. P. Municipalities Act (2 of 1922), S. 67 (8)—It is not only under S. 67 (8) but even under the old Act, law makes notification of imposition of tax issued by Local Government conclusive proof of the fact that "the tax has been imposed in accordance with the provisions of the law applicable"—C. P. Municipalities Act (15 of 1903), S. 39.

The new S. 67 (8) has not introduced any new change in the existing state of the law beyond making S. 67 self-contained; it expressly dispenses with the necessity of reading it in conjunction with the corresponding provisions of S. 22 (5) and 23, C. P. General Clauses Act (1 of 1914). Therefore whether the old C. P. Municipalities Act or the new one is applied, the law makes the notification of the imposition of the tax issued by the Local Government the conclusive proof of the fact that "the tax has been imposed in accordance with the provisions" of the law applicable and so the moment the notification is proved to have been published the Judge is expressly directed to dispense with all corroborative evidence and to forbid all opposing evidence and to draw the presumption of law that the tax is imposed in accordance with the provisions of the law authorizing its imposition. [P 160 C 2, P 161 C 1]

(b) C. P. Municipalities Act (15 of 1903), S. 39—"Purposes of the Act." (*Obiter*)

The Act being intended to make better provision for organization and administration of municipalities, any tax imposed as a means to this end is within its purposes (*Obiter*).

[P 162 C 1]

(c) C. P. Municipalities Act (15 of 1903), S. 39—Service of notice on members forming quorum is not necessary.

The statutory requirement is the presence of a particular quorum for the validity of a special meeting. It does not require that the quorum must be of members served with notice of meeting (*Obiter*).

[P 163 C 1]

(d) C. P. Municipalities Act (15 of 1903), S. 21 (1) (b)—Bye-laws Cl. 19—Provisions as to certificate are not mandatory.

The provisions in respect of the certificate that the proceedings have been confirmed as required by Cl. 19 of the bye-laws are merely discretionary and not mandatory (*Obiter*).

[P 163 C 2]

(e) C. P. Municipalities Act (15 of 1903), S. 21 (1) (b)—Bye laws Cl. 4—Committee, if it adopts procedure of sending round one notice of special meeting to all members, should send it round to every member concerned that call may come to his notice.

Taking into consideration the intention of either sending, giving or serving notice of a special meeting which is to invite every member because he must be given facility to exercise his right to attend it and to influence his deliberations, the committee, if it adopts the procedure of sending round one common notice to all members can be reasonably expected to send it round to every one of the members concerned as often as possible in order that the call may come to his notice (*Obiter*).

[P 164 C 1]

(f) C. P. Municipalities Act (15 of 1903), S. 21 (1) (b)—Bye-laws, Cl. 4—Mere circumstance that proof of service of notice of special meeting to a member is not forthcoming is no reason for holding that meeting is not duly summoned and properly conducted.

Where Municipal records are in due order and state that meetings are held, it will be presumed in the absence of clear evidence to the contrary that such meetings are duly summoned and properly conducted. Thus mere circumstance that the matter of personal service of notice of a meeting to a member is left in doubt and its proof is not forthcoming is no reason for holding that meeting is not duly summoned and properly conducted.

[P 164 C 2]

(g) Practice—Formality.

A formality which is directed by legislature is imperative but if it is prescribed by ordinary individuals and corporations it is directory merely.

[P 165 C 2]

N. G. Bose—for Appellant

H. S. Gour and W. R. Puranik—for Respondents.

Judgment.—Within the local limits of the Khandwa Municipality the respondents, who were plaintiffs in the lower Court, own ginning and pressing factories and carry on business

of ginning and pressing cotton. They did this business in the cotton seasons of 1922-1923 and 1923-1924. The Khandwa Municipality acting through its committee served them with notices on or about 26th November 1924 demanding amounts said to be due on account of arrears of a tax on the trade of ginning and pressing cotton for the year 1923-1924. The demand was repeated on or about 9th January 1925 and the plaintiffs were called upon to comply with it within 24 hours. But the actual recovery from each individual plaintiff was effected on dates ranging from 6th to 9th February 1925. The total amount thus recovered from all the plaintiffs comes to Rs. 16,669-14-0. The plaintiffs feeling themselves aggrieved by the aforesaid recovery of tax served the Municipal Committee with the usual statutory notice and called upon it to refund the aforesaid sum on the ground that its imposition was ultra vires, and recovery illegal. As the committee did not see its way to refund the tax levied, the plaintiffs jointly instituted suit No. 39 of 1925 against it on 6th August 1925 for the amount due with interest at Re. 1 per cent. per mensem. The total value of the claim is Rs. 17,649-4-9. It has been decreed to the extent of Rs. 16,669-14-0 against the Municipal Committee. Hence this appeal by the Municipal Committee.

In para. 3 of the plaint the plaintiffs have set forth the following chief reasons amongst others in support of their contention that the imposition and recovery of the tax were ultra vires, and illegal :

"(a) That no special meeting was convened as required by the Municipal Laws for proposing the imposition of the alleged tax and the meeting held on 16th July 1922 could not and did not, satisfy the requirements of the Municipal Act for proposing the imposition of the tax.

(b) That the defendant did not at any special meeting formulate its proposals for the alleged tax, did not decide the class of persons or description of the property to be taxed and did not frame rules to govern the assessment of the said tax.

(c) That the defendant did not at any special meeting pass any resolution proposing the imposition of the alleged tax as required under S. 39 (1), Municipalities Act (1903).

(d) That on account of the non-observance of the two preliminary steps as stated above, the notice published by the defendant under S. 39 (2), Municipalities Act 1903, was illegal and without jurisdiction.

(e) That the defendant did not settle any date from which the alleged tax was introduced after observing the aforesaid formalities.

(f) That in forwarding the papers regarding the alleged tax for the sanction of the Local Government, the defendant did not demonstrate any necessity as required by law for the alleged taxation and did not append to the application for sanction the documents especially the copy of the resolution of the committee proposing the tax, as required by the circulars issued by the Local Government in the matter of the municipal taxation. Moreover the defendant's application for the sanction of the Local Government did not comply with the other necessary requisites."

The defendant committee maintained that the tax was imposed in the manner prescribed by law and legally recovered, and that the plaintiffs were not entitled to get any refund. The claim was denied on the ground that the suit was not maintainable as the notice served did not comply with the requirements of law, and that it was barred by limitation. It was further contended that the present suit was barred by reason of the decision in former suits Nos. 72 and 75 of 1924 filed by some of the plaintiffs and that it was also bad for misjoinder of plaintiffs.

The Additional District Judge who decided the case framed issues for trial; we reproduce the following relevant issues, as it is contended by the appellant that the pleadings and issues were not specific:

(1) Was the defendant committee entitled to impose the tax in question?

(2) Was the said tax imposed in manner prescribed by law?

(3) Have the taxes been legally recovered?

(5) Was the notice of the claim served on the defendant by the plaintiffs not in accordance with law.

(7) Is the claim of plaintiffs 6 and 13 barred by suits Nos. 72 and 75 of 1924 of this Court according to the rule of res judicata?

The findings relevant to this appeal are those on issues 1, 2, 3, 5 and 7, and are to the following effect:

(1) That the defendant committee was entitled to impose the tax in question.

(2) That the tax was not imposed in the manner prescribed by law.

(3) That the same was, therefore, not legally recovered and that plaintiffs were consequently entitled to claim refund.

(4) That the notice of suit was in accordance with law, and that the suit was not barred by the decisions in the previous suits of 1924 filed by plaintiffs 6 and 13.

In respect of the business in the cotton season of 1922-1923 done by these plaintiffs, they were served with

notices of demand for tax but considering that they were not liable, they instituted suit No. 11 of 1924 on 2nd January 1924 in the Court of the Subordinate Judge, 1st Class, Khandwa for the issue of an injunction restraining the Municipal Committee from realising the said tax from them. That suit was dismissed as not maintainable on 11th April 1924. The dismissal was maintained in civil appeal No. 53 of 1924 by the District Judge, Nimar, on 15th July 1924; against it the plaintiffs have preferred second appeal No. 371 of 1924. As the decision in first appeal and also in the second appeal depended upon the right construction of the proceedings of the Municipal Committee which led to the imposition of the tax, the second appeal was also ordered to be heard by the Bench constituted for the hearing of the first appeal. Although in the view which both the Courts took as to the non-maintainability of suit 11 of 1924, it was wholly unnecessary for the District Judge to discuss and make any observations affecting the merits of the case; that officer went out of his way in expressing his views on points which were in all probability brought out only in the arguments addressed before him, without their being clearly set forth in the pleadings, or having been made the subject of specific issues. However, those obiter dicta of the learned District Judge principally furnished the data required for the pleas which are the subject of dispute in civil suit No. 39 of 1925. As the principal question in both the cases is whether the tax was legally imposed, this judgment will dispose of both the appeals. (After mentioning some preliminary facts and the proceedings of the committee, the judgment proceeded.)

After these formalities of the statute law were gone through the proposals were, as required by S. 39 (4) of the Act, forwarded through the Deputy Commissioner to the Local Government for sanction as per letter dated 28th October 1922 together with its enclosures, Ex. D.8. The Local Government published the Notification No. 269-1298-VIII dated 21st November 1922 in the C. P. Gazette of 25th November 1922 sanctioning the imposition of the tax with effect from its date, as required by Ss. 39 (5) to 93 of the Act (Ex. D.6). The same Gazette publishes the notice

dated 22nd October 1922 of rule proposed by the Local Government to be framed under S. 150 (2) (a) of the Act for the collection of the said tax inviting objections or suggestions to be forwarded to the Secretary to Government in the Local Self-Government Department before 22nd December 1922. This was followed by a subsequent Notification No. 21, 1298-VIII dated 3rd January 1923 published in the C. P. Gazette of 6th January 1923 declaring that the rule was framed and that the tax will be payable on the 1st August of each year. In attacking the lower Court's findings, Nos. 2 and 3 set forth in para. 5 of this judgment, the learned advocate for the appellant argued that assuming that there were defects in the proceedings, they were cured by S. 24 of the old Act corresponding to S. 23 of the new Act (2 of 1922) and that under S. 67 (8) of the new Act the notification of the imposition of the tax, issued by the Local Government is :

"conclusive evidence that the tax has been imposed in accordance with the provisions of this Act,"

and that the lower Court should not have gone, and this Court cannot go into that question: In answer to this contention the learned counsel for the respondents has taken up the position that the tax having been levied while the old Act was in force the legality of the tax must be adjudged with reference to the provisions of that Act and not with reference to the provisions of S. 67 (8) which is not to be found in the old Act.

When the new C. P. Municipalities Act (2 of 1922) was published in the C. P. Gazette on 6th January 1923 it was declared that it shall come into force from 1st July 1923; therefore, prima facie the imposition of this tax within the limits of the Khandwa Municipality with effect from 21st November 1922 as per notification of that date must, as the tenor of the notification itself and the reference therein to the provisions of Act (15 of 1903) shows, be under the powers conferred on the Municipal Committee by the old Act then in force. It is true that sub-S. 8, S. 67 has been newly added when the provisions of old S. 39 were re-enacted in form of S. 67, just as old S. 35 took the form of S. 66 of the new Act

The question, therefore, reduces itself to this, whether, the notifications issued while the old Act was in force have the same effect as pieces of :

"conclusive evidence that the tax has been imposed in accordance with the provisions of of this Act,"

as notifications issued since the new Act came into force can have under S. 67 (8) thereof. In this connexion we think, we must have recourse to the provisions of the General Clauses Act (10 of 1897) which was in force when the Act of 1903 was in force, in order to know the effect of the publication, in the Official Gazette of the rules of assessment and collection under the enactment in force for the time being. A reference to Ss. 20 and 23 (5) of the said Act shows that the aforesaid notifications of the Local Government dated 23rd September 1922, 21st November 1922 and 3rd January 1923 were "publications" within the meaning of that section. That law enjoins that such a publication shall be "conclusive proof that the rule or bye-law has been duly made." It, therefore, follows, that even though S. 39, Municipalities Act of 1903, was not as self-contained as the new S. 67, Municipalities Act, is. It was virtually so when read in conjunction with Ss. 20 and 23, General Clauses Act, of 1897. S. 24, General Clauses Act, further lays down that where any Act of the Governor General in Council is repealed and re-enacted without notification then unless it is otherwise expressly provided any notification, form, rule or bye-law issued or made under the repealed enactment shall as far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued, under the provisions so re-enacted, unless and until it is superseded by any notification, order, rule form or bye-law made or issued under the provisions so re-enacted.

It is necessary to mention here that the C. P. General Clauses Act (1 of 1914) incorporates the provisions of the General Clauses Act of 1897 Ss. 20, 23 and 24 in the form of its own Ss. 20, 22 and 23. If we may venture to say so, we think that, in view of these provisions of the C. P. General Clauses Act, there was no need for adding any express legislative provision on the point in the shape of sub-S. 8 to the rest of

the provisions of S. 67 of the new Act. Thus the new S. 67 (8) has in our opinion not introduced any new change in the existing state of the law beyond making S. 67 self-contained; it expressly dispensed with the necessity of reading it in conjunction with the corresponding provisions of S. 22 (5) and S. 23, C. P. General Clauses Act (1 of 1914).

Moreover, S. 2 (2) of the new Act expressly enacts that the rules, orders and bye-laws made, notifications and notices issued, taxes imposed or assessed under the repealed enactments :

"shall, so far as may be deemed to have been respectively made, issued, imposed or assessed under this Act."

In view of this saving clause also, the position remains unaltered. So whether we apply the old Act or the new Act, the law makes the notification of the imposition of the tax issued by the Local Government, the conclusive proof of the fact that "the tax has been imposed in accordance with the provisions" of the law applicable. There is no definition of the word "conclusive" in the Municipalities Act itself. Its dictionary meaning is "decisive, convincing." Therefore, the aforesaid notification is decisive proof or evidence of the fact that the tax was imposed in accordance with the provisions of the Municipal law applicable.

In declaring that the publication by way of notification is "conclusive" proof of the tax having been imposed in accordance with the provisions of "the particular Municipal law, the legislature has enacted a rule of evidence. As such the expression "conclusive proof" or "conclusive evidence" as used in the aforesaid enactments, can, by analogy, be interpreted to bear the same meaning which that expression has under the Evidence Act. S. 4 of the latter Act has the following definition of conclusive proof :

"When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact, regard the other as proved, or shall not allow evidence to be given for the purpose of disproving it."

It is a presumption of law. Ameer Ali and Woodroffe's Law of Evidence, Edn. 8, p. 119 has the following valuable commentary on this point :

Presumptions are arbitrary inferences which the law expressly directs the Judge to draw from particular facts and

may be either conclusive or rebuttable. They are founded either on the connexion usually found by experience to exist between certain things, or on natural law or on the principles of justice or on motives of public policy. Conclusive presumptions of law are :

"rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connexion just alluded to has been found so general and uniform as to render it expedient for the common good that this connexion should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community: and, therefore, it is that all corroborating evidence is dismissed with, and all opposing evidence is forbidden. Taylor, Evidence. S. 71."

The necessary result, therefore, of the publication of the notification dated 21st November 1922 on the question whether or not the tax in question was imposed in accordance with the provisions of the municipal law applicable thereto is, that the moment the notification is proved to have been published, the Judge is expressly directed to dispense with all corroborative evidence and to forbid all opposing evidence and to draw the presumption of law that the tax was imposed in accordance with the provisions of the law authorizing its imposition. In this view of the case, the lower Court was not entitled to go into the question, whether or not there were any irregularities or defects of procedure in the matter of imposing the tax and it was bound to dismiss the suit as laid. We think, we must, therefore, give effect to the contention of the appellant and dismiss the suits as laid: and, we, accordingly, on this ground alone, allow the first appeal, and, setting aside the decree passed by the lower Court, dismiss suit No. 39 of 1925 and, dismiss the second appeal, and uphold the dismissal of suit No. 11 of 1924 though for different reasons.

It is unnecessary in this view to discuss in detail the several objections raised by the learned counsel for the respondents in the course of his argument. But it is argued that the civil Court is entitled to enquire whether or not the imposition of any particular tax was ultra vires or illegal, and several

cases have been cited in support of this proposition. Reliance is placed on certain passages in Brice on the Doctrine of Ultra Vires, 3rd Edition, page 33, as to necessity of notice of meeting being served on each member of a corporation, page 34, as to contents of the notice and especially as to business; page 594 as to imperative formalities essentially requisite for the legality of the acts of a corporation; page 608 to 612 as to effect of non-observance of imperative formalities vitiating the proceedings and page 627 as to the omission of essential formalities not being capable of being ratified subsequently. Reliance is also placed on the cases of *Ramdulary v. Chhindwara Municipality* (1) and *Municipal Committee Saugor v. Nilkanth* (2) in the first of which it is laid down that public bodies like a Municipal Committee must take care not to exceed or abuse the statutory powers and must rigidly keep within the limits of the authority committed to them and that if they act beyond their power they have to make compensation to the persons suffering damage by reason of their unlawful proceedings. In the second case it was observed that where an act is done under an authority conferred by statute the conditions laid down by the statute must have been strictly followed, otherwise the act is unauthorized and wrongful. The learned counsel also urges that not only should the requirements of the statute be complied with but the bye-laws also framed by the Municipal Committee for the conduct of its business must be strictly adhered to and that, once it is found that there is a legal flaw in the proceedings which led to the imposition of the tax, the tax itself becomes ultra vires of the committee to impose, and its assessment and collection illegal.

Although we have absolutely no doubt as to this contention not being open to the respondents to raise, still with a view to leave no point raised before us undecided, we think, we may discuss this matter briefly on the assumption that such a position is arguable. S. 35 (a) (iii) of the old Act which corresponds to S. 66 of the new Act, empowers a committee to impose a tax on persons carrying on any trade within the limits

(1) [1910] 6 N. L. R. 53=6 I. C. 421.

(2) [1915] 11 N. L. R. 132=31 I. C. 62.

of the municipality. But this power of imposition was under S. 35 exercisable subject to any general rules or special orders which the Governor General in Council may make in this behalf and further the tax had to be levied for carrying out the purposes of the Act, and had to be imposed in the manner required by S. 39 of the said Act, and with the previous sanction of the Local Government. Under new S. 67 the first condition has disappeared; the last two conditions however, remain. The plaintiffs do not challenge the imposition of the tax under S. 35 of the old Act for any contravention of any general rules or special orders of the Governor General in Council; so leaving that thing out of account, what we have to see is whether there has been due compliance with the following requirements common to the old and the new sections.

(1) Whether the taxation was for the purposes of the Act.

(2) Whether it had the previous sanction of the Local Government.

(3) Whether it was imposed in the manner required by S. 39 which is the same as sub-Ss. (1) to (7) of new S. 67.

Section 39 provided that a committee may resolve at a special meeting to propose the imposition of any tax for carrying out the purposes of the Act. The purposes of the Act are manifold and can be gathered from the various provisions of the Act itself and in particular, from those regulating the functions and duties of the municipalities and the objects to which the municipal funds can be applied under the Act. The Act being intended to make better provision for organisation and administration of municipalities, any tax imposed by a municipality as a means to this end will in our opinion be within its purposes. There can, therefore be no doubt that the tax in question satisfies this condition. As already stated in the earlier part of this judgement, the notification of the Local Government clearly proves that the imposition of the tax in question was with its previous sanction.

This brings us to the remaining condition of S. 35, namely, whether there has been due compliance as regards the manner required by S. 39 of the Act to be followed in its imposition. The appellant's contention is that the imposition of the tax was proposed at a special

meeting and that all the formalities of law and the requirements of the bye-law were duly complied with. On the other hand, the respondents urge that there was no such compliance, and therefore, the tax was ultra vires and illegal. This is a convenient stage at which one may discuss the question whether the proceedings were conducted firstly in the manner required by S.39, Municipalities Act, and [secondly, whether there was any contravention of any of the bye-laws framed by the committee for the conduct of its business.

Section 39 (1) requires that there must be a resolution of a special meeting proposing the imposition of the tax. As to this, in view of Resolution No. 3 dated 16th July 1922 passed by the special meeting, there can be no two opinions; and the words used are sufficient to convey the idea that the committee had before it only a proposal in the shape of the so-called bye-laws prepared by the President regarding the tax on the trade of ginning and pressing of cotton. The resolution formulated at the meeting though inartistically worded can bear no other construction than that the members of the committee regarded the motion as a proposal merely. The motion of Seth Kamruddin that the tax should be leviable only on the trade of pressing and not ginning cotton was advanced as an amendment to the main proposal. It was lost for want of a seconder, and, therefore, the primary proposal remained for consideration and was passed. The members must be presumed to know that they had no power to levy the tax without going through the formalities of a previous publication of notice of inviting objections and disposing of them, of a confirmation in another special meeting, and of the necessity of securing the previous sanction of the Local Government; and that the motion before them could not therefore but be the initial step they had to take, namely, to pass only a resolution merely proposing the imposition of the tax and settling the requirements of the notice to be published under S. 39 (2) of the Act. For this purpose, they had to define the class of persons proposed to be taxed, the amount or rate of the tax to be imposed, and the system of the assessment to be adopted. This they

did at the meeting and the resolution and the assessment rules virtually meet all these requirements; although the word "bye-laws" was a misnomer for what purported to be the proposed rules of assessment. So far then there was no failure to comply with the manner required to be followed by the express provision of S. 39 (1) of the Act. This really ought to suffice for the disposal of the objections (a), (b), (c) and (d) set forth in para 3 of the plaint as making the tax illegal and without jurisdiction as urged therein.

But it is argued that no tax could be even legally proposed unless notice of the special meeting is served on each member. In our opinion, this is not what is laid down by the statute itself. The statutory requirement is the presence of a particular quorum for the validity of a special meeting. It does not say that the quorum must be of members served with notice of the meeting. In this view of the case it is unnecessary to discuss the question of the service or non-service of the notice of the special meeting on Col. W. Tarr. Since it is argued that service of notice is an imperative formality, i. e., an essential requisite for the validity of the tax, we may discuss the objection with reference to the bye-laws framed by the Municipal Committee and confirmed by the Local Government for regulating the conduct of its business.

Our attention is drawn to the model bye-laws framed under S. 21 (1) (b) of the Act and in particular to Cls. 4, 5 to 13 and 19 published as S. B (4) at p. 17 of the Municipal Manual Edn. 2, in support of a number of defects pointed out by the learned counsel for the respondents, in the course of his argument although no foundation for them was laid in the course of the pleadings in the case. Before discussing the question of the alleged absence of notice, we think, we should first take up the objections regarding the form of the resolution. It is said there was no proposer and seconder and hence there being no regular proposal there could be no resolution adopting the same and that the resolution if any is no resolution proper. We are not prepared to accept this argument. For aught we

know, the motion was put from the Chair as contemplated by Cl. 15 of the bye-laws and hence no proposer and seconder's name may have been put down in the resolution. Next, it is said that the minutes were drawn up and recorded on the 17th and not on the 16th and that there is no certificate that the proceedings have been confirmed as required by Cl. 19 of the bye-laws. From the tenor of the clause we think we are justified in inferring that the provisions in this respect are only discretionary and not mandatory. We, therefore, overrule these contentions.

Next, it is argued that, under Cl. (4) of the bye-laws a notice of the meeting was bound to be served on Major (now Colonel) W. Tarr. Thinking it was expedient to give the parties a chance to adduce evidence on this point, we recorded an interlocutory order dated 10th July 1928 and allowed Major (now Col). Tarr to be examined as a witness in this Court on 26th July 1928. He said that he did not remember to have put the line in blue pencil on the notice (Ex. D. 15), but at the same time added he might have done so. In his cross-examination, however, he says that his invariable practice is to put his initials and not to draw a line against his name on notices, but he is not quite positive for he confesses he cannot swear that he never made a tick mark. This indicates a possibility of Col. Tarr having personally seen the notice and simply made even tick mark, although his practice has been to put initials. No doubt it is more likely, and even more probable, that he would have put his initials than only tick mark of a line. Col. Tarr does not remember anything and hence his deposition cannot lead to a definite inference that the notice was not sent to him or even shown to him. It is argued on behalf of the appellant that all that Cl. (4) of the bye-laws requires is that a notice shall be "sent to every member," the words are not "served on every member," and that the burden of proving that there was non-compliance with the clause so far as Col. Tarr was concerned remains undischarged. We are fully aware that this argument is more technical than real; because looking to the intention of either sen-

ding, giving, or serving a notice of a meeting which is to invite every member because, he must be given facility, to exercise his right to attend it, and, to influence its deliberations, we think the committee could be reasonably expected to send it round to every one of the members concerned as often as possible in order that the call may come to his notice. Had the notices been separately sent out to each individual member there was no need for repeated circulation, but the fact, that the Khandwa Municipal Committee has adopted the procedure of sending round one common notice to all members who know English, and another notice in vernacular, to those who do not know it, leads us to infer that the person whose duty it is to circulate the notice has instructions to make repeated efforts in circulating them and we would not be acting against law if we were to presume in the ordinary course of things that the instructions might have been duly carried out and consequently the committee did its duty towards its members.

Even though there may be no tangible proof of personal service apparent on the face of the notice, we may still presume that the technical requirements of Cl. 4 referred to above must have been complied with in view of the possibility implied from the deposition of Col. Tarr which we cannot exclude from our consideration. We are not, therefore, prepared to find that the formality of sending notice was not complied with in this case. Since the question of actual service of notice is left in doubt we think we will be justified in giving the Municipal Committee the benefit of the presumption which Ill. (e) appended to S. 114, Evidence Act, holds out in favour of the regularity of official acts. Our finding, therefore, is that the plaintiffs-respondents failed to establish beyond doubt that there was either a positive breach of the bye-law in the matter of sending notice of the meeting to Col. Tarr, or that it was guilty of an omission to observe an imperative formality.

We further think that the absence, if any, of a notice of the meeting dated 16th July 1922 to Col. Tarr was a matter in respect of which he, or even the other members of the committee might have raised an objection if not at

that very meeting at least at the next ensuing meeting dated 29th July 1922 at which the proceedings of this special meeting were brought up for confirmation as required by Cl. (19) of the aforesaid bye-laws and actually read. 17 members including Col. Tarr attended the said meeting; none of them nor even Col. Tarr in particular, cared to object to the proceedings of that meeting being confirmed. At least, there is nothing to show that any voice was raised against the proposed introduction of the tax, vide pp. 23 and 24, Ex. D-13 of suit No. 11 of 1924. The learned counsel for the respondents refers us to a passage at p. 33 of Brice on the Doctrine of Ultra Vires and asks us to hold that the proceedings of the special meeting dated 16th July 1922 were invalid for want of notice to Col. Tarr. But we find on the same page the following observations which clearly show that this is an objection which is capable of being waived, or cured by subsequent acquiescence :

"But if all the persons entitled to be present at any meeting are actually present thereat, whether with or without notice, and do not object to the same on the ground of informality, the want of notice will be excused, and they will be unable afterwards to repudiate the proceeding of such meeting: *Re. British Sugar Refining Co.* (3). Even persons not present, and who did not receive notice, may by subsequent acquiescence in the resolutions passed or other business transacted at any meeting, be bound by the same, if intra vires, and be unable to object to the want of notice; *Smallcombe v. Evans* (4) and *Turquand v. Marshall* (5). So on the maxim "*omnia esse rite acta presumuntur*" where the corporate records, are in due order and state that meetings were held it will be presumed, in the absence of clear evidence to the contrary, that such meetings were duly summoned and properly conducted."

Applying these observations to the facts of this case, we hold that, in the absence of clear evidence to the contrary, the notice of the special meeting was sent to Col. Tarr but at the most it could not be personally served on him, and from the mere circumstances that proof of personal service is not forthcoming, we cannot hold that the meeting was not duly summoned and properly conducted. The proceeding cannot therefore be regarded as invalid.

(3) [1857] 26 L. J. Ch. 369=3 Kay & J. 403 5 W. R. 379.

(4) 3 R. L. 219.

(5) [1869] 4 Ch. 376=33 L. J. Ch. 539=17 W. R. 965=20 L. T. 765.

Next it is contended by the respondent's counsel that the notice of the meeting had not with it a list of the business or at any rate it did not clearly and accurately specify the business to be transacted at it ; and that a failure in this respect invalidates the proceedings of the special meeting dated 16th July 1922. We do not agree with the learned counsel's contention except for the use of the word 'bye-laws,' where the word "rules" as to the system of assessment and collection of the tax etc., proposed to be imposed would have been more appropriate. There is nothing wrong with the notice. The specification as made was sufficiently indicative of the business. It is not necessary that a notice should call attention to matters which the law presumes that every one knows ; the words that the tax is a tax on the trade of ginning and pressing cotton was sufficiently descriptive of the persons or description of the property to be taxed. Old S. 40 and its corresponding new S. 75 are sufficiently clear on the point and cure the defect, if any, on this score and prevent the tax from being invalid in any way. This disposes of objections (a), (b), (c) and (d) in para. 3 of the plaint and reproduced above in para. 2 of this judgment.

As to the argument that the special meeting dated 23rd October 1922 was before the expiry of one month from 30th September 1922, when the last publication of the notice in the C. P. Gazette took place, and, therefore, the proceedings of the second meeting were illegal, suffice it to say that this point was never urged at the trial and that, even if it had been raised, it had no substance in it, as the only compulsory publication was a local publication by beat of drum and by keeping the resolution hung up on the notice board ; and the publication in the C. P. Gazette was under the rules only discretionary and by way of additional precaution: vide Municipal Manual, Section B(6), Rules at page 23. The objections were also submitted with reference to the local proclamation made on 26th July 1922. The second special meeting was clearly more than a month after compulsory publication.

As to the objection (e) namely that the date from which the tax was to be introduced, we think this formality is

not imperative as a reference to the procedure laid down at p. 1, Section C, Municipal Taxation, para. 1 of the Municipal Manual would show. We overrule this contention.

As to objection (f), that there was a failure to demonstrate the necessity for the taxation, we think that that information is required for enabling the Local Government to decide whether the sanction should be accorded or not, and could have been called for by it. Inasmuch as the Local Government did not call for it and return the proposals for the demonstration of the necessity we think, it was not treated as an essential piece of information, especially as, that point was raised in the objections and amply met by the committee in the refutation of each of the objections seriatim. The application was accompanied by the necessary enclosures and we did not think there was any non-compliance with the requirements in this behalf. We, therefore, hold that this objection also must fail.

The formalities referred to above are not formalities directed by the legislature but those of mere procedure laid down, for the guidance of or by the committee themselves. Brice on the Doctrine of Ultra Vires has the following statement of law at p. 610, as regards the distinction between the formalities imposed by legislature and those prescribed by corporations :

"The Courts apparently incline to construe statutory provisions of this description somewhat strictly, and therefore to hold a formality directed by the legislature to be imperative, which if prescribed by ordinary individuals and corporations, would be directory merely."

We accordingly hold that the objections urged, even if upheld, are not illegalities, i. e., violation of any directions of the legislature, which might make the imposition of the tax invalid or ultra vires but that at the most they are mere irregularities of procedure prescribed by the corporation. The provisions of S. 24 of the old Act which corresponds to S. 23 of the new Act lay down that any proceedings taken under the Act shall not be questioned on account of any defect or irregularities not affecting the merits of the case. For all these reasons our finding is that the imposition of the tax was not ultra vires or illegal.

As a result of this decision we further hold plaintiffs were legally liable for the tax and that the same was legally recovered from them. Both the suits were therefore, liable to be dismissed. We accordingly set aside the decree passed by the lower Court and allow this first appeal with costs in both Courts to be paid by the plaintiffs-respondents. As regards the second appeal No. 371 of 1924 we uphold the decree of the Court dismissing Suit No. 11 of 1924, though on different grounds. The successful party in that suit shall get costs of all Courts from the unsuccessful party, who will bear their own throughout.

P.N./R.K. *Order accordingly.*

A. I. R. 1930 Nagpur 166

MUNJE, A. J. C.

Sheoji—Appellant.

v.

Bhaskar and another—Respondents.

First Appeal No. 100 of 1928, Decided on 8th November 1929, against decree of Sub-Judge, Nagpur, in Civil Suit No. 34 of 1927.

(a) Transfer of Property Act, S. 58—Mortgage can be foreclosed even if fraction of debt remains unrepaid by mortgagor—But where there is no debt there is no mortgage as there is no foundation to support it.

The security of mortgage is meant for each and every portion of the debt, and the mortgage can be foreclosed even if a fraction of the debt remains unrepaid by the mortgagor. But where no consideration passes at all, the position becomes different; for a mortgage, though really a conveyance of interest in land is a conveyance merely to secure the due payment of debt. Thus where there is no debt there is no mortgage as there is no foundation to support it. Where the mortgage is not only for the consideration that is advanced before the execution of the mortgage deed, but also for moneys that are advanced before the execution of mortgage deed, as well as for future advances that are promised, as also for an engagement made and accepted to pay off the prior mortgage, it cannot be said that the mortgage is without any consideration and therefore it cannot be contended that the mortgage fails as a mortgage because a portion of the money that is promised to be paid was not paid or because an engagement to satisfy the prior incumbrance which forms part of the consideration is broken: 2 C. P. L. R. 243, *not Appr.*; 28 Bom. 62; 21 M. L. J. 169; 23 I. C. 805; 35 I. C. 455 and 4 C. P. L. R. 120 *Rel. on*; (Other case law considered).

[P 169 C 2, P 170 C 1]

(b) Transfer of Property Act, S. 101—Purchaser of prior mortgage is presumed to keep it alive for his benefit—Transfer of Property Act, S. 74.

Where a portion of the property is mortgaged to A and then the whole property is mortgaged to B and where C a subsequent mortgagee of

another portion of the mortgaged property, purchases the portion mortgaged to A it can be presumed that in discharging the prior mortgage he had the intention of keeping the mortgage alive for his benefit: 10 Cal. 1035 (P.C.), *Foll.* [P 171 C 2]

(c) Transfer of Property Act, S. 74—Prior mortgage debt must be fully satisfied to claim right by subrogation.

There can be no acquisition of the right by subrogation unless the person claiming it fully satisfies the whole of the prior mortgage debt. [P 171 C 2]

(d) Limitation Act, Art. 132—Limitation applicable to enforce priority on ground of subrogation—Transfer of Property Act, S. 74.

The right to enforce priority on the ground of subrogation cannot be exercised after 12 years have elapsed since the cause of action under the prior mortgage accrues: 39 Cal. 527 (P.C.); 13 N. L. R. 217, *Rel. on.* [P 172 C 1]

(e) Mortgagor and Mortgagee—Defendant should be allowed to enforce his equitable right of claiming damages for breach consisting of contractual or statutory obligation arising out of mortgage in mortgagee's suit itself—But plaintiff will not be liable for any remote damages.

In cases where the breach consists of a contractual or statutory obligation arising out of the mortgage or annexed to the relationship of mortgagor and mortgagee created by the transaction, the defendant should be allowed to enforce his equitable remedy to claim damages in the mortgagee's suit itself. But the plaintiff would not be liable for any remote damages; the only proper way of assessing the damages would be to find out what loss the defendant would have suffered had he taken steps to remedy the breach in time. [P 172 C 1]

R. B. Gadgil—for Appellant.

K. P. Vaidya—for Respondent 2.

Judgment.—This judgment also disposes of first appeals Nos. 81, 99 and 101 of 1928. These appeals arise out of a suit to enforce by foreclosure the mortgage dated 1st June 1912 executed by defendant 1's father for Rs. 2000 in favour of the plaintiff. The consideration of the mortgage deed was not fully paid up on the date of the mortgage, Rs. 302 only having been paid previous to its execution. The subsequent payments alleged by the plaintiff to have been made towards the consideration are: (1) Rs. 300, paid on 24th August 1912 (*vide* Ex. P-6), (2) Rs. 100, paid on 16th September 1912 (*vide* Ex. P-7), and (3) Rs. 364, paid on 28th July 1913 (*vide* Ex. P-8). Thus in all, according to the plaintiff, the total sum advanced was Rs. 1066. The mortgage deed describes the consideration as made up of Rs. 302 already paid and the remaining amount left with the mortgagee for the satisfaction of previous liabilities of the

plaintiff mortgagee viz. (1) Rs. 875 to be paid by the plaintiff to the previous mortgagee Marot Rao Deshmukh towards his mortgage dated 8th April 1903 for Rs. 700, for which debt only a portion of the mortgaged property in dispute was hypothecated, viz., the malik makbuza fields; (2) Rs. 225 to be paid to the malguzar in lieu of arrears of land revenue; and (3) Rs. 598 were left with the mortgagee for payment to the mortgagor whenever required. It was stated in the mortgage deed that the mortgage debt was taken in order to pay off the mortgagor's creditors.

The sum ear-marked for the previous mortgagee, Marot Rao, was not paid and eventually Marot Rao brought his suit No. 107 of 1913, to enforce his mortgage. To that suit the plaintiff was joined as a party defendant. A decree was obtained on that mortgage and, before it was made final, the mortgagor had to sell a portion of the mortgaged property viz. the malik makbuza plots to defendant 2 for Rs. 3100 with the object of paying off the amount of the preliminary decree obtained by Marot Rao and other debts. The decretal amount was paid and Marot Rao's mortgage was satisfied. On 16th April 1923 the same malik makbuza plots along with the village share in which they were situate were purchased by the plaintiff himself jointly with other defendants, viz. defendants 3 to 8, the plaintiff's share being one-third.

The plaintiff brought this suit on 13th April 27 and joined all these defendants as they were interested in the equity of redemption. The several contentions of the different sets of defendants would be clear from the issues settled in the suit which were as follows:

" 1. Whether the mortgage in suit has been duly executed by defendant 1's father and whether it is validly attested?

2. Whether the aforesaid mortgage is for consideration of Rs. 1036 only as alleged?

3. Whether the following advances towards the aforesaid Rs. 1036 were made to the mortgagor and whether they were made, if at all, by way of consideration for the mortgage in suit?

Rs. 102 dated 15th May 1912; Rs. 100 dated 30th May 1912; Rs. 100 dated 1st June 1912; Rs. 300 dated 24th August 1912; Rs. 100 dated 16th September 1912; and Rs. 364 dated 28th July 1913.

4. Whether the aforesaid consideration of the mortgage in suit was for payment of antecedent debts and for legal necessity as alleged.

5. Whether payment agreed to be made by the mortgagee to the mortgagor's creditors Marot Rao Deshmukh and Balkrishna Malguzar formed the essence of the contract resulting in the mortgage in suit and whether the plaintiff has committed a breach thereof?

6. What is the legal effect of the aforesaid breach, if any?

7. What was the value of the mortgaged properties at the date of the mortgage in suit?

8. Whether defendant 1 suffered any loss by reason of the plaintiff's default in the payment he alleged to make to Marot Rao Deshmukh? What is the extent of such loss?

9. Whether the plaintiff is bound to give credit for the aforesaid loss in this mortgage debt?

10. Does the mortgage security stand split up by the plaintiff having purchased a portion of the mortgaged property?

11. If issue 10 is answered in the affirmative, what remains the value of the mortgage in suit?

12. Was it ever agreed between the plaintiff's father and defendant 2 that the latter would get rights under the mortgage dated 28th April 1903 by purchasing the mortgaged malik makbuza fields?

13. If so, what is its effect on the present suit?

14. Whether the plaintiff's father represented at the time of the sale deed dated 16th April 1923 that nothing had remained due to him on the date of the mortgage in suit and that it was only a paper transaction?

15. Whether interest claimed exorbitant and penal?

16. What rate of interest should be allowed?

17. Relief."

The lower Court after considering the evidence on both the sides gave the following findings on the above issues: (1) The mortgage is genuine and duly attested. (2 and 3) All the several items alleged by the plaintiff to have been paid towards the mortgage were paid except the last item of Rs. 364 under Ex. P-8. out of which Rs. 198 only was paid towards the mortgage; thus in all Rs. 900 was the total consideration paid. (4) The consideration of the mortgage was partly to satisfy antecedent debts and partly to meet cultivation expenses and thus binding on defendant 1, son of the mortgagor. (5) The mortgage was executed chiefly because the mortgagee had undertaken to pay off the previous mortgage of Marot Rao Deshmukh and the land revenue due by the mortgagor. (6 and 10) Marot Rao's mortgage debt having, however, subsequently been paid off by the sale of malik makbuza fields, which eventually were purchased by the plaintiff, the mortgage was split up and the mortgage could be redeemed piece.

meal. (7) The values of the mortgaged properties on the date of the mortgage in suit were malik makbuza fields Rs. 3,500, absolute occupancy fields with appurtenances Rs. 3,600 and the house Rs. 300. (8 and 9) No findings were given. (11) The plaintiff having purchased one-third of malik makbuza land the only amount which he could recover under the mortgage was Rs. 756, (12 and 13) No findings were given but it was remarked, while discussing issue 5, that none of defendants 2 to 8 secured the rights under the prior mortgage by the mere fact of having purchased the mortgaged malik makbuza fields and liquidated the debt due under the prior mortgage and that, even if any such rights were acquired, the question amounted to setting up a paramount title which could not be investigated in this case. (14) There was no representation on behalf of the plaintiff when he purchased the malik makbuza fields on 16th April 1923 that his previous mortgage was a mere paper transaction. (15 and 16) The interest charged viz. compound interest at 1 per cent per mensem with yearly rests was neither exorbitant nor penal. On these findings a decree for foreclosure for Rs. 2,450 as claimed by the plaintiff, was passed.

All the parties have now filed different appeals attacking findings which are against their interest. As regards the contention that the execution and attestation of the mortgage was not duly proved, I have only to say that the evidence of Laxmanrao (P.W. 2) Ganpati (P. W. 4) and Pandurang (P. W. 8) along with the documentary evidence contained in Exs. P-5 and P-9 clearly shows, as held by the lower Court, that this contention is futile.

As regards the amount of consideration that passed under the mortgage deed it was contended for the plaintiff that the whole of Rs. 1,066 did pass, while on the other hand the defendants admitted receipt of Rs. 302 only. As regards the three amounts paid after the execution of the mortgage, the defendants contended that these at least had no connexion with the mortgage in suit. The lower Court has considered the evidence on this point and the finding has not been seriously challenged in arguments, except as regards the amount

of Rs. 364 paid under the receipt Ex. P-8 dated 28th July 1913. A perusal of this receipt itself will satisfy anyone that the amount was paid towards the consideration of the mortgage and was not any independent debt. The concluding words in the receipt are :

"The balance now due is Rs. 934 which remains with you."

This amount, together with the amount Rs. 1,066 which the plaintiff alleges he has advanced under the mortgage, makes up the total of Rs. 2,000 for which the mortgage was executed. This makes it clear beyond doubt not only that this item forms the consideration of the mortgage but also that the previous items in dispute, viz. those referred to in Ex. P-6 and P-7, did also form part of the consideration of the mortgage. I therefore set aside the finding of the lower Court on this point and instead find that the total amount of the consideration under the mortgage that was received by the mortgagor was Rs. 1,066.

It is clearly admitted by the defendants that the main intention of the mortgage was to pay off the antecedent debts due by the mortgagor, viz. the prior mortgage debt of Marotrao and the land revenue assessment. There is also evidence on record to show that Marotrao had obtained two money decrees against the mortgagor ; these remained unpaid at the time of the mortgage in suit when an attachment under one of the decrees was also pending. As regards the rest of the consideration, it is clear as observed by the lower Court, that the mortgagor being indebted was in want of money which he must have acquired in respect of the cultivation of his garden land. The main purpose of the mortgage being admittedly to pay off the creditors, I would believe the testimony of Ganpati (P. W. 4) the plaintiff mortgagee, when he states in his evidence that the mortgage was executed :

"to pay off the creditors and to defray expenses of cultivation."

There being no rebutting evidence worth the name, I would confirm the finding of the lower Court on this point.

As regards the valuation of the different properties arrived at by the lower Court, no serious argument was addressed to me; but it was brought to my

notice that the area and assessment of the different lands being different they could not be held to have the same value. My attention was also directed to the evidence of Vinayakrao (D. W. 3) who deposed that about 17 years ago the malik makbuza fields were worth Rs. 4,000 and the absolute occupancy fields were worth Rs. 7,000 and that the prices have gone up further since then. In cross examination, however, the witness had to admit that he had never entered into any transaction of land in that mouza Sasundri or nearabout; on the contrary, he had to admit that absolute occupancy land similar in size to the malik makbuza land in suit was sold for Rs. 2,400 only 11 years ago. The lower Court has considered all the evidence on record on this point and has believed the testimony of Ganpatrao (I-D. W. 1), who appeared to be "much more reliable being an independent witness." No reason has been shown to me in arguments why I should interfere with the estimate of the evidence of this witness made by the lower Court. The lower Court, after weighing all the evidence on the point, observes as follows :

"Reading the testimony of P. W. 5 with this qualification and also bearing in mind that the plaintiff is interested in lowering the value of the malik makbuza and in giving an exaggerated value of the other properties I find that at the date of the mortgage the malik makbuza land was worth about Rs. 3,500 absolute occupancy with all appurtenances thereto was worth Rs. 3,500 and the house was worth Rs. 300."

In my opinion this estimate of the evidence of the value seems to be correct and I confirm this finding of the lower Court.

The next contention urged is that the mortgage ceased to be a mortgage and enforceable as such because (1) the whole of the consideration was not paid and (2) the payment of the prior incumbrance which was of the essence of the mortgage was not made. As regards the first point the decision in *Pema v. Durgoo Kachi* (1) might lend support to the contention; for in that case it was held that the agreement of mortgage was one and indivisible, and if the mortgagees were allowed to foreclose the mortgage for only a portion of the debt it would amount to allow him to get for a portion of the consideration what

it was agreed he should get for the whole. The security of mortgage, however, is meant for each and every portion of the debt, and the mortgage could be foreclosed even if a fraction of the debt remained unrepaid by the mortgagor. It would thus appear to me that the reasoning in *Pema v. Durgoo Kachi* (1) is not quite sound. In *Bhagchand v. Radhakisan* (2) and *Tirumal Raju v. Muthiah Naidu* (3) cases based on exactly similar facts the mortgage was enforced in respect of the part consideration that was paid.

In cases where no consideration has passed at all, the position becomes different for a mortgage, though really a conveyance of interest in land is a conveyance merely to secure the due payment of the debt. Thus where there is no debt there is no mortgage, as there is no foundation to support it: vide *Ramaswami Chettiar v. Sundara Reddiar* (4), *Kumarappan Chettiar v. Narayanan Chettiar* (5) and *B. B. Balaprasad v. Bidur Ram* (6). In a recent Privy Council decision in *Veerappa Chetty v. Arunachalam Chetty* (7) the mortgagee sued to enforce his mortgage when he had not at all performed his engagement to pay the prior incumbrance the suit was dismissed and the result worked out on a different ground. The ground was that the plaintiff had established no case whatsoever under the law either for a decree for money or for an account. Again, while a contract to make or take a loan of money of a mortgage could not be specifically enforced: vide *Anakaran, Kasmi v. Saidamadaik Avulla* (8), *Galim v. Sadarijan Bibi* (9) and *Yadavendra Bhatta v. Srinivasa Babu* (10) yet if a portion of money has been actually advanced and the contract partly performed specific performance could be decreed *Hunter v. Langford* (11). Similarly, where the consideration has been partly paid the mere fact that the remaining

(2) [1904] 28 Bom. 62=5 Bom. L. R. 672.

(3) [1911] 35 Mad. 114=21 M. L. J. 169=9 I. C. 28=1911 M. W. N. 113.

(4) [1914] 23 I. C. 805.

(5) [1916] 35 I. C. 455.

(6) [1891] 4 C. P. L. R. 120.

(7) A. I. R. 1924 P. C. 192=4 Rang. 43(P.C.).

(8) [1879] 2 Mad. 73.

(9) [1916] 43 Cal. 59=21 C. L. J. 532=29 I. C. 621=19 C. W. N. 1332.

(10) A. I. R. 1925 Mad. 62=47 Mad. 603.

(11) 3 Moll 272.

(1) [1930] 2 C. P. L. R. 243.

portion has not been advanced should not destroy the mortgage or render it unenforceable: vide *Munshi Bajrangi Sahai v. Udit Narain Singh* (12), *Jwala Prasad v. Achchey Lal* (13), *Tirumal Raju v. Pandla Muthiah Naidu* (14), *Abdul Hashim Sahib v. Kadir Batcha* (15) and *Allah Ditta v. Nazar Din* (16).

In the case before me the mortgage was not only for the consideration that was advanced at the time of the mortgage deed but also for moneys that were advanced before the execution of the mortgage deed as well as for future advances that were promised as also for an engagement made and accepted to pay off the prior mortgagee. Under S. 58, T. P. Act, a mortgage is a transfer of interest in specific immovable property for the purpose of securing (1) payment of money advanced or (2) the payment of money to be advanced by way of loan, i. e., an existing or future debt, or (3) the performance of an agreement which may give rise to a pecuniary liability. The consideration may be past or future; money paid or promised: it may also consist of the performance of an engagement of a character the breach of which would entitle the obligee to recover damages. Such an engagement has been made in this case. It cannot therefore be said that mortgage in this case was without any consideration; and, therefore, the contention that the mortgage fails as a mortgage, because a portion of the money that was promised to be paid was not paid, or because an engagement to satisfy the prior incumbrance, which formed a part of the consideration, was broken, has no force.

As regards the other point, viz., that the payment of the prior incumbrance was of the essence of the mortgage and that, as it was not paid, the mortgage failed as a whole, the learned counsel for the defendants has referred me to the case of *Subba Rau v. Devu Shetti* (17) to support this contention. There is another Full Bench decision which,

(12) [1906] 10 C. W. N. 932.

(18) [1912] 34 All. 371=14 I. C. 132=9 A. L. J. 386.

(14) [1917] 35 Mad. 114=21 M. L. J. 169=9 I. C. 28=(1917) 1 M. W. N. 113.

(15) [1918] 42 Mad. 20=35 M. L. J. 740=48 I. C. 370=(1918) M. W. N. 769.

(15) [1916] 53 P. R. 1916=33 I. C. 474=51 W. R. 1916 (F.B.).

(17) [1895] 18 Mad. 126.

to a certain extent, also supports the same view, viz.: *Gokal Chand v. Rahman* (18). But this case has since been overruled by another Full Bench decision of the same High Court, viz. *Allah Ditta v. Nazar Din* (16). The authority of the Madras case has also been somewhat shaken by later decisions, vide, e. g.,: *Tirumal Raju v. Muthiah Naidu* (15). Assuming, however, that the Madras ruling gives good law, the case, when examined, would show that the decision has been rested on two essentials, viz., (1) that the mortgagor cancelled the mortgage when he failed to receive the money promised, and (2) that the mortgagee acquiesced in that cancellation. The evidence on the record and the circumstances of the case before me do not satisfy either of these essential conditions. The prior incumbrance was intended to be paid off immediately after the execution of the mortgage in question; the payment was not made for a long time, with the result that the mortgagor could not perform even the favourable compromise of his liabilities which he had subsequently made with the prior mortgagee. Yet, soon afterwards, payment was allowed to be tendered to the prior mortgagee. This fact would appear from the judgment and pleadings of both the parties in the previous suit instituted by the prior mortgagee. It was then for the mortgagor to have demanded that money from the mortgagee and, if default were made in payment, to have cancelled the transaction. Nothing of the sort was done. The prior mortgagee then filed his suit and even there the mortgagor acquiesced in the plaintiff being joined in that suit and allowed a chance to redeem. Even when the decree was passed and the plaintiff would not pay the amount, with the result that the mortgagor had to approach defendant 2 for the money, the mortgagor does not seem to have taken any notice of the plaintiff's default but has remained inactive since.

These circumstances clearly show that the mortgagor never intended to cancel the mortgage on the ground that the plaintiff defaulted in the performance of his engagement; much less did the plaintiff acquiesce in the cancellation of the mortgage. Another important fact is

(18) [1907] 59 P. R. 1907 (F.B.).

that more than a year after the mortgage the mortgagor accepted no less an amount than Rs. 364 towards the consideration of the mortgage. The evidence adduced by the defendant to the effect that, when defendant 1 purchased the malik makbuza fields comprised in the mortgage or when he sold these fields along with the village share to the plaintiff and defendants 3 to 8, the plaintiff declared that his mortgage was a fictitious transaction, is very interested and not at all worthy of reliance. The witness Ganpatrao Ajankar (2-D. W. 1) is heavily indebted to defendant 2, i. e., to the extent of Rs. 7,000, and has all of his property mortgaged with him and, therefore, seems to be under the thumb of defendant 2. The next witness Ganpati Shanker (2-D. W. 2) is also a debtor of defendant 2. Again, if the plaintiff really make any such declaration and the defendants were satisfied therewith, it is not understood why the defendants did not take the evident step of demanding the mortgage deed from the plaintiff.

It is thus clear that the essential conditions in *Subba Rau v. Devi Shetti* (17) are not satisfied in this case, and, therefore, the plaintiff's mortgage cannot fail. There is also no evidence worth the name to show that the payment of the prior incumbrance was of the essence of the mortgage so as to attract the provisions of S. 26, T. P. Act. The evidence shows that the payment of this incumbrance as well as the debts on account of the land revenue assessment due to Foujdar were only the immediate occasion for defendant 1 to enter into this transaction; these were not the only liabilities of the mortgagor who was otherwise heavily indebted both to the prior mortgagee and others. He had also allowed a large portion of the consideration to remain deposited with the plaintiff to meet the demands. I, therefore, find that the payment of the prior mortgage or the payment of the assessment to Foujdar was not of the essence of the plaintiff's mortgage and further that neither did the mortgagor take any steps to cancel the mortgage, nor did the plaintiff acquiesce in the cancellation thereof; on the contrary, the conduct of the mortgagor

seems to show that he acquiesced in the subsistence of the mortgage.

The next contention is that defendant 2 had acquired by subrogation the rights of the prior mortgagee and should have been allowed to enforce those rights as against the plaintiff. When defendant 2 purchased the malik makbuza fields comprised in the mortgage he was already holding a subsequent mortgage with respect to the other mortgaged property, viz., the absolute occupancy field, and there was also the plaintiff's mortgage, and, therefore, it could be presumed that in discharging the prior mortgage he had the intention of keeping the mortgage alive for his benefit: *Gokaldas v. Puranmal* (19). Defendant 2 has, however, transferred the malik makbuza land while he still remains the puisne mortgagee with respect to the other property. In these circumstances it is difficult to say if he has also parted with the rights acquired by subrogation. Even if it were assumed that the plaintiff and defendants 3 to 8 have acquired the rights, it is extremely doubtful whether the plaintiff, having failed to perform his engagement to pay off the prior mortgage, could claim to exercise those rights: vide. *Har Shyam v. Shyam Lal Sahu* (20).

Again, defendants 3 to 8 who have associated with him in the purchase of the malik makbuza fields, could also not be allowed to exercise such rights; for, otherwise, plaintiff would also get the benefit by exercising his right of contribution, which he could not in equity. Even if they be regarded as purchasers of a separate two-thirds interest in the malik makbuza fields, they cannot be said to have fully satisfied the whole of the prior mortgage debt, without which there could be no acquisition of the right by subrogation. The decision of this question is, however, not necessary; for whichever of the defendants may have the rights, the right to enforce priority cannot now be exercised owing to the bar of limitation, as more than 12 years have elapsed since the cause of action under the prior mortgage accrued: vide, *Mahomed Ibrahim Hossain Khan*

(19) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).

(20) [1916] 43 Cal. 60=22 C. L. J. 227=31 I. C. 22=20 C. W. N. 601.

v. *Ambika Pershad Singh* (21) and *Nathuram v. Sheolal* (22). The prior mortgage of Marotrao Deshmukh was made in 1903 and was payable in seven years, and it is now too late for them to claim to enforce their right.

As regards the contention referred to in issue 12, viz., whether there was an agreement between defendant 2 and the plaintiff that the former would get rights under the prior mortgage of Marotrao Deshmukh by paying it off, I have only to observe that the determination of the question is no longer necessary; for, as already stated above, the right of subrogation cannot now be enforced owing to the bar of limitation.

The next question is whether the defendants are entitled to set off the amount of damages resulting from the plaintiff having broken off his engagement to pay off the prior mortgage. It has been held in *Rani Raghubansi Kunwar v. Raunakali* (23) the only case on the point for the time being available to me that the defendants' remedy for recovery of damages resulting from the default of the mortgagee is by a separate suit. With due respect to the Judges, I cannot accept the decision; for I cannot understand why the mortgagor should be driven off to a separate suit in order to enforce his right which is an equitable right. The proper rule, in my opinion, should be that, in cases where the breach consists of a contractual or statutory obligation arising out of the mortgage or annexed to the relationship of mortgagor and mortgagee created by the transaction, the defendant should be allowed to enforce his equitable remedy in the mortgagee's suit itself.

But the plaintiff would certainly not be liable for any remote damages; the only proper way of assessing the damages would be to find out what loss the defendant would have suffered, had he taken steps to remedy the breach in time. This he could do by borrowing money in the market and paying off the prior mortgagee in time. He did make the arrangement to pay off the prior mortgage subsequently, i. e., soon after 14th April 1917 when he sold the malik

makbuza fields to defendant 2. He should, therefore, be supposed to have borrowed the debt in the market on 1st June 1912 (the date of the plaintiff's mortgage) and paid it off soon after 14th April 1917, i. e., roughly five years. This loan would, in the plaintiff's circumstances, have naturally been an unsecured loan and would not have been available unless the full Mahajani rate of Rs. 2 per cent per mensem were paid. The loss, then, suffered by the mortgagor would be the interest on Rs. 875 at Rs. 2 per cent per mensem for these five years. This amount comes to Rs. 1,050 and this I assess as the amount of the damages. This amount will be deducted from the mortgage money on 1st June 1917.

As regards the contention that the interest allowed has been of a penal and exorbitant nature, I fully agree with the lower Court in its finding in the negative. The right of Re. 1 per cent per mensem compound interest, is certainly not of an extortionate nature and also not penal.

The plaintiff's account now stands thus :

| | | | |
|---|-----|---------|-----------|
| Principal amount | ... | ... | Rs. 1,066 |
| Deduct rateable amount on one-third share of malik makbuza fields mortgaged which the plaintiff purchased | ... | ... | Rs. 170 |
| | | Balance | Rs. 896 |
| Add interest at 1 per cent per mensem, compound rate, from the date of mortgage till 1st June 1917, about which date the mortgagor satisfied the prior mortgage | ... | ... | Rs. 710 |
| | | Total | Rs. 1,606 |
| Deduct Rs. 1,050, damages which mortgagor became entitled to on 1st June 1917 owing to plaintiff's breach | ... | ... | Rs. 1,050 |
| | | Balance | Rs. 556 |
| Add interest at 1 per cent per mensem, compound rate, on the balance from 1st June 1917 to 1st December 1929, the due date for defendant 2 | ... | ... | Rs. 1,707 |
| Total for defendant 2 payable on 1st December 1929. | | | |
| | | Total | Rs. 2,263 |
| To 1st January 1930, the due date for defendants 3 to 8 | ... | ... | Rs. 1,728 |
| Total for defendants 3 to 8, payable on 1st January 1930. | | | |

TOTAL Rs. 2,284

(21) [1912] 39 Cal. 527=14 I. C. 496=39 I. A. 69 (P.C.).

(22) [1917] 13 N. L. R. 217=42 I. C. 796.

(23) [1907] 10 O. C. 69.

To 1st February 1930, the due date for defendant 1 ... Rs. 1,749
Total for defendant 1, payable on 1st February 1930.

TOTAL Rs. 2,305

The plaintiff shall be entitled to have proportionate costs of the suit and the two appellants only added to the decretal amount. The decree shall be in form No. 6, Appx. D, Civil P. C. The defendants want an opportunity to redeem the whole mortgage and have objected to any division of liability as between them, as has been made by the lower Court in its decree and I have, therefore, decided to pass a decree for the whole amount as detailed above. In the peculiar circumstances of the case I order all the defendants to bear their own costs. The defendants have raised several pleas and taken grounds before me in which they have failed; they have succeeded only as regards some. It is, therefore, that I make the above order regarding their costs.

P.N./R.K. *Order accordingly.*

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SUBHEDAR, A. J. C.

Dinkarrao and others — Plaintiffs — Appellants.

v.

Shamrao and others — Defendants — Respondents.

Second Appeal No. 118-B of 1927, Decided on 18th October 1929, against decision of Dist. Judge, Akola, D-/ 12th February 1927, in Civil Appeal No. 64 of 1926.

(a) Transfer of Property Act, S. 91—Phrase 'having an interest in the property' in S. 91 has same meaning as is attached to similar phrase in O. 34, R. 1, Civil P. C.—One coparcener, not manager, mortgaging property held in coparcenary by himself and others—Mortgage is not binding on other coparceners and they are not entitled to redeem mortgage — Hindu Law—Alienation—Coparcener.

The phrase 'having an interest in the property' in S. 91(a) has the same meaning as is attached to the similar phrase appearing in O. 34, R. 1, Civil P. C., and, therefore, only those persons, who are necessary defendants to a suit to enforce a mortgage, can have a right to redeem such mortgage either in the same suit or, if they are excluded from it, by another suit of their own for redemption. If one of the coparceners who is not a manager mortgages property held in coparcenary by himself and others, the mortgage is binding

so far as the mortgagor's joint share in the property is concerned but it does not bind the other coparceners and their interest in the mortgaged property remains unaffected. The other coparceners are not, therefore, necessary parties to a suit instituted by the mortgagee to enforce the mortgage for the reason that whatever interest they possessed in the mortgaged property is not in law affected by the foreclosure decree and they are not entitled to redeem the mortgage : 11 N. L. R. 117 and 4 N. L. R. 9, *Rel. on.* [P 175 C 2 : P 176 C 2]

(b) Transfer of Property Act, S. 91—One tenant-in-common has no interest in share held by another entitling him to claim redemption.

A tenant-in-common possesses no interest in the share held by another tenant-in-common in the common property of both the owners so as to entitle him to claim redemption in that mortgaged share for the reason that the interest of each co-owner is distinct and defined and he must own and hold it not in unison with the other co-owner but independently of him. [P 176 C 1,2]

(c) Practice — Subsequent events—Claims of parties to claim reliefs must be restricted to right possessed by them at the time of institution of suit.

The rights of parties must be ascertained as they are at the date of the action brought and they cannot be allowed to claim relief on the basis of a right which accrues to them after the institution of the action brought : 6 N. L. R. 17 *Foll.* : 6 *Bom.* 139 : A. I. R. 1925 *Mad.* 63 ; A. I. R. 1926 *Mad.* 6, *not foll.*

[P 177C 1]

(d) Practice — Court can grant relief if parties are entitled to it on facts ascertained in the case.

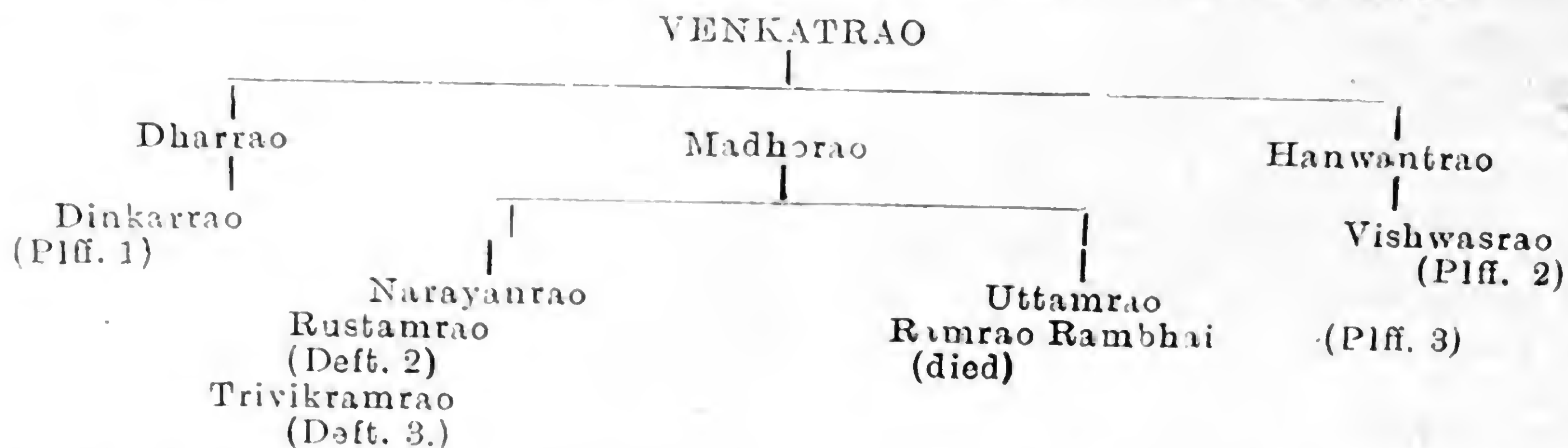
The Court is not precluded from awarding such relief as the parties are found entitled to on the facts ascertained in the case : 23 *Bom.* 385, *Ref.* [P 177 C 1]

M. V. Joshi, A. V. Khare and T. L. Sheode—for Appellants.

M. R. Bobde and Y. R. Dongre—for Respondent 1.

Judgment. — This and second appeal No. 119-B of 1927 arise out of Civil Suit No. 108 of 1924 decided by Mr. J. E. Solomon, Second Class Subordinate Judge, Akola, on 26th June 1926. Both the contesting parties were dissatisfied with the trial Court's decision and they preferred separate appeals to the Court of the District Judge, Akola, the appeal by defendant 1 was Civil Appeal No. 64 of 1926 and that by the plaintiffs Civil Appeal No. 67 of 1926. The result in both the appeals was the dismissal of the suit but as two separate decrees were drawn up by the District Judge both the present second appeals had to be filed by the plaintiffs. This judgment will govern disposal of both the second appeals.

The facts leading to these appeals are a bit complicated and require to be stated in some detail and for the proper understanding of the points in dispute it is necessary to give the following genealogical tree of the family of the plaintiffs and defendants 2 and 3 :



The subject matter of the dispute in the case is a field S. No. 52 and a house in mouza Chelak of the Akola District. These were mortgaged by defendant 2 in 1909 to the father of defendant 1 who having foreclosed the mortgage obtained possession of the property on 8th May 1916 which has since remained in possession of defendant 1. After execution of the aforesaid mortgage defendants 2 and 3 filed a suit against the present plaintiffs 1 and 2 and Ramrao, the husband of plaintiff 3 for partition of the joint family properties which undoubtedly included the mortgaged properties. This suit dragged on for nearly 15 years and ultimately a final decree was passed on 22nd December 1924 under which the field and the house foreclosed to defendant 1 were allotted to the share of the present plaintiffs. It may be noted that defendant 1 was not made a party to the partition suit.

The present suit out of which these second appeals arise was filed by the plaintiffs on 9th May 1924 soon after the allotment of share in the partition suit was made, but admittedly before the final decree for partition was drawn up. The plaintiffs claimed possession of the field and the house from defendant 1 on the ground that the property had fallen to their share at the partition. They asserted that the mortgage executed by defendant 2 was a personal affair of the mortgagor and did not bind them. In the alternative they claimed to redeem the mortgage because they were not made parties to the mortgage suit.

The case proceeded ex parte against defendants 2 and 3. Defendant 1 alone contested the plaintiffs' claim on various grounds. A fair idea of the pleadings of the parties would be gathered by a perusal of the following issues which were settled for trial :

1. Are the plaintiffs 1 and 2 the adopted sons of Dharrao and Hanwantrao respectively as alleged? Are they as such entitled to 1/3rd share each in the property in suit?
2. Can plaintiff 3 claim 1/6th share in the property in suit? Can she claim to figure as co-plaintiff in this case?
3. Was the property in suit the separate and sole property of defendant 2 as alleged? Or was it the ancestral family property?
4. Is defendant 1 and his predecessor-in-title in adverse possession of the property in suit for over 12 years prior to this suit? Is the plaintiffs' claim time barred?
5. Did the property in suit fall to the share of the plaintiffs by the partition decree in C. S. No. 26 of 1903 of the Court of A. D. J. Akola?
6. Is the said decree obtained fraudulently and collusively in the manner alleged by defendant 1?
7. Is or is not the said decree binding on defendant 1?
8. Is the claim based on partition decree premature for reasons alleged by defendant 1?
9. Can the plaintiff claim possession of the property in suit on the basis of the partition decree?
10. Did defendant 2 execute a mortgage for Rs. 1520 dated 12 March 1903 of the property in suit in favour of defendant 1's father for consideration?
11. Was the mortgage executed for purposes binding on the joint family?
12. Did defendant 1 foreclose the property in suit in C. S. No. 42 of 1914 as alleged?
13. Is the mortgage decree not binding on plaintiffs for reasons alleged by them?
14. If not, are the plaintiffs entitled to redeem the said mortgage?
15. Can the plaintiffs claim accounts of the profits of the property from defendant 1 from 8th May 1916 onwards as alleged?
16. If so, how do the accounts stand as between the parties and what is due from one to the other and vice versa?
17. Are the plaintiffs bound to pay court-fee on the excess amount claimed by them?
18. Can plaintiffs claim possession? If so, on what conditions if any?
19. To what relief are plaintiffs entitled?

Issues 1, 5, 10, 12, 14 and 15 were answered in the affirmative and Nos. 2, 4, 6 to 9, 11 and 13 in the negative. On issue 3 the finding was that the property was joint ancestral property and no finding was recorded on issues 16 and 17. In the result the trial Court passed a decree for redemption in plaintiffs' favour declaring the price of redemption to be Rs. 2,779 minus plaintiffs' costs of the suit. As already stated against this decree both sides preferred separate appeals and the learned District Judge allowed defendant 1's appeal and dismissed the plaintiffs' suit, but

"directed that the plaintiffs be ordered to re-open the partition and that the Court which passed the partition decree should after reference to the Collector allow to the plaintiff property, a field and a house, equal in value to the whole of the mortgaged property."

The cross-appeal of the plaintiffs was dismissed.

The plaintiffs have, therefore, filed the present second appeals. The first contention advanced on their behalf is that since at the date of the present suit they were coparceners, they should have been given a decree for possession of the property in dispute leaving defendant 1 to work out his remedies by a suit for partition on the principles enunciated in *Mohanlal v. Tekchand* (1). Respondent 1's learned advocate urged that the case cited does not govern the present case and I consider this contention to be well founded. By the preliminary decree for partition passed on 29th October 1919, if not on the filing of the partition suit, there was a disruption of the joint family and thereafter until the passing of the final decree for partition the position of the plaintiffs was that of tenants-in-common only. For this reason it seems to me that the principle underlying the decision of *Mohanlal's* case would not govern the present case and the plaintiffs are therefore, not entitled to a decree for possession of the property in dispute and to drive respondent 1 to file a suit for partition to have his equities worked out.

The next question for determination is if the appellants are entitled to a decree for redemption. Their learned counsel relied on the wording of S. 91 (a), T. P. Act, which lays down that any

person having an interest in the mortgaged property may institute a suit for redemption. Sir Moropant Joshi therefore argued that because the plaintiffs were co-owners of the mortgaged properties they had "an interest" in the same entitling them to redeem the mortgage.

On behalf of respondent 1 it was, however, contended that because at the date of the present suit the plaintiffs were merely tenants in common having a definite 5/6th share in the mortgaged property, they could not be said to be interested in the remaining 1/6th share belonging to defendant 2 which alone was the subject of the mortgage in the eye of the law, and as such the plaintiffs could not be said to have an interest in the property within the meaning of S. 91 (a), T. P. Act. There is undoubtedly much force in this contention. The phrase "having an interest in the property" appearing in S. 91 (a), T. P. Act, is nowhere defined but it is now well settled that it has the meaning as is attached to the similar phrase which appears in O. 34, R. 1, Civil P. C. It follows therefore that only those persons, who are necessary defendants to a suit to enforce a mortgage, can have a right to redeem such mortgage either in the same suit or, if they are excluded from it by another suit of their own for redemption.

In *Shankersingh v. Hukumchand* (2) Mittra, A. J. C., held that a person cannot be said to have any "interest in the property" within the meaning of S. 91 (a), T. P. Act, unless he can be prejudiced by a foreclosure or sale in pursuance of the mortgage. The same proposition was laid down by Stanyon, A. J. C., in an earlier case reported as *Ghanya v. Ukund Rao* (3), in these words:

"Redemption is primarily an incident of the contract of mortgage and such the right to it can only exist in such persons as are reached and bound by the contract."

As very pertinently observed by Stanyon, A. J. C., in the aforesaid ruling S. 91, T. P. Act, requires the plaintiffs to be interested not merely in what purports to be mortgaged but what in law and therefore in fact is actually mortgaged. In the present case defendant 2 executed a mortgage of property which was at that time held in coparcenary by him-

(1) [1913] 9 N. L. R. 18=18 I. C. 826.

(2) [1918] 14 N. L. R. 117=47 I. C. 99.

(3) [1908] 4 N. L. R. 9.

self and the plaintiffs, but according to the law as interpreted in these provinces the mortgage was a perfectly valid one only so far as the joint share of the mortgagor in the said property was concerned, and as defendant 2 admittedly did not purport to act in the transaction as the manager of the joint family, it was not binding upon the plaintiff's coparceners and their interest in the mortgaged property which remained wholly unaffected by the mortgage.

The plaintiffs were, therefore, not necessary parties to the suit instituted by defendant 1 to enforce the mortgage for the simple reason that whatever interests they possessed in the mortgaged property were not in law to be affected by the foreclosure decree which defendant 1 claimed in that suit. It is also the plaintiffs' own case here that the foreclosure decree which was ultimately passed in that suit was not binding on them or their interests in the mortgaged property.

The position of the plaintiffs at the date of the present suit with reference to the mortgaged property is even worse. By the preliminary decree in the partition suit their shares in the foreclosed property were now made definite, viz., they admittedly held 5/6th share while defendant 2 or defendant 1 held the remaining 1/6th. So far as the plaintiffs 5/6ths share in the property in dispute is concerned it was in the eye of the law outside the purview of the property which was the subject of the mortgage and it is therefore clear that the plaintiffs can claim no right of redemption with regard to this share.

The sole question then is if they have such a right with regard to the 1/6th share which under the law was the only mortgaged property and which by the force of the preliminary decree for partition belonged solely to defendant 1. The answer to this question would depend in turn upon the solution of the further question if the plaintiffs could in law be deemed to have any interest in the defined 1/6th share held by the defendant 2. In other words, does a tenant in common possess any interest in the share held by another tenant, in common in the common property of both the owners? The obvious answer to this must be in the negative, for the simple reason that the interest of each

co-owner is distinct and defined and he must own and hold it not in unison with the other co-owner, but independently of him. I hold, therefore, that the plaintiffs have no interest in the mortgaged property and have, therefore, no right to claim redemption.

The last point argued for the appellants was that events which happened subsequent to the filing of the present suit should be taken into consideration in determining the right of the appellants to claim an unconditional decree for possession against the contesting respondent on the footing that by the final decree for partition they had acquired a legal title to the properties in suit absolutely. The appellants' counsel relied on the following cases in support of the first branch of his argument: *Krishnaji Ravaji v. Ganesh Bapuji* (4) *P. Thiwnayya v. P. Siddappa*, A. I. R. 1925 Mad. 63, *V. Appalasuri v. Kannamma Nayuralu*, A. I. R. 1926 Mad. 6.

In the first case the plaintiff who was suing for redemption had not acquired a title to the equity of redemption on the date he brought his suit but during the course of the trial the sale in his favour having been confirmed, it was held that he should have a decree for redemption. In the second case where the plaintiff had no right of suit at the date of its institution but acquired that right through inheritance opening in his favour before disposal of the suit, it was held that the decree was not bad for want of formal amendment of the plaint. In the third case it was held that an amendment of the plaint was necessary in cases where right of suit accrues during the progress of the suit and that it was entirely in the discretion of the Court to allow or not to allow such an amendment.

But the view of this Court as expressed in *Udebhan v. Jagannath* (5) at p. 20 is that "the rights of the parties must be ascertained as at the date of the action brought." It may be noted that this view was based upon the decision of the Madras High Court in *Ramandan Chetti v. Pulikutti Servai* (6), which is, however, not even referred to in the aforesaid two unofficially reported deci-

(4) [1881] 6 Bom. 139.

(5) [1910] 6 N. L. R. 17=5 I. C. 699.

(6) [1898] 21 Mad. 288=8 M. L. J. 121.

sions of that Court cited here for the appellants. I prefer to follow the precedent of this Court and hold that the appellants should not, under the circumstances of this case, be allowed to claim relief on the basis of a right which accrued to them after the institution of the present suit.

It only remains to decide what form of relief should be allowed to the parties on the footing of the findings arrived at in the case. The foreclosure decree obtained by defendant 1 against the property in dispute is not at all binding upon the plaintiffs. Neither is the decree in the partition suit No. 26 of 1909 binding upon defendant 1 because in spite of the bona fide attempts of both sides to make him a party to the proceedings in partition, he was not made a party to that suit. The plaintiffs have been found not entitled to any of the reliefs claimed by them.

But the Court is not precluded from awarding such relief as the parties are found entitled to on the facts ascertained in the case *Sri Mahant Gobind Rao v. Sita Ram Kesho* (7) and *Gama v. Lahario* (8). Neither party is satisfied with the decree passed by the lower appellate Court. The most convenient and just course under the circumstances therefore is to set aside the decrees of the two lower Courts and remand the case to the Court of the first instance with directions to re-open the partition of the joint family estate effected by the decree in Suit No. 26 of 1909 between the plaintiffs and defendants 2 and 3 and re-adjust the allotments between them and defendant 1 according to law. In *Lakshman v. Gopal* (9) such relief was claimed in the alternative and allowed. As to costs I am of opinion that under the peculiar circumstances of this case the proper order to pass would be that each party should bear his own costs in all the three Courts.

P.N./R.K.

Case remanded.

A. I. R. 1930 Nagpur 177

SUBHEDAR, A. J. C.

Punjaji—Defendant 2—Appellant.

v.

Ramanand and another—Plaintiff and Defendant 1—Respondents.

First Appeal No. 35-B of 1928, Decided on 27th November 1929, from decision of First Class Sub-Judge, No. 1, Akola, D/- 5th November 1927, in Civil Suit No. 34 of 1927.

Civil P. C., O. 32, R. 11—Court cannot, after it decides the case, remove guardian originally appointed by it.

The Court has no jurisdiction, after it decides a suit, to remove the guardian originally appointed by it and substituting another in his place. The proper remedy for a person desiring to prosecute an appeal on behalf of a minor is to apply to an appellate Court for an order to remove the guardian originally appointed and to appoint him under O. 32, R. 11, and after his appointment to present an appeal: (1839) A.W.N. 203, *Relon*. [P 178 C 1]

G. G. Hatwaine for Appellant.

G. R. Deo—for Respondent 1.

Order.—A decree on the basis of a mortgage was passed in the lower Court against two persons, Akoji Narayan and his minor son Punjaji Ekoji, the latter being a minor was represented through the Court Reader who was appointed guardian ad litem under O. 32, R. 3, Civil P. C. Against the aforesaid decree the present appeal has been filed on behalf of the minor by his mother Sarjabai although she was not appointed guardian ad litem originally but was so appointed after the passing of the decree by the lower Court on an application made by her in that behalf for removal of the Court reader from the guardianship and for her own appointment under O. 32, R. 11, Civil P. C.

A preliminary objection has been raised by the respondent's pleader that the appeal was not properly filed and should be dismissed as such because after the suit was decided the lower Court was functus officio and could not pass any orders under O. 32, R. 11 for the removal of the original guardian ad litem and substitution of the mother in his place. Sarjabai has now moved this Court to take action under O. 32, R. 11 for removing the Court Reader and for her own appointment as guardian in order to enable her to conduct the appeal on behalf of the minor.

It is clear to me that after the suit was decided the lower Court had no

(7) [1899] 21 All. 53=25 I. A. 195=7 Sar. 370 (P. C.).

(8) [1908] 4 N. L. R. 86.

(9) [1899] 23 Bom. 385.

jurisdiction to remove the guardian originally appointed by it under the provisions of O. 32, R. 11, Civil P. C. In *Bawan Das v. Bishanath* (1), the proper remedy under similar circumstances as suggested by the Allahabad High Court is that a person desiring to prosecute an appeal on behalf of a minor should apply to the appellate Court for an order to remove the guardian originally appointed in the lower Court and to appoint him under O. 32, R. 11, and after his own appointment to present an appeal. Although in the present case the memorandum of appeal was not accompanied by an application on behalf of the mother of the appellant it has now been presented and I do not think that the technical objection of the respondent's learned pleader that the appeal already presented should be dismissed as incompetent should prevail. Under the circumstances stated in the application and the affidavit accompanying it, I remove the Court reader from guardianship of the minor defendant and appoint Sarjabai, as his guardian ad litem and admit the appeal as properly filed. The appellant should, however, pay to the respondent Rs. 50 as costs of these proceedings before the appeal is heard on merits.

P.N./R.K.

Order accordingly.

(1) [1899] A. W. N. 203.

A. I. R. 1930 Nagpur 178

SUBHEDAR AND MOHIUDDIN, A. J. C's.

Bhanu Pratapsingh—Appellant.

v.

Pratap Singh—Respondent.

First Appeal No. 136 of 1928, Decided on 13th September 1929, from decree of Addl. Dist. Judge, Mandla, D/- 4th October 1927, in Civil Suit No. 402 of 1927.

Civil P. C., O 34, R. 3—Good cause for allowing extension.

After an application for making the preliminary decree for foreclosure was made final, the Court permitted that part of the amount may be deposited within 25 days and allowed further extension of four months in case the above payment was made. The terms for allowing extension were not complied with and further extension of a week was allowed. But as no payment was made, the preliminary decree was made final :

Held : that the order making preliminary decree final was correct : A. I. R. 1928 P. C. 137 (P. C.), Ref.

R. S. Salve—for Appellant.*D. N. Chaudhary*—for Respondent.

Judgment.—The facts leading to this appeal may shortly be stated as under :

A mortgage by conditional sale was executed by one Rupsingh for himself and as guardian of his three minor sons, the appellants, on 15th April 1921 in favour of respondent Pratap Singh for Rs. 7,000. The debt was repayable with interest at one per cent per mensem in 14 years by annual instalments of Rs. 500 each and in default of payment of two instalments the whole debt was to become payable at once. The mortgaged property consisted of the whole village of Chicholi. On 31st March 1927 the plaintiff-respondent brought the suit upon the said mortgage to recover Rs. 17,647-15-0 against the mortgagor Rupsingh and his three sons. As the father declined to act as guardian ad litem for his sons the Court Reader was appointed their guardian ad litem and defended the suit unsuccessfully. On 21st December 1927 a preliminary decree for foreclosure was passed against all the defendants for Rs. 20,269-14-6 and the usual six months time was fixed for redemption.

On 25th June 1928 an application was made by the plaintiff for making the aforesaid decree final. At the request of the defendants and with the consent of the plaintiff the lower Court, on 25th August 1928, permitted the defendants to pay Rs. 1,000 within 25 days and ordered further extension of four months in case the above payment was made. On 22nd September 1928 further extension for a week was allowed by the lower Court at the request of the defendants, but as no payment was made the preliminary decree was made absolute on 29th September 1928.

It is against this order making the decree absolute that the present appeal was filed on behalf of the three minor defendants on 5th November 1928. During the pendency of the appeal the appellants had secured an order from this Court to deposit the entire decretal amount in Court by 22nd June last but they have failed to carry out the order. It is now urged in argument that if 20 days time were allowed the appellants would deposit Rs. 16,000 and in another six months the balance would be paid off. The learned advocate for the mortgagee respondent does not, however, accept this offer and in

view of the decision of their Lordships of the Privy Council in *Motilal v. Ujjar Singh* (1) we are precluded from granting any further extension at this stage.

It was also contended that since no order was passed on the application for six months' extension which was presented on behalf of three appellants by their pleader on 11th August 1928, the case should be remanded for an enquiry if sufficient cause existed for allowing the extension asked for in that application.

The only ground for extension stated in that application was that the money could not be arranged "as it is rather famine time now-a-days." On the face of it the application did not show any cause for non-payment within the time fixed for redemption. As a matter of fact the appellants by themselves could do nothing in the matter of raising money beyond what their father defendant 1, who was managing the property, was attempting to do and it was at his request that extension of time was allowed for payment on certain terms on 25th August 1928. When the father could not raise the money within the time allowed, the Court Reader, who was the appellants' guardian ad litem may not have pressed the application of 11th August on behalf of the minors. This accounts probably for no formal order being passed by the lower Court on that application.

As already stated we do not find that any sufficient cause for non-payment in the past and for extension of time for payment in future was made out in the said application of the appellants and, we, therefore, hold that the lower Court had no other alternative but to pass the order on 29th September 1923 for making the preliminary decree absolute. For the reasons given above we find no ground for interference with the order appealed against and dismiss this appeal with costs. Pleader's fee Rs. 100.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 179

JACKSON AND MOHIUDDIN, A. J. C's.

K. L. Niyogi and Co.—Appellant.

v.

District Council, Buldana — Respondent.

First Appeal No. 6.B of 1929, Decided on 7th December 1929, against decree of Addl. Dist. Judge, Khamgaon, Decided on 27th October 1928, in Civil Suit No. 15 of 1927.

Central Provinces Local Self-Government Act, S. 73—Claims arising out of contract are not governed by S. 73.

The words "anything done or purporting to be done under the Act or any rule or by-law made under it" in S. 73 must be interpreted as relating only to an act done or purporting to be done in direct execution of the Act or of a rule or bye-law. Breach of a duty imposed or exercise of a power conferred, by a contract is not such an act : 2 *Mad.* 124 ; 22 *Mad.* 524 ; 31 *Mad.* 522 ; 19 *Bom.* 407 and 2 *C. W. N.* 689 ; *Rel.* ; A. I. R. 1922 *Bom.* 380, *not Appr.* A. I. R. 1923 *All.* 267, *Dist.* [P 181 C 2]

D. N. Choudhury — for Appellant.

A. V. Khare and W. B. Pendharkar — for Respondent.

Judgment.—The plaintiff in this case had taken a contract from the District Council, Buldana, for the construction of a road and of inspection bungalows. He has now sued the District Council for damages on the plea that the Council illegally terminated the contract on 9th April 1927. On 8th October 1927 the plaintiff served the Council with a notice under S. 73, C. P. Local Self-Government Act and on 10th December 1927 he instituted his suit. S. 73 (1), Local Self-Government Act, provides that no suit shall be instituted against any Council for anything done or purporting to be done under the Act or any rule or bye-law made under it until the expiration of two months next after notice in writing has been delivered at the office of the Council. S. 73 (2) provided that every such suit, unless it is a suit for the recovery of immovable property or for a declaration of title thereto, shall be dismissed unless it is instituted within six months from the date of the cause of action. The lower Court has dismissed the plaintiff's suit because it has been instituted more than six months after the cause of action. It was pleaded on behalf of the plaintiff that under S. 15 (2), Lim. Act, he was entitled to exclude the

(1) A. I. R. 1928 P. C. 137=24 N. L. R. 182=55 Cal. 821=55 I. A. 207 (P.C.).

period of notice in computing the period of limitation but the lower Court has held that S. 15 (2) is not applicable to the present case.

A different plea is taken in appeal, namely, that S. 73, Local Self-Government Act, has no application in the present case and that, consequently, there is the ordinary period of limitation for a suit of this nature three years. An objection has been taken to this plea being raised for the first time in appeal. Reference was made to *Nathu v. Umedmal* (1) in which it is declared that the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case and that it is not open to the Courts of appeal to expose a party after he has obtained his decree to the brunt of a new attack of which he had never had any notice during the hearing of the suit. Here, however, there is no new case set up and there is no new attack; all that is contended for on behalf of the appellant is that in the lower Court the Court and the parties misconceived the law of limitation applicable to suits against a District Council. We consider that there is no force in the preliminary objection.

It is argued on behalf of the plaintiff that S. 73, Local Self-Government Act has no application to suits based on contract as in such cases the suit cannot be said to have been instituted against the Council for anything done or purporting to be done under the Act or any rule or bye-law made under it. The defendant takes the extreme attitude that all suits against a District Council, other than those excepted by sub-S. (4), are governed by S. 73, but that view is clearly wrong from the wording of the section as it would make the words :

"for anything done or purporting to be done under the act or any rule or bye-law made under it,"

superfluous. The argument that the exception made by sub-S. (4) means that there can be no other exceptions to the rules contained in the preceding subsections can be of no assistance in the present case as the plaintiff is not pleading an exception to those rules he pleads that as worded they cannot apply to his suit.

(1) [1908] 10 Bom. L. R. 768.

A number of cases have been cited before us in which provisions similar to S. 73 in other local and special Acts have been interpreted in the way the plaintiff seeks to interpret that section. The earliest cited is *Mayandi v. Mc. Quhae* (2) in which it was held that a suit on a breach of contract was not governed by the provisions of S. 168, Madras Towns Improvement Act, as it was not brought for anything done under the Act. To similar effect are the decisions in *Trustee of the Harbour Madras v. Best and Co.* (3), which was concerned with S. 87, Madras Harbour Trust Act, and in *Muthiya Chettiar v. Secretary of State* (4), which was concerned with S. 87, Madras Salt Act. In *Maneklal Motilal v. Municipal Commr. Bombay* (5) it has been held that S. 527, Bombay Municipal Act of 1888, does not apply to claims arising out of contracts or quasi-contracts and in *Ambika Churn Mozumdar v. Satish Chunder Sen* (6) that S. 363, Bengal Municipal Act of 1884 applies to suits based on tortious acts and not on any act arising upon a contractual or quasi-contractual basis.

Two English decisions have been cited before us, *Sharpington v. Fulham Guardians* (7) and *Bradford Corporation v. Myers* (8) which considered the applicability of S. 1, Public Authorities Prosecution Act 1893, the material part of which runs as follows :

"Whereafter the commencement of this Act any act, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution of any act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect :

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of or, in case of a continuance of injury or damage within six months next after the ceasing thereof x x x."

In the first of these cases a contractor claimed damages for loss al-

(2) [1878] 2 Mad. 124.

(3) [1899] 22 Mad. 524.

(4) [1908] 31 Mad. 522.

(5) [1895] 19 Bom. 407.

(6) [1898] 2 O. W. N. 689.

(7) [1904] 2 Ch. 449=73 L. J. Ch. 777=20 T. L. R. 643=2 L. G. R. 1229=68 J. P. 510=52 W. R. 617=91 L. T. 739.

(8) [1876] 1 A. C. 242.

leged to have been caused by negligence and frequent changes of plans on the part of the defendants and it was held that the claim was in respect of a private duty arising out of a contract, not for any negligence in performing any statutory or public duty. In the second of the two cases the Bradford Corporation had contracted to sell and deliver a ton of coke to the plaintiff and by the negligence of their agent the coke was shot through the plaintiff's shop window. The House of Lords held that, as the act complained of was not done in the direct execution of a statute or in the discharge of a public duty or the exercise of a public authority, the Public Authorities Protection Act afforded no defence to the action. It would appear from the judgments delivered in that case that it is not only suits based on contract that are excluded from the operation of S. 1, Public Authorities Protection Act but it is clear from the authorities cited that at least suits based on contract are excluded from the operation of that section and other provisions of a like nature and similar wording.

Two decisions have been cited before us as taking a different view from the one we have stated above. The decision of the Allahabad High Court in *Abdul Wahid v. Municipal Board, Allahabad* (9), can be distinguished on account of the wording of the section in the United Provinces Municipalities Act, which provides that no suit shall be instituted against a Board in respect of an act done in its official capacity, unless such action be commenced within six months next after the accrual of the cause of action. A section so worded has obviously a much wider application than the section we are considering. The decision in *Baban Hemraj v. City Municipality, Poona* (10) is, directly against the view that we take, as the wording of S. 167, Bombay District Municipal Act, 1901, closely resembles that of S. 73, C. P. Local Self Government Act. In that case it was held as follows:

"The municipality had entered into that contract under the powers granted to it under S. 40, Bombay District Municipal Act. The municipality claimed according to the terms of that contract to deduct a certain amount

from the plaintiff's deposit for non-performance of his contract. As the municipality obtained their powers to enter into this contract from the Act, it follows that their powers to enforce the contract, according to the construction they put upon it, must arise be in pursuance of the Act. Therefore, any suit which the plaintiff might wish to bring under the contract would come within the provisions of S. 167, Bombay District Municipal Act."

A similar argument has been rejected in *Mayandi v. Mc Quhae* (2), in which the following passage occurs:

"The contract was, doubtless, made by the commissioners under the powers conferred by the Act; but it does not follow from this alone that a breach of the contract by non-payment of the balance due gives rise to a suit of the kind contemplated by S. 168, that is, a suit for a thing done under the Act. "Actions brought" within the meaning of this section are suits in respect of acts and defaults of a different description."

In view of the latter decision and of the other authorities already cited by us, we submit, with all respect, that the law has not been correctly expounded in *Baban Hemraj v. City Municipality, Poona* (10).

We consider that the words:

"anything done or purporting to be done under the Act or any rule or bye-law made under it"

in S. 73, Local Self-Government Act must be interpreted as relating only to an act done or purported to be done in direct execution of the Act or of a rule or bye-law, and that breach of a duty imposed, or exercise of a power conferred, by a contract is not such an act. It has been argued that the District Council, having terminated the contract under the power given to them by para. 16 of the agreement executed by the plaintiff (Ex. D-9), which is in a form prescribed under S. 79 (1) (23), Local Self-Government Act, did so or purported to do so under a rule under the Act; but the argument is fallacious. The power to terminate the contract is given by the plaintiff, and that fact is not altered because he is required by rule, in contracting, to give that power.

In view of our finding that S. 73 does not apply to the present suit, the case must be remanded for further trial. It has been argued on behalf of the defendant that only a part of the suit should be remanded on the ground that some of the claims made by the plaintiff are not based on the contract but on alleged tortious acts and that the suit as regards such claims must be

(9) A. I. R. 1923 All. 267.

(10) A. I. R. 1922 Bom 380=46 Bom. 123.

held to be covered by S. 73 and so time barred. As we have already pointed out, S. 73 does not necessarily apply to all cases which are not based on contract; but the point is immaterial here. The plaintiff's cause of action is stated to be the illegal termination of his contract by the District Council and it has been definitely stated before us that the termination of the contract is the sole basis of the suit. As regards each particular claim for damages, the plaintiff, to succeed, must show that the loss on account of which the claim is made was occasioned by the termination of the contract. If he fails to prove this as regards any particular claim, then his suit, as far as that claim is concerned, fails, apart from any question of limitation. We set aside the decree of the lower Court and remand the case under O. 41, R. 23. The appellant will be granted a refund of court-fees, but, as he has succeeded in appeal on a ground not taken by him in the lower Court, there will be no order as to other costs of this appeal.

P.N./R.K.

*Case remanded.***A. I. R. 1930 Nagpur 182**

MACNAIR, A. J. C.

Balaji and another—Appellants.

v.

Balkrishna—Respondent.

Misc. Appeal No. 27-B of 1928, Decided on 12th December 1929, from decree of Addl. Dist. Judge, Yeotmal, D/- 25th July 1928, in Civil Appeal No. 39 of 1927.

Pre-emption — Field adjoining field of beneficiary who had right of pre-emption—Trustee purchasing for himself and not exercising right of pre-emption on behalf of beneficiary—He does not commit breach of trust unless such act is prejudicial to beneficiary—Trusts Act, S. 62.

It cannot be said that it is always desirable for a person in possession of land to purchase neighbouring land when it comes into the market. Where a trustee, a relation of beneficiary, purchases certain field for himself and though the beneficiary had a right of pre-emption with regard to the field, and the field adjoined his land, the trustee does not exercise the right of pre-emption on behalf of beneficiary, he does not commit a breach of duty unless it can be shown that such failure to purchase is an act prejudicial to beneficiary: *A. I. R. 1923 Lah. 480, Dist; A. I. R. 1925 All. 333, Rel. on.* [P 182 C 2 ; P 183 C 1]

M. B. Kinkhede and D. T. Mangal-murti—for Appellants.

M. R. Bobde—for Respondent.

Judgment.—The main ground urged before me is that the defendants' father Vishwanath, although a trustee of the plaintiff, was not bound to pre-empt certain lands on behalf of the plaintiff. Vishwanath purchased several fields for Rs. 2,200 under a registered deed of sale dated 17th June 1918. The plaintiff had a right of pre-emption with regard to one of the fields, but the defendants' father who was his trustee did not exercise this right of pre-emption on his behalf. The learned Additional District Judge has held that, as the plot in dispute adjoins a plot of the plaintiff and both are recorded as parts of one field, it was convenient and desirable that the plaintiff should pre-empt the plot in dispute and it was therefore obligatory on the trustee to have acquired the land as a man of ordinary prudence would have done so. The suit was dismissed in the trial Court. The learned Additional District Judge, remanded the case for a finding whether the plaintiff's financial position was such that he could in the period allowed for pre-emption have made the purchase from his surplus funds. The Judge has added that even if he could not, it might have been advisable for Vishwanath to borrow in order to effect the purchase.

Now, in my opinion, it cannot be said that it is always advisable for a person in possession of land to purchase neighbouring land when it comes into the market. There is a finding by the lower appellate Court that Vishwanath paid a full price for the land he purchased. The learned Judge of first appeal has referred to a Lahore case, *Partab Singh v. Hakim Singh* (1). I do not think that ruling has much application to the facts of the present case. In the Punjab it may be desirable not to allow a stranger to the village to purchase land therein, the ground presumably being that such purchase might prevent peaceable enjoyment of the neighbouring lands. In the present case there was no reason to think that the plaintiff's enjoyment of his plot would be prejudiced by the possession by a relation of the plaintiff of a neighbouring plot. In *Shankar Sahai v. Rechu Ram* (2), it was held that, where there was no evidence that the pre-emption of neighbouring plot

(1) *A. I. R. 1923 Lah. 480=4 Lah. 171.*(2) *A. I. R. 1925 All. 333=47 All. 381.*

was required for the protection of the estate already held, the purchase could not possibly be regarded as a benefit to the estate or a legal necessity. Again, there were clearly reasons why it would not have been prudent for Vishwanath as trustee to purchase the land for himself as owner. The plaintiff in this suit has said that Rs. 850 was the proper price, while the learned appellate Judge gives finding which show that Rs. 1,000 should have been paid. I can see no reason why it was the duty of Vishwanath to purchase for the plaintiff land, for which a full price had to be paid, merely because the plaintiff had an option of purchase and the land adjoined a field of the plaintiff. It was for the plaintiff to show that the defendant committed a breach of duty in failing to purchase the field. He has not shown that he had large surplus sums, investment of which was eminently desirable; he has not shown that the purchase of the trustee was likely to be challenged on the ground that an excess price had been paid. I therefore set aside the order of the lower appellate Court and restore the order of the original Court. Costs in all Courts will be borne by the respondent. Counsel's fee in this Court Rs. 75.

P.N./R.K.

*Order set aside.***A. I. R. 1930 Nagpur 183**

MACNAIR AND MUNJE, A. J. C's.

Commr. of Income-tax—Applicant.

v.

Ballarpur Collieries, Chanda—Non-Applicant.

Misc. Judl. Case No. 32 of 1929, Decided on 28th November 1929.

(a) *Income-tax Act, S. 24 (2)—Assessee.*

A registered firm can be held to be an assessee. [P 183 C 2]

(b) *Income-tax Act, S. 10—S. 10 deals with profits or gains of any business.*Section 10 deals solely with the profits or gains of any business carried on by the assessee: *A.I.R. 1929 Lah. 556, Diss from.* [P 184 C 1](c) *Income-tax Act Ss. 24 (2) and 10 (2) (6)—Business resulting in loss—Assessee can claim to increase amount of loss by adding loss due to depreciation of machinery etc.*

Loss in S. 24 (2) refers to loss of "profits or gain." Phrase 'loss of profits or gain' when the loss is under the head of business means loss on the year's working. An assessee can claim, in the case of business which has resulted in a loss, that the amount of that loss shall be increased by adding the amount of diminution of value of building, machinery etc. [P 184 C 2]

(d) *Income-tax Act, S. 10—Partner, not**being assessed with regard to profits of firm, is not assessee.*A firm is the assessee in respect of the profits and gains of the business of the firm. A partner is not assessed with regard to the profits of the firm and is therefore not an assessee: *A.I.R. 1921 Mad. 474 (S.B.), Diss from.* [P 185 C 1]*D. N. Choudhary—*for Applicant.*P. R. Sreenivasam and A. D. Mande—*for Non-Applicant.

Macnair, A. J. C.—Rai Bahadur Bansilal Abirchand and Sir Maneckji Dadabhoy are partners in a firm designated the Ballarpur Colliery. The return of income for the year 1928-1929 shows that the firm had suffered a loss of over six lakhs including an amount of over two lakhs on account of depreciation of buildings, machinery, etc. used for the purposes of the business of the firm. The income-tax authorities in calculating the net business loss of the firm made no allowance for depreciation stating that as the firm had suffered a loss, depreciation could not be allowed for the calculation of that year, but would be carried forward for being allowed in future. The firm desires that the allowance for depreciation should be taken into consideration for the purpose of calculating the loss for the year in question. The members of the firm have other income against which the loss of the firm, as it is registered, can be set off under the provisions of S. 24, Income-tax Act and therefore desire that the net business loss of the firm should be held to be as large as possible. The question which arises has been thus stated by the Income-tax Commissioner:

"In view of the provisions of S. 10 (2) (6), Income-tax Act, 1922, can an assessee claim, in the case of a business which has resulted in a loss, that the amount of that loss shall be increased by adding the amount of depreciation calculated in the prescribed manner?"

The question does not refer to the fact that the assessee is a registered firm and it has been argued before us that a registered firm cannot be described as an assessee. S. 24 (2) of the Act shows that a registered firm can be an assessee. The fact that the assessee is a registered firm will be taken into consideration in my discussion of the question. I note that the word "loss" in the question means a loss of profits or gains which makes the provisions of S. 24 applicable.

In order to understand the provisions of S. 10, Income-tax Act, it is necessary to refer to some of the preceding sec-

tions. S. 6 states that different heads of income, profits and gains shall be chargeable to income-tax. Each of the succeeding sections gives instructions regarding the manner in which one head of income, profits and gains is chargeable. S. 10 refers to the tax payable by an assessee under the head "business." It does not take into consideration profits or gains under any other head. It does not refer to the rate of tax which is elsewhere stated to be governed by the total income of the assessee.

Now, S. 10 (2) states that the profits or gains of any business carried on by an assessee shall be computed after making certain allowances. It gives no definite instructions for computing the loss of any business and it cannot be assumed that loss is calculated in exactly the same way as profits or gains. Cl. 6 (b) of the subsection enunciates a special proviso regarding the allowance for depreciation:

"Provided that, where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years."

In *Karam Illahi-Muhammad Shafi v. Chief Commissioner, Income-tax, Delhi* A. I. R. 1929 Lah. 556, it was considered that the profits or gains referred to were profits or gains generally from whatsoever source derived. With the greatest respect I must dissent from this opinion: S. 10, as I have remarked, deals solely with the profits or gains of any business carried on by the assessee. I remark that it would be still more difficult to hold that the profits or gains included profits or gains of a member of the firm which carried on the business. In my opinion, however, the provisions of S. 10 (2) (6) (b) give no assistance in the decision of the question referred to the Bench. In the first place, S. 10 refers to the computation of profits and does not deal with computation of loss. In the next place, the proviso which I am considering deals with the case where effect cannot be given to an allowance owing to there being no profit:

even if there is no profit in the business. I consider that effect can be given to the allowance, if the assessee (or where the assessee is a firm, all the individuals who constitute the firm) can benefit by that allowance by virtue of the provisions of S. 24.

The question with which I have to deal relates to the calculation of "loss of profits or gains" for the purpose of interpreting the provisions of S. 24, Income-tax Act. This section is as follows:

"(1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in S. 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year; (2) Where the assessee is a registered firm, and the loss sustained cannot wholly be set off under sub-S. (1), any member of such firm shall be entitled to have set off against any income, profits or gains of the year in which the loss was sustained in respect of which the tax is payable by him, such amount of the loss not already set off as is proportionate to his share in the firm."

It is clear that the loss to which sub-S. (2) refers is "loss of profits or gains." This phrase is unusual, but must, when the loss is under the head "business," mean loss on the year's working. When the general principles on which profits or gains of a business are computed are utilized to ascertain the result of the year's working and the calculation shows that there has been a loss, that is a loss of profits or gains. Now, Cl. (6) (b), S. 10 (2) does not enunciate a general proposition regarding the calculation of the result of a year's business. It is applicable only when there is in reality no profits or gains and it is not used for calculation of loss. The general principle is that the diminution of value of buildings, machinery, plant and furniture should be taken into account in calculating the result of the year's working: for the sake of convenience a certain percentage of the original cost is taken to represent the diminution in value during the year. There is no reason why this general principle should not receive full application in calculating the loss of profits or gains. Every business-man will consider whether the machinery and furniture used for his business have become less valuable when he is calculating the result of the year's working. Again, suppose that the profits of a business computed after making

the allowance detailed in S. 10 amount to Rs. 1,000: surely, if the income had been Rs. 2,000 less and the expenses had been the same, there would have been a loss of Rs. 1,000. In my opinion the question must be answered in the affirmative.

I add that the reasoning in *Commr. of Income-tax, Madras v. Arunachalam Chettiar* (1) would involve an answer, qualified but to a great extent in the affirmative, to the question on other grounds. The learned Judges who decided that case considered that a partner of a firm, registered or unregistered, which carried on business was an assessee in respect of the profits or gains of that business and was therefore entitled to set off the loss in the business of the firm against the profits in other business carried on by him. I respectfully dissent from this reasoning. As I have pointed out, it is clear that a registered firm can be an assessee. The firm, then, is the assessee in respect of the profits and gains of the business of the firm. A partner is not assessed with regard to the profits of the firm and is therefore not an assessee. It is only under the provisions of S. 24 (2) that a partner in the firm is allowed to set off against the profits, for which the partnership is liable to pay income-tax, a proportion of the loss incurred by the firm. Costs will be paid by the Commissioner. Counsel's fee one hundred rupees.

Munje, A. J. C. — I agree.

P.N./R.K. *Answer in affirmative.*

(1) A.I.R. 1924 Mad. 474=47 Mad. 660 (S.B.)

A. I. R. 1930 Nagpur 185

MACNAIR, A. J. C.

Shantabai—Appellant.

v.

Laxmichand—Respondent.

First Appeal No. 122 of 1928, Decided on 16th January 1930 against order of Sub-Judge, 1st Class, Wardha, D/- 4th August 1928, in Execution Case No. 119 of 1926.

(a) Civil P. C., O. 32, R. 5 — Person appointed guardian ad litem in suit—His appointment subsists even for execution proceedings.

Words "every application" in O. 32, R. 5 mean every application made in connexion with the lis. Where a person is appointed guardian ad litem in the suit, the appointment is to be treated as subsisting for the purpose of execution proceedings: A. I. R. 1925 Cal. 23;

A.I.R. 1921 Cal. 476 Diss. from 14 All. 35; 40 Cal. 635 (P.C.), Rel. [P 186 C 1]

(b) Civil P. C., O. 32, R. 5—Sale in execution of decree against minor—Guardian ad litem neglecting his duties — Person interested in minor must be allowed to set it aside—Civil P. C. O. 21, R. 90.

A person who is not a guardian for the suit but who is interested in the minor must be allowed to appear on behalf of the minor to prosecute an application for setting aside the sale held in execution of the decree obtained against the infant if the person can show that the guardian ad litem has been neglecting his duties; 40 Cal. 635 (P.C.), Rel. on. [P 186 C 2]

D. N. Khare and T. J. Kedar—for Appellant.

D. T. Mangalmurti — for Respondent.

Judgment.—The respondent Lakhmichand obtained a decree for Rs. 7,900 and costs against the appellant Shantabai, a minor girl, and her mother Vithabai. Vithabai in that suit was appointed guardian ad litem for Shantabai. Lakhmichand in execution of the decree attached immovable property. Notice was served on Vithabai but she did not appear. On 17th December 1927 a pleader empowered by one Madhorao appeared on behalf of Shantabai; the decree-holder did not object to his appearance and the Judge did not apparently notice that the pleader held no power from the person appointed guardian ad litem. On subsequent hearings Ramchandra, an agent of Madhorao, took steps on behalf of the minor Shantabai. At the instance of Madhorao it was directed that certain fields should first be sold. Later, after these fields were purchased by the decree-holder Madhorao applied that the sale should be set aside, and, as the decree-holder agreed, the sale was set aside. A fresh sale was held on 23rd June 1928. The property was again purchased by the decree-holder for less than half of the former price. On 16th July 1928 Madhorao, on behalf of Shanti, again applied that the sale should be set aside and on 23rd July 1928 applied that he should be appointed guardian ad litem in place of Vithabai. On 4th August 1928 the sale was confirmed: the Court held that Vithabai was the guardian ad litem of Shanti and Madhorao had no authority to apply that the sale should be set aside. After the issue of notices Vithabai was removed and Madhorao was appointed guardian ad litem of Shanti. Shanti through her guardian Madhorao has appealed against the order confirming the

sale. The question which I have to consider is whether the application for setting aside the sale should have been considered before the sale was confirmed.

It is first urged that, although Vithabai was appointed guardian ad litem in the suit she did not continue as guardian ad litem in the execution proceedings. Reliance is placed on *Salaudhin v. Afzal Begum* (1) and *Fani v. Surendra* (2). With the greatest respect I must dissent from the view expressed in these cases. It has been held by the Allahabad and Madras High Courts that, when a guardian ad litem has once been appointed, his appointment enures for the whole of the litigation. In *Jwala Devi v. Pirbhu* (3) it was held that, where a person is appointed as guardian for the purpose of a lis, that means of such lis in all its ramifications and so long as it subsists. This case was quoted with approval in *Venkata Chandrasekara v. Alakarajamba Maharani* (4) and *Bhagelu v. Dharma* (5). It is clear, then, that, though the Judges were deciding the question whether the appointment subsisted for the purpose of an appeal, they held that it continued in execution proceedings. It is the practice of all Courts to treat the appointment of a guardian ad litem as subsisting for the purpose of execution applications. It would cause the gravest inconvenience if executing Courts ignored the appointment of a guardian ad litem in the suit and required a fresh appointment to be made before notice was issued to a minor judgment-debtor. The words "every application" in O. 32, R. 5, Civil P. C., mean, in my opinion, "every application made in connexion with the lis." I add that their Lordships of the Privy Council in *Krishna Pershad Singh v. Moti Chand* (6) were clearly of opinion that the appointment of the Nazir of the local Court of Benares, who was appointed guardian for the purpose of a suit, enured during the subsequent execution proceedings until these proceedings were transferred to a Court at Hazaribagh and the Nazir refused to continue to act as guardian.

It is next urged that, as Vithabai, the guardian ad litem, was neglecting the interest of the appellant, Madhorao who had been acting as the guardian of the appellant should have been allowed to apply that the sale should be set aside. It is to be noticed that a sale for a larger sum had been completed and was satisfied at the instance of Madhorao on behalf of the infant. The confirmation of the subsequent sale for a smaller sum renders the act of Madhorao prejudicial to the interest of the minor. It appears improper to allow the decree-holder to treat Madhorao as the guardian of the minor and thus get the sale set aside, and then to refuse to allow Madhorao to challenge the subsequent sale. I am, however, of opinion that in all cases there must be some means by which a person interested in a minor can endeavour to get a sale set aside if the guardian ad litem fails to do her duty. Their Lordships of the Privy Council in *Krishna Pershad Singh v. Moti Chand* (6) at 649 state :

"Their Lordships are, therefore, of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards, it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his interests with regard thereto being sacrificed."

In my opinion their Lordships considered that, where this is the only way to prevent the interest of a minor being sacrificed, a person who is not the guardian for the suit must be allowed to appear in the name of the infant.

The property had been sold for a price less than half of the price realised a few months before. The guardian ad litem was taking no steps. Madhorao made two applications, which must be considered as connected, within the period allowed for an application under O. 21, R. 90. The question whether the sale should be set aside for material irregularity has not received consideration, and for the purpose of this appeal I may assume that material irregularity existed. It was not possible for Madhorao to obtain appointment as guardian ad litem within 30 days from the sale. I consider it was necessary in the interests of justice to allow Madhorao, if he could show that the guardian ad litem had neglected her duties, to prosecute

(1) A. I. R. 1925 Cal. 23.

(2) A. I. R. 1921 Cal. 476.

(3) [1891] 14 All. 35 = (1891) A.W.N. 192.

(4) [1899] 22 Mad. 187.

(5) A. I. R. 1924 All. 79 = 45 All. 623.

(6) [1913] 40 Cal. 635 = 19 I. C. 206 = 40 I. A. 140 (P.C.).

the application for setting aside the sale. It has now been held that Vithabai was neglecting her duties and Madhorao has been appointed guardian ad litem. The application that the sale should be set aside must now receive consideration, as the interests of justice require that Madhorao should be treated as if he had been appointed guardian ad litem on the date when he was applying that he should be so appointed and that the sale should be set aside. The appeal, therefore, succeeds. The order confirming the sale is set aside and the Judge is directed to enquire into the allegation that there was material irregularity by reason of which the minor sustained substantial injury. Costs of this appeal will be borne by the respondent. Counsel's fees Rs. 60.

P.N./R.K.

*Appeal allowed.***A. I. R. 1930 Nagpur 187**

JACKSON, A. J. C.

Balkisandas—Appellant.

v.

Rambakas Laxmandas Shop and others—Respondents.

Second Appeal No. 106-B of 1928, Decided on 4th November 1929, against decree of Special Addl. Dist. Judge, Akola, D/- 21st February 1928, in Civil Appeal No. 65 of 1927.

Negotiable Instruments Act, S. 118 — Burden of proof lies on promisor to prove want of consideration and is not shifted simply because part of consideration is not made in cash as stated in promissory note.

The presumption that arises under S. 118 that every negotiable instrument is made or drawn for consideration throws the burden of proving want of consideration upon the promisor and the burden of proof is not shifted on to the promisee by the mere fact that part of the consideration is shown not to have been paid in cash as represented in the promissory note : 1 *Lah.* 429; and 4 *C. W. N.* 82, *Dist.*

[P 183 C 1]

*M. R. Bobde—for Appellant.**M. K. Chande—for Respondents.*

Judgment.—This appeal arises from a suit on a promissory note. In the plaint it was alleged that the consideration of Rs. 3,500 was paid in cash and the plaintiff Rambakas, who was examined on commission, has deposed that the payment was made in cash through a broker Kesrimal (D. W. 1). Kesrimal deposed that he paid Rs. 1,000 only to the defendant on behalf of Rambakas, thus supporting the defendant's plea

that only Rs. 1,000 had been paid and that the balance of Rs. 2,500, though Rambakas had promised to pay it in a few days, was never paid. The trial Court decreed the plaintiffs' claim for Rs. 1,000 only with interest.

On appeal to the District Judge, the trial Court's decision was held to be correct, but the plaintiffs were permitted to amend their pleadings and the suit was remanded for a fresh decision. It was objected before me, though the objection was not pressed, that the District Judge had no jurisdiction to allow the amendment. As the amendment was allowed in an order of remand, which has not been appealed against, it cannot now be questioned.

After remand, the sons and brother of Rambakas, who had died about eight days after his examination on commission, pleaded that in case the payment of consideration of the promissory note, Rs. 2,500 was not proved to have been made in cash, it should be taken as paid by satisfaction of a debt due to Rambakas from the defendant in respect of the compromise of a civil suit. According to Rambakas, the suit was compromised for Rs. 2,400 and Rs. 100 was paid to the broker who brought about the compromise. Rambakas who represented the whole of the consideration of the promissory note as having been paid in cash, also represented that the amount due under the compromise was paid in cash by the defendant; and that is the case of the defendant who says that he paid Rambakas Rs. 2,400 in cash a few days before 10th October 1923, the date of the promissory note. The dates are sufficiently close together to support the alternative case set up by the plaintiffs, that the consideration of the promissory note was paid to the extent of Rs. 2,500 by satisfaction of the debt due under the compromise; and that is the view that has been taken by the lower appellate Court.

The question is whether I am entitled to interfere in second appeal with the lower appellate Court's finding of fact. It is urged on behalf of the defendant that once it is accepted that payment was not made in cash as stated in the promissory note, the burden of proof lay on the plaintiffs to prove how it was paid and this has not been done. Reference has been made to *Madho Ram v.*

Nandulal (1) but I find nothing in that ruling to help the defendant. Certain other decisions relating to bonds have been cited of which the most important is *Laxmi Chand v. Hailar Shah* (2), a decision by the Privy Council; but they seem to me to have no application when a promissory note is in question. Under S. 118, Negotiable Instruments Act, there is a statutory presumption that every negotiable instrument was made or drawn for consideration. This throws the burden of proving failure of consideration upon the defendant; and I do not think that the burden is shifted by the mere fact that part of the consideration is shown not to have been paid in cash as represented in the promissory note. It is by no means uncommon for a book transaction to be represented in documents and account books as a cash transaction; and when Rambakas in his plaint and in his deposition represented all the transactions to have been in cash, it does not necessarily follow that consideration failed to the extent that this representation is found to be untrue.

If, as I hold, the burden of proof lies upon the defendant, it seems to me clear that he has failed to discharge it. There is a hint in his own evidence, as *D. W. 2*, that Rs. 2,500 out of the consideration was covered by a book credit; and Kesrimal (*D. W. 1*) deposes that, when he paid Rs. 1,000 to the defendant and obtained from him the promissory note for Rs. 3,500 the defendant admitted that he had already received the balance of the consideration. In view of what I have said I must uphold the lower appellate Court's decision. The appeal is dismissed with costs.

P.N./R.K.

Appeal dismissed.

(1) [1920] 1 Lab. 429=53 I. O. 982.

(2) [1900] 4 C. W. N. 82.

A. I. R. 1930 Nagpur 188

JACKSON, A. J. C.

Dharamchand and others — Decree-holders—Appellants.

v.

Sheoranlal and others — Judgment-debtors—Respondents.

First Appeal No. 8 of 1929, Decided on 28th January 1930, against order of First Sub-Judge, First Class, Saugor, D/- 27th October 1928.

Civil P. C., S. 141 and O. 9, R. 9 — Separate personal decree must be passed where decree merely gives liberty to decree-holder to apply for personal decree for balance—Application for such second decree is in continuation of suit and if it is dismissed for default second application is barred under O. 9, R. 9—Civil P. C. O. 34, R. 6.

If a decree is passed in the form prescribed as No. 4 in Appendix D to Sch. 1 with liberty to decree-holder to apply for personal decree for the amount of the balance such reservation of liberty does not amount to personal decree for the balance and a separate personal decree has to be subsequently passed. An application for such second decree is a continuation of the original suit and if it is dismissed for default, a second application is barred by O. 9, R. 9: 1 *N. L. R.* 143, *Foll.*; 29 *All.* 12 and *A. I. R.* 1924 P. C. 198, *Dist.*; *A. I. R.* 1918 P. C. 159, *Expl.* [P 189 C 1]

D. N. Choudhry—for Appellants.

Judgment.—The appellants in this case obtained a preliminary decree for sale on the basis of a mortgage deed. The property mortgaged was brought to sale and the proceeds of the sale were insufficient to satisfy the decree. They then applied under O. 34, R. 6, for a personal decree against the mortgagors. Their application was dismissed for default and a second application has been held to be barred by O. 9, R. 9 read with S. 141, Civil P. C.

In appeal it is argued that no application for a personal decree was necessary and that, in spite of the application for a personal decree having been dismissed the appellant can still apply to have the respondent's personal liability enforced. Reliance is placed upon two decisions. The first is that of the Allahabad High Court in *Sadho Singh v. Maharaja of Benares* (1) which ruled that when a decree for sale of hypothecated property is both a decree for a sale of the property under S. 88 (corresponding to O. 34 R. 4, Sch. 1 Civil P. C. 1908) and a personal decree under S. 90 (corresponding to O. 34, R. 6,) T. P. Act, there is no need for the decree-holder to apply under S. 90 for a separate decree; and if he does so and his application is rejected, this will not operate as a bar to his executing the decree against the judgment-debtor personally. The second is a decision of the Privy Council in *Jeena Bahu v. Parmeshwar Narain* (2), which lays down

(1) [1906] 29 All. 12=3 A. L. J. 506=(1906) A. W. N. 251.

(2) A. I. R. 1918 P. C. 159=47 Cal. 370 (P. C.).

that it is not necessary to put such a construction on section 90, T. P. Act, as would establish as a condition precedent to the power of decreeing personal payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt. Neither of these decisions is applicable to the present case; in both the decree under consideration was one which definitely gave the decree-holder a right to enforce it against the judgment-debtor personally, if the sale of the property failed to satisfy the decretal debt. The *Allahabad* decision held that when such a decree has been passed, a second decree is not necessary, and the Privy Council decision is only an authority for holding that such a decree can be passed. In the present case such a decree has not been passed: the lower Court's decree is in the form prescribed as No. 4 Appendix D; Sch. 1, Civil P. C., The last clause of the decree provides that if the net proceeds of the sale are insufficient to pay the decretal amount with subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance. It is argued that this amounts to a personal decree in the event of the sale proceeds being insufficient to satisfy the debt; but the plain wording of the decree is against this interpretation. As Rankin, J., remarked in *Pell v. Gregory* (3), there is no force in the contention that an application is to enforce a decree because it is made under a liberty to apply reserved by the decree.

My view that when a decree has been passed in the form used in the present case, a separate personal decree must subsequently be passed is supported by *Ramdayal Surajmal v. Mohamad Ghose* (4) in which it was further held that the application for the second decree is a continuation of the original suit and that if it is dismissed for default, then a second application is barred by S. 103, Civil P. C., 1882 (corresponding to O. 9, R. 9). This decision has been approved in *Purna Chandra Mandal v. Radha Nath Das* (5); but it is urged that it has been in effect overruled by the Privy Council decision in *Lachmi Narain Marwari v.*

Balmakund Marwari (6). In that case the High Court had, in appeal, made a decree for partition by consent of the parties and had remitted the suit for disposal under the decree; the plaintiff failed to appear on the day appointed by the lower Court and an order was passed dismissing the suit; it was held that the Court had no jurisdiction to make this order, since after a decree has been made a suit cannot be dismissed unless the decree is reversed on appeal. There is a clear distinction between that case and the present one. In this case the decree for sale had been completely executed and the subsequent proceedings were taken for the purpose of obtaining another decree. The lower Court's order does not amount to dismissal of a suit, in which a decree has been passed, it is the dismissal of an application for a further decree. I am clearly of opinion that *Ramdayal Surajmal v. Mohamad Ghose* (4) has not been overruled by the Privy Council decision referred to, and that the lower Court is right in following it. I dismiss the appeal with costs.

P.N./R.K.

Appeal dismissed.

(6) A. I. R. 1924 P. C. 198=4 Pat. 61=51 I. A. 321 (P. C.).

A. I. R. 1930 Nagpur 189

MOHIUDDIN, A. J. C.

Faizuddin—Applicant.

v.

Mir Yusuf Ali—Non-Applciant.

Civil Revn. No. 433 of 1929, Decided on 30th November 1929, against order of Addl. Dist. Judge, Bhandara, D/- 9th September 1929.

Civil P. C., S. 17 and O 14, R. 2—Jurisdiction once vested is not taken away though plaintiff is found not to have title to portion of property within jurisdiction of that Court as alleged unless inclusion of such portion is not bona fide—Trial of such issue as to title as preliminary point is illegal—Such preliminary point does not merely raise question of law to justify its trial first.

When once jurisdiction is vested in a Court, it will not be taken away afterwards, even if it is found that the portion of the property being situated within the local limits of the Court which gave it jurisdiction does not belong to the plaintiff as alleged in the plaint unless the inclusion of that portion is not a bona fide one. The trial of an issue as to whether the portion belongs to the plaintiff as alleged as a preliminary point is quite unnecessary and is not warranted by law. Such preliminary point does not raise a question of law only and therefore O. 14, R. 2 does not

(3) A. I. R. 1925 Cal. 834=52 Cal. 328 (F.B.).

(4) [1905] 1 N. L. R. 143.

(5) [1906] 33 Cal. 867=4 C. L. J. 141.

apply: 12 *Mad.* 308; 30 *All.* 560 *Rel. on*; 9 *C. L. J.* 128; A. I. R. 1924 P. C. 65, *Dist.*

[P 191 C 1]

D. N. Choudhary—for Applicant.

G. P. Dick and *Samiullakhan*—for Non-Applicant.

Judgment—This is a revision application filed by the plaintiff Faizuddin, against the order dated 9th September 1929 passed by Mr. W. G. Mandpe, Additional District Judge, Bhandara, holding that

"the question of Mardan Ali's title to the two villages in the Sakoli tahsil must be tried as a preliminary point before proceeding to determine title to the whole estate."

The plaintiffs claim one-third share in the Porla estate, as heir of Mir Mardan Ali, who died in 1889. They allege that the whole estate consisting of 28 villages, including the two villages in the Bhandara district, belonged to Mir Mardan Ali, while the defendant contends that the mahals of Jamli Fazal and Jamli in the Bhandara district did not belong to Mir Mardan Ali, but were acquired by Mardan Ali in leasehold rights from the Zamindarin of Rajoli by means of patta dated 26th February 1884 for his son, Yaqubali, who was a minor at that time. The defendant also objected to the trial of the suit in the Bhandara Court, on the ground stated by him in para. 2 of the written statement dated 19th August 1929, which runs as follows:

"Defendant begs to submit that these mahals never belonged to Mir Mardan Ali, but they belonged to his son, Mir Yaqubali, and as such the claim of plaintiffs for a right to share in the estate left by Mir Mardan Ali is not tenable and does not lie. Consequently this Court has no jurisdiction to entertain the present suit as the rest of the property claimed lies in the Chanda district."

The learned Additional District Judge did not record the preliminary point which he was going to consider, and wrote the following in order sheet dated 19th August 1929:

"For the present the only point raised is whether the question of jurisdiction should be tried as a preliminary point."

He recorded his finding on 9th September 1929, and decided to determine the question of Mardan Ali's title to the two villages as a preliminary point. It is contended on behalf of the applicant that the procedure adopted by the Court is irregular and illegal, and that once jurisdiction is vested in a Court, as it certainly does at present, in the Bhandara Court on account of the allegations

made in the plaint, it will not be taken away afterwards, even if it is found that the two villages in the Bhandara district did not belong to Mir Mardan Ali. The learned advocate for the applicant cited the following cases: *Khatija v. Ismail* (1) and *Kubra Jan v. Ram Bali* (2).

In none of these cases the fact which is at issue in this case arose for consideration and decision, but they do afford some guidance in the matter. In *Khatija v. Ismail* (1), the claim with regard to the property situated within the jurisdiction of the Court was withdrawn, and an objection about the jurisdiction of the Court was taken in appeal, but it was overruled by Muttusami Ayyar, and Parker J., who held that the subsequent withdrawal of the claim in regard to the property at Mangalore on the ground that there was a compromise entered into with the defendant who had it in their possession, could not in the absence of a positive rule of law, operate to take away the jurisdiction which had once vested, unless the compromise was shown to have been otherwise than bona fide and a mere contrivance to defeat or a fraud upon the policy of the rule of procedure as to local jurisdiction. A Full Bench of the Allahabad High Court in *Kubra Jan v. Ram Bali* (2), held that there being no fraud or improper motive alleged either with reference to the compromise or to the filing of the suit in the Court at Bareilly, that Court was not by reason of the compromise divested of jurisdiction to hear and decide the suit in respect of the property situate in Oudh.

The applicant's claim in the present case is certainly a bona fide one, as far as the inclusion of the two villages is concerned, and there is no allegation that it is a mere contrivance to have the suit tried at Bhandara. It is a general principle of law that where a suit can be instituted in more Courts than one, the plaintiff has a right to select his own forum. The plaintiffs in this case had the option of filing their suit either in the Bhandara Court or in the Chanda Court, and they elected to file it in the Bhandara Court. They were perfectly

(1) [1839] 12 *Mad.* 380.

(2) [1903] 30 *All.* 560=5 *A.L.J.* 647=(1903) *A. W. N.* 235 (F. B.).

within their rights in doing so. It is dated 9th September 1929 is wrong and not alleged that they did this with any ulterior motive, and it is clear from the settlement made by the defendant about the acquisition of these two villages that the inclusion of these villages in the claim, which were acquired during the lifetime of Mir Mardan Ali is a bona fide one, so far as the plaintiffs are concerned. S. 17, Civil P. C. gives jurisdiction to the Bhandara Court to entertain this suit, and this jurisdiction cannot be taken away afterwards, even if it is found that the two villages in the Bhandara District did not belong to Mir Mardan Ali. When once jurisdiction is vested in a Court, it will not be taken away afterwards, if it is found that the portion of the property within the jurisdiction of that Court did not belong to a person as alleged in the plaint. The trial of an issue or issues about these two villages only, as a preliminary point is quite unnecessary and is not warranted by law. The trial of a case piecemeal will only lead to protracted litigation which is not conducive to the proper administration of justice. The order is wrong and must be set aside.

The learned counsel for the non-applicant Mir Yusufali referred to the statements made on 19th August 1929 and 9th September 1929, and urged that the order passed by the lower Court was correct. He referred to O. 14, R. 2, Civil P. C. and cited *Rangamani Dasi v. Jogendra Nath Manna* (3) and *Ramlal v. Kisanachandra* (4). The terms of O. 14, R. 2, Civil P. C. are perfectly clear and prescribe that when issues of law going to the root of the case arise, the Court must try those issues first and may, in its discretion, postpone the settlement of issues of fact, until after the issues of law have been determined. This was pointed out by Coxe and Doss, JJ., in *Rangamani Dasi v. Jogendra Nath Manna* (3). I have read *Ramlal v. Kisanachandra* (4) and I find that that decision does not afford any assistance in deciding the present case. The preliminary point proposed to be decided does not raise a point of law only, and therefore O. 14, R. 2, Civil P. C. does not apply at all. The order

is hereby set aside. The application is allowed with costs. Pleader's fees Rs. 50.

P.N./R.K.

Revision allowed.

A. I. R. 1930 Nagpur 191

SUBHEDAR, A. J. C.

Madanlal—Decree-holder—Appellant.

v.

Ripusudanprasad—Judgment-debtor—Respondent.

Second Appeal No. 604 of 1928, Decided on 29th January 1930, from order of Dist. Judge, Raipur, D/- 20th October 1928, In Misc. Appeal No. 13 of 1928.

(a) Civil P. C., S. 47—Decree-holder purchaser—Second appeal lies against order under Civil P. C., O. 21, R. 90.

A second appeal against an order passed under O. 21, R. 90, is competent where the decree-holder himself is the purchaser as the case under such circumstances falls under S. 47 : A. I. R. 1926 Cal. 798 (I. B.), *Rel. on.*

[P 192 C 1]

(b) Civil P. C., O. 21, R. 66—Value of property must be stated in sale proclamation.

The value of the property is a very necessary element to be stated in the sale proclamation for the reason that the bidders should know how to regulate their bids : 20 All. 412 (P.C.); 12 C. W. N. 542 ; 15 C. W. N. 713 and A. I. R. 1924 Cal. 589, *Rel. on.* [P 192 C 2, P 193 C 1]

(c) Evidence Act, S. 115—Statute.

There is no estoppel against a statute.

[P 193 C 1]

(d) Civil P. C., O. 21, R. 90—Judgment-debtor not appearing though served to settle terms of proclamation of sale—Still he is not estopped from applying to set aside sale.

A judgment-debtor is not estopped from making the application under O. 21, R. 90 from setting aside the sale simply because he does not appear in obedience to the notice served upon him under O. 21, R. 66 for settling the terms of the proclamation : A. I. R. 1927 All. 513, *not Foll.* [P 193 C 1]

D. N. Chowdhry—for Appellant.

K. V. Deoskar—for Respondent.

Judgment.—The facts leading to this second appeal are very simple. In execution of his decree against the respondent judgment-debtor, the appellant decree-holder had attached and brought to sale a one anna six pies share of mouza Sungera belonging to the respondent and purchased it himself for Rs. 1,700 at the auction sale. The respondent put an objection under O. 21, R. 90, Civil P. C., to have the sale set aside on the ground that there was material irregularity in publishing the proclamation for sale in that the value of the property to be sold was not speci-

(3) [1903] 9 C. L. J. 123=3 I. C. 304.

(4) A. I. R. 1924 P. C. 95=20 N. L. R. 23=51 Cal. 361=51 I. A. 72 (P. C.).

fied and which irregularity caused him substantial injury. It was alleged that the share was worth at least four thousand rupees. The appellant pleaded that there was no irregularity in drawing up the proclamation that even if there was any it did not prejudice the respondent in any way and that the value of the property was not more than Rs. 1,708 for which it was purchased by him.

The respondent examined only one witness who was a cosharer malguzar of the same village and who stated that the share of the respondent was at least worth Rs. 4,000 and that he himself was prepared to purchase it for that price. He also stated that :

"the average value of the land of this village is Rs. 40 an acre."

The appellant did not examine any witness. The Court of first instance held that there were irregularities in the proclamation of sale but that there was no prejudice caused to the respondent on that account because the price fetched at the auction sale was fair and reasonable. It accordingly refused to set aside the sale. On appeal by the respondent the learned District Judge set aside the sale by holding that the property was worth at least Rs. 3,480 and that therefore the price fetched at the auction was a good deal less than the true value. The learned Judge further held that the irregularity of omitting to specify the value of the property in the proclamation had caused substantial injury to the judgment-debtor entitling him to have the sale set aside. It is against this order that the present second appeal is filed by the decree-holder.

A preliminary objection is raised by the respondent's pleader to the effect that the second appeal does not lie because the order passed under O. 21, R. 90, Civil P. C., was appealable only once under O. 43, R. 1 (j) *ibid*. But my learned predecessor had already ordered the matter to be registered as second appeal probably because the decree-holder himself being the purchaser of the property the case fell within the purview of S. 47, Civil P. C. There are undoubtedly conflicting views on the point if under the circumstances of the present case a second appeal lies or not. In *Rajagopala Ayyar v. Ramanujacha*

riar (1) it was held that no second appeal lay while in *Kailash Chandra Tarapdar v. Gopala Chandra Poddar* (2) a contrary view was taken. I prefer to follow the Calcutta view and hold that the second appeal lies in the present case.

On the authority of *Mohan Lal v. Kali Charan* (3) Rai Bahadur Chowdhry, who appeared for the appellant, urged that since the respondent had been duly served with a notice sent to him under O. 21, R. 66, Civil P. C., and he did not raise any objection at the time of the drawing up of the proclamation of sale he was estopped from challenging the sale under R. 90 of the same order on the ground that there were material irregularities in the proclamation. With due respect to the learned Judges who decided that case I am unable to follow the law as laid down by them. As far back as 1898 it was laid down by the Privy Council in *Saadatmund Mohan v. Phul Kuar* (4) at p. 418 that :

"Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of these things which the Court considers material for a purchaser to know" and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated "as fairly and accurately as possible."

In *Saurendra Mohan v. Hurruk Chand* (5) it was also held that :

"if any enquiry into the value of the property is necessary, the Court should hold an enquiry."

while in a later case the same High Court held that the Court is bound under this clause to investigate the value and insert it in the sale proclamation: *Lachman Pershad v. Ganga Pershad* (6). Again in *Bejoy Singh v. Ashutosh* (7) it was laid down that in exceptional cases the Court should state in the proclamation the values stated both by the decree-holder and the judgment-debtor. In view of these decisions it is clear that the value of the property was a very necessary element to be stated in the sale proclamation for the simple reason that the

(1) A. I. R. 1924 Mad. 431=47 Mad. 288 (F.B.)

(2) A. I. R. 1926 Cal. 798=53 Cal. 781 (F.B.).

(3) A. I. R. 1927 All. 513=49 All. 788.

(4) [1898] 20 All. 412=25 I. A. 146=7 Sar. 380 (P.C.)

(5) [1908] 12 C. W. N. 542.

(6) [1911] 15 C. W. N. 713=6 I. C. 180.

(7) A. I. R. 1924 Cal. 589.

bidders should know how to regulate their bids.

The view of the Allahabad High Court in *Mohan Lal v. Kali Charan* (3) cannot be reconciled with the well-known proposition of law that there is no estoppel against a statute. I therefore hold that the respondent was not estopped from making the application under O. 21, R. 90, Civil P. C., for setting aside the sale simply because he did not appear in obedience to the notice served upon him under R. 66 of the same order for settling the terms of the proclamation of sale.

It was next argued that the lower appellate Court had :

"misappreciated the un rebutted evidence of the judgment-debtor's uncle, a cosharer of the village, whose estimate of the value was unimpeachable."

Having read the evidence of the witness I am perfectly satisfied that the complaint of the appellant's counsel in this matter is incorrect. I hold therefore that the estimate of the market value of the property purchased by the appellant at the auction sale was correctly made by the learned District Judge upon the available evidence on record. The result is that the appeal fails and is dismissed with costs. Pleader's fee Rs. 25.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 193

JACKSON, A. J. C.

Ganpatras—Plaintiff—Appellant.

v.

Ragho and another—Defendants — Respondents.

Second Appeal No. 229 of 1929, Decided on 29th January 1930, from decree of District Judge, Hoshangabad, D/- 11th February 1929, in Civil Suit No. 79 of 1928.

(a) C. P. Tenancy Act, S. 105 (c)—Civil Court's jurisdiction is not barred where transfer by occupancy tenant is void independently of Act.

Where the transfer by the occupancy tenant is invalid independently of the prohibition of the Act, the jurisdiction of the civil Court to avoid transfer is not barred: *A. I. R.* 1927 Nag. 30 and 8 N.L.R. 22, *Rel on*; 11 N.L.R. 124 *not foll.* [P 194 C 2]

(b) C. P. Tenancy Act, S. 35—Mere transfer of occupancy rights does not amount to abandonment—Landlord suing to set aside transfer—Parties revert to former position.

The mere transfer of a right of occupancy does not entail a forfeiture of such right and

if a landlord elects to set aside such transfer, all parties revert to the status in quo ante: 15 C. P. L. R. 17; 14 C.P.L R. 14; 11 N. L. R. 124; 18 N. L. R. 82 *Rel, on.* [P 194 C 2]

W. R. Puranik—for Appellant.

M. R. Bobde—for Respondents.

Judgment.—The appellant in this case is the lambardar of mouza Sainkheda in the Multai Tahsil. One Mogal was the occupancy tenant of khasra Nos. 206, 220/7 and 280 in that village. He died on 25th September 1923, leaving a widow, Mt. Rambha, who is respondent 2. Respondent 1 is Ragho, who claims to have been adopted by Mogal and who has filed an adoption deed (Ex. D-2), dated 10th January 1923. In 1925 the appellant sued Rambha alone for arrears of rent. Ragho applied to be joined as a party on the ground of his adoption; but a decree was passed against Rambha alone, because under the adoption deed Ragho was not to take possession of the property until after the death of the widow. Thereafter Rambha had the fields entered in the name of Ragho alone, and the appellant applied under S. 13, C. P. Tenancy Act 1920, for possession. The revenue authorities, however, held that the adoption deed was prima facie valid and, consequently that Ragho's possession was legal, and dismissed the application. The appellant then brought the suit, out of which this appeal arises, for a declaration that Ragho is not the adopted son of Mogal. An objection was raised by Ragho as to Court-fees, and the appellant paid Court-fees on the value of the fields and added a claim for possession. The trial Court passed a decree declaring that Ragho is not Mogal's adopted son and directing him to deliver possession of the fields to the appellant. In appeal the learned District Judge has cancelled the decree for possession and has added to the declaration that Ragho is not Mogal's adopted son, a further declaration that Mt. Rambha is the occupancy tenant of the fields in suit.

In second appeal the only question for decision is whether the appellant is entitled to a decree for immediate possession or not. A number of rulings of this Court have been cited to me, the earliest of which is *Hira Lal Misra v. Aola* (1), in which it was held by

(1) [1901] 14 C. P. L. R. 14.

Ismay, J. C., that a landlord seeking to eject a trespasser is not bound to show that the interests of the late tenant have ceased to exist unless the question of abandonment arises out of the pleadings; in that case the trespasser had nowhere alleged that he held as a license from a tenant who was still in existence. In *Bhola v. Fathu* (2) the same learned Judge, dealing with an unauthorized transfer, held that it was incumbent upon the landlord to show that the tenant's right had ceased to exist. In *Sahasram v. Sheonath* (3) it was held that when the landlord sues to eject a trespasser from a tenant's holding, it is not open to the defendant, who is not a transferee from the tenant and does not hold under the tenant, to plead that the tenant has not abandoned his holding. In *Nakulsao v. Ramadhinsao* (4), the learned Judge, who decided *Sahasram v. Sheonath* (3) held that when a landlord sues to avoid a transfer by an absolute occupancy tenant made in contravention of the provisions of S. 41, C. P. Tenancy Act 1898, and to evict the transferee in possession, the question whether the tenant has abandoned his holding does not arise, whether or not the tenant be joined as a party. The view was taken that the principles embodied in *Bhola v. Fathu* (2) related to a condition of affairs which had become obsolete and did not apply to the conditions existing under the Tenancy Act of 1898, as sub-S. (8), S. 41 of that Act gave absolute occupancy tenants protection which the previous law did not and, consequently, there was no longer need for the Courts to extend protection on the principles enunciated in *Bhola v. Fathu* (2).

As regards occupancy and ordinary tenants it was remarked that the civil Courts have nothing to do with the avoidance by the landlord of transfers by them. In *Allibhai v. Shamrao* (5), it was held that it is open to a landlord, where his title is in jeopardy from the aggressions of a trespasser, to bring a suit to have his own rights declared against that trespasser and to claim khas possession in this case, as in *Hira Lal Misra v. Aola* (1) and *Sahasram v. Sheonath* (3),

the trespasser did not claim through the tenant.

The first point to be determined is whether the civil Court can in any circumstances have jurisdiction to decree possession in a case like the present one. It has been pointed out, as I have already remarked, in *Sahasram v. Sheonath* (3), that, under the Tenancy Act of 1898, the civil Courts have nothing to do with the avoidance of transfers by occupancy tenants and there has been no change made on this point in the Act of 1920. In *Ganeshdas v. Shankar* (6), however, it was held that, though no suit can be maintained in a civil Court to avoid a transfer of occupancy tenant-right which would be valid between the parties thereto except for the prohibition contained in S. 46 or S. 70, C. P. Tenancy Act 1898, the jurisdiction of the civil Court is not barred when the transfer is one which is invalid independently of the prohibition contained in the Act; and a similar view has been taken in the Bench decision in *Chindhu v. Rameshwarnath* (7). For the reasons given by the lower appellate Court the transfer by Rambha to Ragho is invalid independently of the Tenancy Act and the jurisdiction of the civil Court is not barred.

As regards the decision in *Nakulsao v. Ramadhinsao* (4), I must point out that conditions have again changed owing to the enactment of the Tenancy Act of 1920, as that Act does not protect the tenant in a case in which a civil Court has jurisdiction and exercises it. The principles stated in *Bhola v. Fathu* (2), cannot, therefore, be now regarded as obsolete; and it is clear from the cases in *Hira Lal Misra v. Aola* (1), *Sahasram v. Sheonath* (3) and *Allibhai v. Shamrao* (5), that it is only when the person in possession is a pure trespasser and there is no privity between him and the tenant that the Court will grant a decree for possession to the landlord; in other cases where the person in possession holds under a transfer by the tenant, possession will not be decreed unless abandonment by the tenant is proved. As has been held in *Bhola v. Fathu* (2) the mere transfer of a right of occupancy does not entail a forfeiture of such right and if a landlord elects to

(2) [1902] 15 C. P. L. R. 17.

(3) [1915] 11 N. L. R. 124=31 I. C. 303.

(4) [1916] 12 N. L. R. 86=34 I. C. 693.

(5) A. I. R. 1922 Nag. 216=13 N. L. R. 82.

(6) [1912] 8 N. L. R. 22=13 I. C. 90.

(7) A. I. R. 1927 Nag. 30=22 N. L. R. 123.

set aside such transfer, all parties revert to the status in quo ante. The reason seems to me obvious. To take the present case as an example, Rambha had clearly no intention to abandon the holding altogether and in any circumstances; all that she was willing to do was to give it to Ragho and it must be presumed that if her attempt to make Ragho the tenant of the holding failed, she would wish to resume it for herself. I hold that there has been no abandonment of the holding and that the lower appellate Court was right in substituting for a decree for possession a declaration that Rambha is still the tenant of the holding. The appeal fails and is dismissed with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1930 Nagpur 195**

FINDLAY, J. C.

Secy. of State—Defendant — Appellant.

v.

Harinath Bikaji Bax—Plaintiff—Respondent.

Second Appeal No. 542 of 1928, Decided on 10th December 1929, from decree of Addl. Dist. Judge, Nagpur, D/- 7th August 1928, in Civil Appeal No. 23 of 1928.

Land Improvement Loans Act, S. 7 (Proviso)—Scope.

Where takavi loan is given by Government to a person when he was occupancy tenant and the malguzar acquires the holding after the loan is given, Government has a first charge on the holding and is entitled to proceed to recover the loan as if the said loan were arrears of land revenue : 41 *Mad.* 491, *Rel. on.* [P 196 C 1]

G. P. Dick—for Appellant.*V. R. Dhok* and *G. V. Moharir*—for Respondent.

Judgment.—The present suit was filed by the plaintiff-respondent, who is the malguzar of mouza Ridhora (Nagpur), against the Secretary of State for India for a declaration that occupancy fields Nos. 26 and 12 are not liable to attachment and sale for recovery of the takavi loan advanced to Ramachandra and Bhadu, the reputed tenants of these two respective fields. The plaintiff's case was that Ramachandra had been ejected from field No. 26 by a decree of the civil Court in 1917. In the case of Bhadu his allegation was that he had obtained possession of the

field No. 12 in 1924 in execution of two civil Court decrees of the years 1913 and 1917 respectively. The takavi loan was given to Ramachandra and Bhadu jointly on 3rd March 1921, and the plaintiff's case was that Bhadu had previously been adjudged an insolvent, that Rakhadu (Bhadu's brother) was also a joint tenant of the field, that Bhadu had made no improvement in the field and that both fields were now khudkasht of the plaintiff and not liable, as stated, for recovery of the takavi loan.

On the issues which arose on these and connected pleadings, the Judge of the first Court came to the following findings :

(i) That the plaintiff had acquired the holding of Ramachandra in 1918 and that of Bhadu and Rakhadu on 28th March 1924 ;

(ii) that Ramachandra was not in possession of the holding on the date of the takavi loan and that the field No. 26 cannot be sold by Government ;

(iii) that Bhadu had been declared insolvent before the granting of the takavi but that this had no effect on the transaction ;

(iv) that no improvement had been effected by either borrower in the land concerned ; and

(v) that Rakhadu was not the necessary party in the loan transaction.

On these and connected findings, the Judge of the first Court came to the conclusion that field No. 26 could not be sold at all and that Government could not sell the proprietary interest of the plaintiff in field No. 12. The plaintiff's appeal to the Court of the Additional District Judge proved successful, that Court ordering that the occupancy rights in field No. 12 were also not liable to attachment and sale.

The Secretary of State has come up here on second appeal against the decree of the lower appellate Court ; but, as is clear from the detailed grounds of appeal, we are no longer concerned with Ramachandra's field No. 26, and the only question at issue is as regards the liability of field No. 12, that of Bhadu, to attachment and sale. I may at once clear a principal point. Objection was taken by the pleader for the respondent to the finding of both the lower Courts on the question of the

alleged compromise, which, according to the respondent, would imply that the Secretary of State had surrendered any right he might have had to sell either field, because of a compromise arrived at by the Tahsildar, to the respondent. There is not the slightest ground for disturbing in this connexion in second appeal what is undoubtedly a pure finding of fact. The Tahsildar may have been ready to have come to such arrangement, as that alleged, with respondent, but it is perfectly clear that the proposed arrangement was not accepted by the higher revenue authorities. It is clear, moreover, as pointed out by the Additional District Judge, that the plaintiff himself was aware of this fact, and the alleged compromise has clearly not been established.

I am wholly unable to agree with the learned Additional District Judge in his finding on grounds 5 to 9 of the appeal in his Court. The questions therein dealt with were largely irrelevant in the present case. It is an undoubted fact that Bhadu, as the reputed tenant of the field in question, was given a takavi loan at a time when the jamabandis showed him as occupancy tenant, and the simple question for decision, therefore, is whether, having regard to the language of S. 7 (c) of the Land Improvement Loans Act, Government is entitled to proceed to recover the loan from field No. 12 exactly as if the said loan were arrears of land revenue. There is a definite finding of fact that the plaintiff did not acquire the holding of Bhadu and Rakhadu until the year 1924, long after the takavi loan had been given. When we turn to the wording of S. 7, Land Improvement Loans Act, it is perfectly clear from the proviso thereto that only certain interests in the land, which were in existence before the date of the order granting the loan, are protected from the operation of the main part of the section. When the proviso in question is read with S. 128, Land Revenue Act (cf. also S. 12 (3), Tenancy Act), it seems to me perfectly clear that Government, by virtue of having granted the loan, have undoubtedly acquired a first charge on the land concerned. Had the intention of the legislature been otherwise, the proviso to S. 7 (c), Land Improvement Loans Act, would undoubtedly have been more compre-

hensive than it is. On the other hand, the language employed in S. 7 (1) (c) is peculiarly explicit, viz. :

"out of the land for the benefit of which the loan has been granted as if they were arrears of land-revenue due in respect of that land ;".

The conclusion seems to me to be inevitable that the loan must be regarded as a first charge upon the property and, on this view, it is perfectly clear that the present plaintiff has no right of suit so far as field No. 12 is concerned.

I am in full agreement with Ayling and Ayyar, JJ., in *Sankaran Nambudripad v. Ramaswami Ayyar* (1), where the question involved in this case has been considered at great length and, in those circumstances I hold that the plaintiff's suit will be dismissed in toto so far as occupancy field No. 12 of mouza Ridhora formerly held by Bhadu and Rakhadu, is concerned. The plaintiff respondent must pay the defendant-appellant's costs in this Court. I fix pleader's fees at Rs. 20. As regards costs in the two Courts below, as the parties have practically equally succeeded and equally failed, I am of opinion that the most just order is that they should bear their own costs in both these Courts. I order accordingly.

P.N./R.K.

Order accordingly.

(1) [1918] 41 Mad. 691=34 M. L. J. 446 = 47 I. C. 301=8 M. L. W. 12.

A. I. R. 1930 Nagpur 196

MACNAIR, A. J. C.

Gopal Gunaji—Appellant.

v.

Balaji and others—Respondents.

First Appeal No. 86-B of 1928, Decided on 11th December 1929, against decree of Addl. Sub-Judge, First Class, Yeotmal, D/- 5th October 1928 in Civil Suit No. 47 of 1928.

Provincial Insolvency Act, S. 47 — Insolvency Court can, if mortgagee so desires, order sale of property mortgaged free from mortgage.

Where the mortgagee desires that the mortgaged property of the insolvent mortgagor should be sold free from the mortgage rights and the mortgage debt should be recovered from the sale proceeds the insolvency Court is competent to comply with his request : *A. I. R. 1924 Pat. 259* and *A. I. R. 1924 Mad. 761, Dist.* [P 197 C 2]

M. R. Bobde—for Appellant.

M. B. Kinkhede—for Respondents.

Judgment. — The plaintiff-appellant hold a mortgage over certain property.

The mortgagor became insolvent. The insolvency Court at the request of the mortgagee, directed the mortgaged property to be sold separately, free from the mortgage rights, and gave the mortgagee the same rights in the sale proceeds as he had in the property. It seems probable that there was some misapprehension at the time of the auction. The property was sold for Rs. 50 to the son of the mortgagor and this son Gopal (D. W. 2) stated before the insolvency Court that he had purchased the property subject to the mortgage. The mortgagee brought this suit for foreclosure of the property sold. The learned trial Judge held that what was put up for sale was the property free from the mortgage but that the insolvency Court though it purported to sell the property free from the plaintiff's mortgage, could not legally do so. The mortgagee was therefore given a decree for foreclosure. The purchaser Gopal appeals.

It is urged that the insolvency Court had power to sell the property free from the plaintiff's mortgage. The learned trial Judge has correctly stated that S. 47, Provincial Insolvency Act, does not provide for the sale which was effected. But S. 47 gives power to a creditor to insist on certain procedure: there is nothing in the section which prohibits the adoption of some other procedure with his consent. The learned Judge has referred to *Sant Prasad v. Sheodutt Singh* (1). The decision in that case does not appear relevant. At p. 728 the learned Judges remark:

"It is of course open to the appellant to consent to the property being sold in the insolvency proceedings, but we do not find that the appellant, at any time, consented to the properties being sold by the insolvency Court."

Where the mortgagee does not consent to the sale of the property, free from his mortgage, an order that the property should be so sold would be in derogation of his rights, and he could claim that it should be set aside. There are remarks in *Kannappa Mudali v. Raju Chettiar* (2), which support the view taken by the learned trial Judge. But the decision is mainly based on the fact that the mortgagee did not consent, and the remarks are not supported by detailed argument.

Section 28 (2) of the Act states that

(1) A.I.R. 1924 Pat. 259=2 Pat. 724.

(2) A.I.R. 1924 Mad. 761=47 Mad. 605.

on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver. "Property" is defined in S. 2 (1) (d):

" 'Property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

Section 2 (1) (e) is as follows:

" 'Secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor ;"

In view of Ss. 2 (1) (d) and 2 (1) (e) it seems impossible to hold that, where the land is subject to a mortgage, the property of the mortgagor can be considered to be limited to the right of redemption; it would be nonsense to speak of a person holding a mortgage on a right of redemption. S. 28 (6) states that the vesting of the property in the Court shall not affect the power of any secured creditor to realize his security:—there is nothing in sub-S. (6) which suggests that the mortgaged property is not to be considered the property of the insolvent. S. 59 (a) authorizes the receiver to sell the property of the insolvent. The receiver, then, has power to sell property on which a secured creditor holds a lien; the sale, of course, must be effected with due regard to the rights of the secured creditor. The mortgagee may find it convenient that the property should be sold free; the mortgage rights and that the mortgage debt should be recovered from the sale proceeds. If he desires that this course should be taken, the insolvency Court is, in my opinion, competent to comply with his request: it would be unfortunate if the insolvency Court had not power to adopt this procedure when convenient to all parties.

The sale effected by the insolvency Court was therefore a legal sale. It is unfortunate that owing to some misapprehension the property fetched only Rs. 50, but I must hold that the property free from the mortgage debt, was sold for Rs. 50. Even if the purchaser did not know what he was purchasing this will not affect the validity of the sale. The purchaser, then, obtained the property free from liability to the mortgagee. The mortgagee cannot enforce his decree against the rights of the purchaser. The appeal must therefore succeed. The suit is dismissed. In view of the fact that

the appellant did not know what he was purchasing and obtained large rights for a small one, I direct that costs in the proceedings should be borne as incurred.

P.N./R.K.

Appeal allowed.

A. I. R. 1930 Nagpur 198

MOHIUDDIN, A. J. C.

Fattesing Chatri—Defendant—Appellant.

v.

Sarha—Plaintiff—Respondent.

Second Appeal No. 593 of 1927, Decided on 4th January 1930, against decree of Dist. Judge, Raipur, D/- 27th July 1927, in Civil Appeal No. 5 of 1927.

Hindu Law—Alienation by widow of small portion for spiritual benefit of husband is valid—Excavation and consecration of tank are acts of high spiritual benefit—What constitutes reasonable portion depends on facts.

The excavation and consecration of a tank for the benefit of the soul of the husband are acts of high religious merit and a widow can alienate a small portion of the estate in her hands for such a purpose; and the question whether such an alienation covers a reasonable portion of the property of her husband is a question which must be determined with reference to the circumstances of each particular disposition: *A. I. R. 1922 P. C. 261; 43 Cal 574 and 37 Cal 1, Rel. on.* [P 198 C 2. P 199 C 1]

M. R. Bobde and *G. R. Deo*—for Appellant.

D. N. Choudhary—for Respondent.

Judgment.—This is an appeal from a judgment and decree of the District Judge, Raipur, dated 27th July 1927, and arises out of a suit, brought by the plaintiff Sarha Brahman, in the Court of first Sub-Judge, Second Class, Bilaspur, on 29th October 1925. The object of the suit was to set aside an alienation purporting to have been made for a religious or pious purpose by a Hindu lady of the name of Mt. Dukhni on 2nd November 1887, in favour of Lalla Singh, a brother of the defendant Fatte Singh. The subject matter of the suit is mouza Baghelkapa, which was purchased by Judawan, husband of Mt. Dukhni on 31st May 1874 for Rs. 750, and was sold by Mt. Dukhni to Lalla Singh on 2nd November 1887 for Rs. 2,500, excluding the tank and the adjoining land. Judawan died in 1881 and Mt. Dukhni died in March 1924 and the plaintiff Sarha is a next reversioner of Judawan.

The trial Court held that Judawan did not make an oral will in favour of

Mt. Dukhni regarding the village Baghelkapa and she did not get an absolute interest in it, that the sale was binding on the plaintiff, and dismissed the suit. The lower appellate Court came to the conclusion that Judawan neither made a sankalp nor gave direction to his wife to sell the village and to appropriate the proceeds of the sale for the construction of the tank nor did he commence the excavation of the tank nor did he perform its first ceremony of starting the work as alleged by the defendant, that Mt. Dukhni constructed the tank after the death of her husband and had borrowed Rs. 2,000 for this purpose from Lalla Singh, that there was no evidence to show the purpose for which Rs. 500 which were taken at the time of the sale were utilized, that Mt. Dukhni under the circumstances of this case, could utilize one-third share for the charitable purpose which would advance the spiritual welfare of her husband, and directed that the defendant should put the plaintiff in possession of two-third share of mouza Baghelkapa.

Though the memorandum of appeal covers every question which was in controversy between the parties in the Courts below, the arguments in appeal in this Court, were confined to the sole question of the validity of the transfer made by Mt. Dukhni for a pious purpose, which conferred spiritual benefit on her husband Judawan. The learned advocate for the appellant argued that as Mt. Dukhni spent Rs. 2,000 in constructing the tank, and had excluded the tank and other land in the village from the sale-deed, and also had land at mouza Daiza and other property as mentioned in the plaint, it ought to have been held that the alienation of the village was binding on the reversioners. It appears from Ex. D-7 that Mt. Dukhni reserved for herself the tank and the surrounding land and sold the village for Rs. 2,500. It is clear that she was not in possession of cash or grain at that time, otherwise she would not have borrowed money from Lalla Singh, for the construction of this tank. She had no other property except the land at Daiza, and there is no doubt that she alienated a major portion of the property left by her husband, for the construction of the tank. The excavation and consecration of a tank are acts of

high religious merit, and a Hindu widow can alienate a small portion of the estate in her hands for such a purpose. As pointed out in *Sardar Singh v. Kunj Behari Lal* (1) p. 513 of 44 *All.* the Hindu Law recognizes the validity of the dedication or alienation of a small fraction of the property by the Hindu female for the continuous benefit of the soul of the deceased owner. In that case dedication related to one-seventy-fifth of the property and was specially made for the creation of a permanent benefit. In *Khub Lal Singh v. Ajodhya Misser* (2), the area alienated was about one-fifth, and Mookerjee and Newbound, JJ., expressed the opinion that the area alienated did not constitute an unreasonably large fraction of the entire estate. In *Churaman Sahu v. Gopi Sahu* (3), the gift which was upheld was of a portion of the estate, worth more than one-fourth and less than one-third of the total value.

The question whether an alienation covered a reasonable portion of the property of her husband is a question which must be determined with reference to the circumstances of each particular disposition. In this case Lalla Singh advanced Rs. 2,500 to Mt. Dukhni, out of which, Rs. 2,000 were spent in the construction of the tank. The transaction took place about 42 years ago and since then Lalla Singh, and after him, the defendant have remained in possession of the property. Mt. Dukhni had immovable property at that time at mouza Daiza, and retained for herself the tank and the surrounding land. There is no doubt that she had the land at Daiza besides the village which she sold to Lalla Singh. Considering all these facts it seems to me that in this particular case, an alienation of one-third share in the village must be considered to be reasonable and proper, and, therefore, valid.

The plaintiff filed a cross-objection on 26th October 1928, and urged that there was no necessity for alienating any part of the village, that under the circumstances of the case, alienation of one-third share in the village, was far

in excess of the widow's power to alienate even for conferring religious benefit on the soul of her husband. For reasons stated in para, 3 of this judgment, I dismiss the cross-objection. The appeal and the cross-objection, therefore, fail and are dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 199

JACKSON, A. J. C.

Mahadeo and another—Decree-holders—Appellants.

v.

Zingru and others—Judgment-debtors—Respondents.

Second Appeal No. 40 of 1929, Decided on 18th January 1930, against decision of Dist. Judge, Bhandara, D/- 12th October 1928.

Civil P. C., S. 47—Absolute occupancy land mortgaged to M and a portion of that land was mortgaged to S—In execution of decree obtained by S on his mortgage, portion sold and its possession obtained by landlord under S. 6, C. P. Tenancy Act—In execution proceedings of decree obtained by M landlord's application to have portion excluded was allowed and remainder of land ordered to be sold—Appeal against such order does not lie as application cannot be considered to be one under S. 47 but must be deemed to be disposed of under inherent power of Court—Civil P. C., S. 151.

An absolute occupancy land was mortgaged to M and a portion of this land was mortgaged to S which was sold in execution of the decree obtained by S. The landlord under S. 6, C. P. Tenancy Act, on deposit of value of the portion obtained its possession. In execution proceedings of the decree obtained by M on his mortgage the landlord's application to have the portion of which he had obtained possession excluded from the decree was allowed and the remainder of the land was ordered to be sold. An appeal was preferred against the order.

Held: that though the landlord had acquired the interest of the judgment-debtors he was not a representative of the judgment-debtor and the application could not be considered to be made and disposed under S. 47 but must be deemed to be disposed of under the inherent power of the Court and therefore no appeal lay against the order : 26 *All.* 447, *Dist.*

[P 200 C 2]

W. B. Pendharkar—for Appellants.

M. R. Pathak and Y. V. Jakatdar—for Respondents.

Judgment.—The appellant, Mahadeo had obtained a final decree for sale on 26th November 1926 in a suit brought on a simple mortgage executed in his favour by Zingru and Sitaram, respondents 1 and 2. The land mortgaged was

(1) A. I. R. 1922 P. C. 261=44 *All.* 503=49 I. A. 383 (P.C.).

(2) [1916] 43 *Cal.* 574=31 I. C. 433=22 C. L. J. 345.

(3) [1910] 37 *Cal.* 1=10 C. L. J. 545=1 I. C. 945=13 C. W. N. 994.

24'20 acres of absolute occupancy land and out of this 14'87 acres had been brought to sale on 11th December 1922 in execution of a decree obtained by Shankarrao Chitnavis. This portion was sold subject to the mortgage lien of Mahadeo and was purchased by one Hari Sonba. Govinda, respondent 3, who is the landlord of the village, made an application under S. 6, C. P. Tenancy Act, 1920, and the Revenue Officer passed an order on 2nd February 1925 fixing Rs. 1,000 as the value of the portion in question. On deposit of this amount by the landlord under S. 6 (5) the mortgage debt of Mahadeo became a charge on the purchase money in exoneration of the land. In the proceedings taken to make the preliminary decree obtained by Mahadeo final, Govinda applied to have the portion sold in execution of Sir Shankarrao Chitnavis's decree, of which he had obtained possession under S. 6, Tenancy Act, excluded from the decree; but his application was rejected. He repeated his claim when execution proceedings were started on the basis of Mahadeo's mortgage decree. His application was allowed and only the remainder of the land was ordered to be sold. An appeal was preferred to the Court of the District Judge, but it has been rejected on the ground that no appeal lies.

It is argued on behalf of the appellants that an appeal did lie because the landlord, Govinda, stepped into the shoes of the auction-purchaser and became a representative of the judgment-debtors within the meaning of S. 47, Civil P. C. In support of this argument a leading Allahabad case, *Gulzari Lal v. Madho Ram* (1), has been cited, in which it was held that the term "representative" as used in S. 244, Civil P. C., (corresponding to S. 47 of the present Code), when taken with reference to the judgment-debtor, does not mean only his legal representative, that is, his heir, executor or administrator, but it means, his representative in interest and includes a purchaser of his interest who so far as such interest is concerned, is bound by the decree. In view of this ruling Hari Sonba, the auction-purchaser, would be a representative of the judgment-debtors, as the land was sold

to him subject to the appellant's mortgage. Govinda's possession is, however, entirely different. When he exercised his right under S. 6, Tenancy Act, the mortgage debt, by operation of law, became a charge on the purchase money paid by him and not on the land. Therefore, although Govinda did acquire the interest of the judgment-debtors, he is not, as regards that interest, bound by the mortgage or the decree based on it. Under the ruling on which the appellants rely he is not a representative of the judgment-debtors; and it follows that his application cannot be treated as having been made and disposed of under S. 47, Civil P. C.

It is argued that it must be made under S. 47, because it cannot be made under O. 21, R. 58. It is pointed out, on the authority of *Sunoo Modi v. Mt. Latkari* (2), that O. 21, R. 58, has no application to claims preferred to properties directed to be sold under mortgage decrees; but it does not follow that S. 47 does apply in the present case. The fact is that neither the section nor the rule referred to applies; and it must be taken that the trial Court in allowing Govinda's application exercised its inherent power to make such order as might be necessary for the ends of justice or to prevent abuse of the process of the Court: there is no appeal against such an order. I agree with the lower appellate Court that no appeal lay to it; and I dismiss this appeal with costs. I fix pleader's fee at Rs. 15.

P.N./R.K.

Appeal dismissed.

(2) [1905] N. N. L. R. 142.

A. I. R. 1930 Nagpur 200

MOHIUDDIN AND SUBHEDAR, A. J. C's.
Commissioner of Income-tax, C.P. and Berar—Applicant.

v.

Jambudas—Non-Applicant.

Misc. Judl. No. 46-B of 1927, Decided on 15th April 1929, referred by the applicant on 6th September 1927.

(a) Income-tax Act, S. 28—Receipt by assessee of decretal debt with interest but interest not shown in return—Assessee following cash system of accounts but receipt of amounts not shown in khata—Assessee entering whole amount in cash book and posting all in ravangi khata—No other instance in which such amounts were posted in ravangi khata—No explanation submit-

(1) [1904] 26 All. 447=1 A. L. J. 65=(1904) A. W. N. 61.

**ted of non-inclusion of interest in return—
Assessee is guilty of concealment of income.**

An assessee received a decretal debt and interest in respect of it. The amount of interest was not included in his return. Though the assessee followed cash system of accountancy, the receipt of the amount of decretal debt including interest was not entered in the khata nor was interest entered in the kasar khata. The assessee credited the whole amount in his cash book and posted it immediately in the "ravangi khata" which meant and dealt with the items issued in cash by the owner of the shop to his servants for Court and other expenses. There was no other instance in which payments received in satisfaction of debts were posted in the ravangi khata. The assessee did not along with his return submit any explanation why the amount of interest was not shown therein.

Held: that the assessee was guilty of concealment of income within the meaning of S. 28. [P 203 C 2]

(b) Civil P. C., S. 100—Two inferences possible from facts found—One drawn by lower Courts—No question of law arises.

Where two inferences are possible to be drawn from the facts found in the case and one such is drawn by the lower Courts, no question of law arises for the decision of the High Court: 21 *Bom.* 91; 46 *I. C.* 794; *A. I. R.* 1924 *Nag.* 160; *A. I. R.* 1926 *Nag* 192; *A. I. R.* 1918 *P. C.* 92 and 42 *Cal.* 888, *Rel. on.*

[P 203 C 1]

D. N. Choudhary—for Applicant.

W. R. Puranik—for Non-Applicant.

Order.—The facts necessary for the disposal of this reference are shortly these. In the assessment proceedings for the year 1925-26 the assessee, Jambudas Devidas of Karanja, submitted a return under S. 22 (2), Income-tax Act, on the usual form and appended to it a schedule, as required by R. 19 of the rules framed under the said Act, showing his total taxable income as Rs. 23,151-5-0, for the one year ending the Divali of 1924. This return was not accepted, and therefore after an examination of his books of accounts the Assistant Commissioner of Income-tax found his income to have been Rs. 43,361 inclusive of an item of Rs. 15,400 representing interest, received by the assessee through the civil Court, in respect of a decretal debt due from Sheikh Amir and others. The assessee was accordingly assessed to income-tax on the aforesaid income and the Assistant Commissioner, who made the assessment in the case, also levied a penalty under S. 28, Income-tax Act, on the amount of Rs. 15,400 at the maximum rate holding that the assessee was guilty of "deliberate concealment"

of this part of his income. The Commissioner of Income-tax to whom an appeal was preferred also concurred with this finding of the Assistant Commissioner and held that the penalty was correctly imposed. After the dismissal of his appeal the assessee unsuccessfully moved the Commissioner, under S. 66 (2), Income-tax Act, to refer the point in dispute for the decision of this Court and later on filed an application in this Court under S. 66 (3) *ibid*, which was allowed by Kinkhede, A. J. C., who directed the Commissioner of Income-tax to make the desired reference *Jambudas v. Commr. of Income-tax, C.P. & Berar* (1).

It is in obedience to this mandamus that the Commissioner of Income-tax has made the present reference for the decision of the following point:

"Under the circumstances of the case and in view of the system of book-keeping observed at the assessee's, was the income-tax department justified in holding that the assessee was guilty of concealment of income within the meaning of S. 28, Income-tax Act, and that he was liable to be penalised with the maximum penalty with respect to the item of Rs. 15,400?"

For the proper decision of the question referred to us it is necessary in the first instance to recapitulate the facts found, in this case, by the income-tax authorities. These are briefly as under:

(a) that on 22nd June 1925, the assessee filed his return on the usual form and attached thereto a schedule showing how he arrived at the figure of taxable profits;

(b) that the item of Rs. 15,400 representing the amount of interest, which is the subject in respect of which penalty has been imposed, was not shown by the assessee in the aforesaid schedule;

(c) that the assessee follows the cash system of accountancy, i.e., 'as soon as the money is received or issued in cash it is entered in the books of accounts. Under this system, therefore, the receipt of Rs. 21,400 should have been entered in its proper place, i.e., in Sheikh Amir's khata, and the net interest of it, i.e., Rs. 15,400, entered into the kasar khata, i.e., interest account. This was not done though, with the system of accountancy obtaining with the assessee, it should have been;

(d) that the assessee had, as a matter of fact, withdrawn the amount of Rs. 21,400 (inclusive of the sum of Rs. 15,400 for interest) from the civil Court deposit on 11th February 1924. He credited it in his cash book on 15th February 1924 and posted it immediately in the ravangi khata" against the name of his brother Mr. Jaikumar, pleader, who had actually withdrawn the amount at Akola and sent it on to the assessee at Karanja ;

(e) that the assessee did not, along with his return, submit any explanation as to why this amount was not shown therein as income in the account year ;

(f) that long before the return was submitted by the assessee, the Income-tax Officer in his prospective survey operations had come to know that the assessee had received this large amount in satisfaction of the decree ;

(g) that the assessee did not of his own accord submit his books of account for the inspection of the Income-tax Officer in support of his return ;

(h) that when the books of account were produced this large amount credited therein and called upon the assessee to explain why it was not included in the return, Hirusa, the agent of the assessee, simply stated that because an appeal was preferred against the decree claiming an additional sum of about Rs. 4,000 :

"the amount of interest would be shown in the accounts after the appeal was decided."

In the written grounds of appeal before the Commissioner the reason assigned for the omission was that :

"the amount of Rs. 15,400 for interest had to be shown in a sort of suspense account as the matter was pending decision in appeal";

(i) that the income-tax authorities also discovered that there was no other instance in which payments received in satisfaction of decretal debts were ever posted in the "ravangi khata" by the assessee;

(j) that the "ravangi khata" meant and dealt only with the items that are issued in cash by the owner of the shop to his servants for Court and other expenses and which are adjusted as soon as the servants return to the headquarters and that Rs. 21,400 in question was admittedly not a remittance so sent out by the assessee ; and

(k) that but for the inspection of the account books by the Income-tax Officer,

which was prompted by the knowledge he had already gained in his survey enquiries, the item in question would have remained concealed from the income-tax authorities.

It was upon these facts that the Assistant Commissioner as well as the Commissioner of Income-tax came to the conclusion that the assessee's conduct came within the purview of S. 28 (1), Income-tax Act, which states that :

If the Income-tax Officer is satisfied that an assessee has concealed the particulars of his income, or has deliberately furnished inaccurate particulars of such income, and has thereby returned it below its real amount, he may direct that the assessee shall, in addition to the income-tax payable by him, pay by way of penalty a sum not exceeding the amount of income-tax which would have been avoided if the income so returned by the assessee had been accepted as the correct income."

The learned Commissioner of Income-tax in para. 5 of the reference assures this Court that the principle of the normal presumption being in favour of the assessee's good faith was not departed from in this case in arriving at the aforesaid finding.

In issuing the mandamus our learned brother Kindkhede, A. J. C., had observed that :

"The question whether the applicant has been rightly found to have concealed his income from the income-tax department depends upon the decision of the question whether or not, on the facts found the inference of concealment could be based,"

because according to the dictum of their Lordships of the Privy Council in *Nafar Chandra Pal v. Shukur* (2), "the proper legal effect of proved facts is a question of law."

Mr. Puranik, the learned advocate for the assessee, pressed upon us to review the adverse finding of the income-tax authorities on the ground that the only inference that could legally be drawn from the facts ascertained in the present case was that there was no intention on the part of the assessee to conceal his income or deliberately make an inaccurate return thereof, howsoever negligent or unbusinesslike the conduct of the assessee may have been in not maintaining his accounts properly which may possibly have resulted in the return being inaccurate in respect of the item of Rs. 15,400. It was not, and could not be denied that the receipt of the amount in

(2) A. I. R. 1918 P. O. 92=46 Cal. 189=45 I. A. 183 (P.O.).

question during the assessment year was a part of the total taxable income for that year. It, was, however, contended that at the time when the return was submitted the assessee honestly believed that it was not an income accrued during the year because he had not appropriated it as such in his accounts, though it may be, that he should have done so.

On the other hand, Rai Bahadur D. N. Choudhury, who appeared for the Commissioner of Income-tax, contended that one and only one conclusion could not be drawn from the facts found and that it was as much possible to draw the inference of innocence or mistake suggested for the assessee, as the one to the contrary already come to concurrently by the two responsible officers of the income-tax department. It was, therefore, argued that no question of law arose in the case for decision. In view of the authorities noticed in the following paragraphs we have no hesitation in holding that the finding of the Income-tax authorities that the conduct of the assessee came within the purview of S. 28, Income-tax Act, was a pure finding of fact which is not open to revision by this Court.

In *Rajaram v. Ganesh* (3) it was observed:

"From facts found it is often easy to rule with certainty that a certain legal inference ought or ought not to be drawn. When such a state of facts occurs, the Court in second appeal can and often does correct erroneous conclusions drawn by the lower appellate Court. Where, however, the legal inference to be deduced from facts is doubtful, it is not open to this Court in second appeal to interfere with the findings of the lower Court. A test which often presents itself to an English lawyer is this: Would a Judge withdraw the case from a jury on the ground that there was no evidence of the question to be found upon, such as adverse possession or title, to go to them, or would be, on the other hand, on certain facts being established, direct them to find in a particular manner. In either of these cases it would be open to this Court in second appeal to come to a different conclusion from the lower appellate Court. But where the question upon the facts and law is one which the Judge would lay before the jury to decide, there it is not open to this Court to consider the propriety of the finding of the lower appellate Court."

In *Madho v. Govindbhat* (4), Drake-Brockman, J. C., followed the principle enunciated in the aforesaid *Bombay*

case and held that where more than one inference is open the High Court cannot in second appeal refuse to be bound by that drawn in the Court below. Similarly in *Mt. Mathurabai v. Lalsingh* (5), Kinkhede, A. J. C., approved the view propounded in the *Bombay* case and observed that the mere fact that a Court of appeal draws one of two possible inferences on a question of fact does not entitle the second appellate Court to interfere with the finding based upon such inference and that it is only where one legal inference is possible and which has not been drawn that interference is justified. Again, in *E. I. Railway Co. v. Badrilal* (6) the same learned Judge laid down the law in these words:

"Given certain set of facts, from which two inferences are possible, it is open to the first appellate Court to draw any one of them, vide *Rajaram v. Ganesh Hari Karkhanis* (3) and his decision will not be open to challenge in second appeal. Their Lordships of the Privy Council discountenanced the practice of undue interference in second appeal with findings of fact duly supported by evidence proper for consideration. They have expressed their disapprobation in the following passage of their judgment in *Nafar Chandra Pal v. Shakur Shaiikh* (2). The mere fact "that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion," is no ground for second appeal, "it is precisely this revision of evidence which is excluded by the limited character of a second appeal." In *E. I. Ry. Co. v. Changa Khan* (7), it was held that after there has been a decision of fact in the two Courts of original and first appellate jurisdiction the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final."

The application of the rule deducible from the above authorities make it perfectly clear to us that on the facts found in the present case no question of law arises for our decision. It is also equally clear to us that if it were possible for us to review the finding we would have come to the same conclusion upon the facts established in the case as has been come to by the income-tax authorities. We, therefore, answer the reference in the affirmative. The assessee shall pay

(5) A. I. R. 1924 Nag. 160.

(6) A. I. R. 1926 Nag. 192.

(7) [1915] 42 Cal. 888=22 C. L. J. 212=28 I. C. 245=19 C. W. N. 1034.

(3) [1897] 21 Bom. 91.

(4) [1918] 46 I. C. 794.

the costs of this reference. Counsel's fee Rs. 100.

P.N./R.K. *Answer in affirmative.*

A. I. R. 1930 Nagpur 204

MACNAIR, A. J. C.

Ganpat—Appellant.

v.

Narayan—Respondent.

Second Appeal No. 525 of 1927, Decided on 29th January 1930, from decree of Addl. Dist. Judge, Wardha, D/- 4th July 1927, in Civil Appeal No. 8 of 1927.

(a) **Hindu Law—Widow allowing transferees from herself or trespassers to remain in possession of absolute occupancy holding during her life—Reversioner on her death or remarriage is entitled to its possession.**

If a Hindu widow allows transferees from herself or trespassers to remain in possession of an absolute occupancy holding during her life the reversioner at her death is entitled to possession of the holding. The remarriage of the widow has the same effect as her death. Where the reversioner during the lifetime of the widow sells the holding in his own right and the lambardar obtains possession on the ground that the transferees are trespassers, the reversioner is entitled on remarriage of the widow to possession of the holding in a suit against the lambardar: 6 C. P. L. R. 135; 5 N. L. R. 172; 8 N. L. R. 154, *Rel. on.* [P 204 C 2]

(b) **Transfer of Property Act, S. 43—Reversioner selling during widow's lifetime in his own right—Transferee does not get that interest even on widow's death.**

The fact that a reversioner sells a holding during the lifetime of the widow in his own right does not pass the interest, which he subsequently acquires in the holding, instantly to the vendee. [P 205 C 1]

G. S. Lule and R. A. Mande—for Appellant.

M. B. Niyogi and T. J. Kedar—for Respondent.

Judgment.—One Watya Mahar was the absolute occupancy tenant of a field, and on his death the tenancy devolved on his widow Mt. Ani. Ganpati the uncle of Watya purported to sell part of the field to two persons Shankarrao and Gangaram. He executed a registered sale deed on 4th day of February 1922. There is a concurrent finding of fact that Ganpati was not the de facto guardian of Mt. Ani but claimed the land as his own and sold it in that capacity. In 1924 the lambardar brought a suit to eject Shankarrao and Gangaram as trespassers. It is clear from Ex. D-1, a copy of the appellate judgment in that suit, that the suit succeeded on the ground that Ganpati did not sell the

holding on behalf of Mt. Ani and therefore the defendants were not transferees from a tenant but trespassers. During the pendency of this suit Mt. Ani remarried. Ganpati is the next reversioner to Watya. Ganpati, within two years from the date of Mt. Ani's remarriage, has brought the suit out of which this appeal arises against the lambardar for possession of the land from which the lambardar ejected Shankarrao and Gangaram. The trial Judge held that the adverse possession of Shankarrao and Gangaram for more than two years extinguished only the widow's interest and that the claim was not barred by time. He also found that the defendant could not take advantage of S. 43, T. P. Act. The suit therefore succeeded. The Judge of first appeal disagreed with the trial Judge on both these points and dismissed the suit. The plaintiff has appealed to this Court.

In *Laxman v. Bhulabai* (1) it has been held by a Bench that a Hindu widow, who succeeds to an absolute occupancy holding, has not more extended rights of transfer than those she would possess over other landed property. The decision in *Fakira v. Hari* (2), *Vithu v. Mt. Mendri* (3) and *Bhura v. Ramrao* (4) that a transfer by a Hindu widow was not binding on the reversioners, was approved. It follows that, if a Hindu widow allows transferees from herself or trespassers to remain in possession of a holding during her life, the reversioner at her death is entitled to possession of the holding: it is not disputed that remarriage of the widow has the same effect as her death. Shankarrao and Gangaram were trespassers and the plaintiff became entitled to the holding when Mt. Ani remarried. His suit is filed within two years of that date. The defendant lambardar obtained possession of the holding at a date subsequent to the remarriage. His suit is therefore in time.

Section 43, T. P. Act, gave Shankarrao and Gangaram an option to claim that the sale should operate on the interest which Ganpati acquired at the death of Mt. Ani. The learned Judge of first appeal is wrong in stating that, because

(1) A. I. R. 1930 Nag. 65=26 N. L. R. 1.

(2) [1893] 6 C. P. L. R. 135.

(3) [1909] 5 N. L. R. 172=4 I. C. 792.

(4) [1912] 8 N. L. R. 154=17 I. C. 366.

of the sale executed by Ganpati, the interest which he subsequently acquired passed instantly to Shankarrao and Gangaram. Shankarrao and Gangaram are not parties to this suit: it may be that they can hereafter exercise the option and claim the suit land from the plaintiff, but the plaintiff in this suit has a right to possession against the defendant. The fact, that the plaintiff was at the time he executed the sale deed, a reversioner, is not important. The defendant obtained possession against the transferees because they had not purchased from the tenant but from a person without title. They were, so far as the original tenant was concerned, mere trespassers. Ganpati, then, must be considered to be a reversioner who has succeeded to rights in a holding over which trespassers had possession. It is urged that the provisions of S. 115, Evidence Act estopped the plaintiff from asserting his title to the land. This was not urged in the lower Courts and it has not been shown that the defendant was induced to believe anything to be true or acted on such belief. The appeal therefore succeeds. The decree of the trial Court is restored. Costs in all Courts will be borne by the defendant-respondent.

P.N./R.K.

Appeal allowed.

* A. I. R. 1930 Nagpur 205

FINDLAY, J. C.

Balaji Kunbi—Appellant.

v.

Chindya and others—Respondents.

Second Appeal No. 167 of 1928, Decided on 7th January 1930, from judgment of Dist. Judge, Chhindwara, D/- 20th January 1929, in Civil Appeal No. 125 of 1927.

(a) Interpretation of Statutes — Statute creating special jurisdiction has to be strictly construed.

A statute purporting to create a special jurisdiction must be very strictly construed, particularly if it is likely to have the effect of depriving the subject of a common law right.

[P 206 C 1]

* (b) C. P. Tenancy Act, Ss. 13 and 105 — Revenue Officer placing person in possession of occupancy holding under S. 13 — Civil Court has jurisdiction to consider whether there had been a transfer or not.

The grant of a special jurisdiction does not carry with it the power to act beyond and outside that jurisdiction and so any question of exercise of power which is ultra vires can be agitated in the civil Court. Thus if the revenue

officer takes action under S. 13 by placing a person in possession of the occupancy holding, the jurisdiction of the civil Court to consider whether there had been a transfer is not barred for otherwise it would be possible for the revenue Court to hold that a set of incidents amounted to a transfer although in fact or law they were not so, and so to oust the jurisdiction of the civil Court: A. I. R. 1927 Nag. 30, *Rel. on.*

[P 205 C 2; P 206 C 1]

*M. R. Bobde and S. K. Barlinge—*for Appellant.

*D. T. Mangalmurti—*for Respondents.

Judgment.—The plaintiff-appellant's suit was brought for a declaration that he is the occupancy tenant of field No. 112 of mouza Gondra (Chhindwara) and that the order of the revenue Court placing the original defendant 1 in possession of the field in question was a nullity. The pleas of the parties are clear from the record and, on the issue which arose therefrom, the Subordinate Judge held that the transfers of the land by Mt. Mendo to Shamji and by the latter to Sitaram were not against the provisions of S. 12, C. P. Tenancy Act. The Subordinate Judge also held that the decision of the revenue officer was beyond his jurisdiction and that the present suit lay. The plaintiff's suit was accordingly decreed. The decision was reversed by the learned District Judge who took the view, in para. 5 of his judgment, that it lay entirely with the revenue Court to decide whether, under S. 13, Tenancy Act, there had been a "transfer" or not. If, in the opinion of that Court, there had been a transfer, then, in his opinion, the jurisdiction of the civil Court to interfere was entirely ousted. In this view of the case he was of opinion that the decision of the revenue authorities was final and dismissed the suit.

The Judge of the lower appellate Court gave no reasoned finding on the question of whether the transactions in question amounted to a transfer or not. The single sentence, which occurs at the end of para. 5 of his judgment, is not a reasoned finding and must be treated as a mere obiter. I find myself wholly unable to agree with the view of the learned District Judge. It is hardly necessary to point out that the grant of a special jurisdiction does not carry with it the power to act beyond and outside that jurisdiction and it inevitably follows that any question of exercise of power which is ultra vires, can be agitated

in the ordinary civil Court. If the view of the learned District Judge were accepted, a very dangerous position of affairs arises because it would be possible, e. g., in a case like the present, for the revenue Court to hold that a set of incidents amounted, in reality, to a transfer, although in fact or in law they were not so, and so oust the jurisdiction of the ordinary civil Court in a matter which S. 13 read with S. 105, Tenancy Act, was never intended to exclude from the purview of the ordinary civil Court. It is an elementary principle of law that a statute purporting to create a special jurisdiction must be very strictly construed, particularly if it is likely to have the effect of depriving the subject of a common law right.

The learned District Judge has failed to appreciate the all essential difference which there is between the existence of a jurisdiction and the exercise of such. It was necessary in the present case to decide in the first instance whether the revenue officer had any jurisdiction in the matter at all : cf. *Chindu v. Rameshwarnath* (1). It is pertinent to point out the carefully guarded language employed in S. 105, Tenancy Act. The civil Courts are debarred from entertaining suits on the matters specified therein provided that the revenue officer concerned was empowered to determine, decide or dispose of them. Turning to S. 13, Tenancy Act, the revenue officer can obviously only take action if there has been a transfer by the occupancy tenant of his right in the holding. It seems clear to me, therefore, that it was essential for the learned District Judge to decide whether, in point of fact, there had been such a transfer or not. If the answer to the question be held to be in the negative, then the jurisdiction of the revenue Court in the matter was clearly barred and the defendant-respondents would not be protected by S. 105, Tenancy Act.

I have already shown above that the District Judge has given no sound or proper finding on the question of fact involved as to whether the incidents, out of which the question of transfer arises, did, in reality, amount to this or not. The case must, therefore, go back to the lower appellate Court for disposal of this question. The judgment of the

lower appellate Court is, therefore, reversed and the case is remanded to that Court for disposal of appeal No. 125 of 1927 on the merits with advertence to the above remarks. Costs incurred in this will follow the event. There will be a certificate of refund of court-fees in this Court.

P.N./R.K.

Case remanded.

A. I. R. 1930 Nagpur 206

SUBHEDAR, A. J. C.

Mt. Laxmibai—Applicant,

v.

Tukaram—Non-Applicant.

Civil Revn. No. 212-B of 1929, Decided on 23rd December 1929, against order of Sub-Judge, First Class, Basim, D/- 25th February 1926 in Civil Suit No. 88 of 1926.

(a) Civil P. C., S. 2 (2)—Mere use by Court of form of final decree does not make it final—Partition.

Where final decree for partition cannot be drawn up without a partition having been effected as directed by a preliminary decree but the Court though no partition is made uses the form of the final decree and signs it, the decree does not amount to final decree for partition. [P 207 C 1]

(b) Limitation Act, Art. 181—Application reminding Court of its duty does not fall under Art. 181.

Where under the terms of a preliminary decree for partition the Court has to appoint a commissioner and get the partition effected through him, an application reminding the Court in the matter cannot be treated as an application falling within the purview of Art. 181 : 4 *Mad.* 172, *Rel. on.* [P 207 C 1]

W. B. Pendharkar—for Applicant.

D. T. Mangalmurti—for Non-Applicant.

Order.—The facts leading to this application for revision are very peculiar. On 5th February 1918 a preliminary decree for partition was passed declaring the shares to which the parties were entitled in the property which is the subject of the litigation and appointing one Mr. Mojamdar to effect the partition and report the fact of his having done so on or before 6th April 1918. On 30th November 1918 Mr. Mojamdar was removed and Mr. Dabir was appointed commissioner in his place. The order-sheet of 11th January 1919 states that the commission did not issue as plaintiff did not deposit the commissioner's fee and because the case was

(1) A.I.R. 1927 Nag. 30=22 N.L.R. 128.

pending unnecessarily for a long time and could not be shown as disposed of until the final decree was passed, the Court proceeded to use the form of the final decree and signed it. The form of the decree is left blank in several particulars and therefore it could not be said that a final decree for partition followed the preliminary decree in the eye of the law.

On 18th July 1927 the plaintiff moved the trial Court for the appointment of a commissioner to partition the property in terms of the preliminary decree. This application was resisted on various grounds but was allowed by the lower Court which appointed a commissioner and directed him to make the partition. Against this order the present application for revision is filed.

Two contentions have been raised on behalf of the applicant. The first is that since a final decree was drawn up and was not appealed from, the preliminary decree could not be revived by the application presented on 18th July 1927. But as I have said above, there has been no final decree drawn up yet in the eye of the law. In *Pandurang v. Gayabai* (1) it is laid down that a finding, unless it operates in the eye of the law as a decree, will not be a decree merely because the Judge chooses to make use of a printed form entirely inapplicable to that finding. On the admitted facts in the present case no final decree could be drawn up without a partition having been effected as directed by the preliminary decree.

The next contention advanced is that the application dated 18th July 1927 was barred by time under Art. 181, Lim. Schedule. But since under the terms of the preliminary decree itself the Court had to appoint a commissioner and get the partition effected through him, the application of the plaintiff reminding the Court of its duty in the matter could not be treated as an application falling within the purview of Art. 181, Lim. Schedule. In *Kylash Goundan v. Ramasawmi Ayyar* (2) it is laid down that the provisions of the Limitation Act, though in their terms doubtless most extensive, must be held to apply to applications for the exercise, by the authority to

which the applications are addressed, of powers which it would not be bound to exercise without such application, and not to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character. For the above reasons the application for revision is dismissed with costs. Pleador's fee Rs. 15.

P.N./R.K.

Revision dismissed.

A. I. R. 1930 Nagpur 207

MACNAIR, A. J. C.

Ramchandra Tejmal—Applicant.

v.

Mohanlal—Non-Applicant.

Civil Revn. No. 261-B of 1928, Decided on 6th December 1929, against order of Dist. Judge, Akola, D/- 24th September 1928, in Misc. Civil Appeal No. 25 of 1928.

(a) Civil P. C., O. 7, R. 10—Appeal against order wrongly returning plaint to be presented to proper Court is tenable even though plaintiff has submitted to the jurisdiction of that Court.

Where a plaint is wrongly returned for presentation to the proper Court it does not appear equitable that the plaintiff should have to allow the period of limitation for presentation in another Court to pass or else give up his right to challenge the order. A plaintiff who has a good case, should not by an erroneous decision of a Court be made to face alternatives, acceptance of either of which may preclude him from obtaining investigation of his claim. An appeal against an order wrongly returning the plaint to be presented to the proper Court is, therefore, tenable even though the plaintiff has submitted to the jurisdiction of the other Court: 11 C. W. N. 765, *Rel. on.* [P 208 C 1]

(b) Civil P. C., S. 115—Scope.

Where the Judge wrongly thinks an appeal is untenable the High Court should interfere in revision. [P 208 C 1]

(c) Contract Act, S. 49—No specific contract—Payment must be made at creditor's place—Debtor and creditor.

Where no specific contract exists as to the place where the payment of the debt is to be made it is the duty of the debtor to make the payment where the creditor is: A. I. R. 1927 P. C. 156, *Foll.* [P 208 C 2]

G. G. Hatvalne and W. B. Pendharkar—for Applicant.

Kedar—for Non-Applicant.

Order.—The order in this case will govern the disposal of Miscellaneous Judicial Case No. 48 of 1929. The applicant, a resident of Kothali in the Malkapur taluq, filed a suit in the Court

(1) A. I. R. 1921 Nag. 108=17 N. L. R. 66.

(2) [1882] 4 Mad. 172.

of the First Class Sub-Judge of Malkapur. The plaint was returned to him for presentation to a Nagpur Court on the ground that the cause of action arose in Nagpur only. The applicant presented his plaint in the Nagpur Court and filed an appeal against the order of the Sub-Judge, Malkapur. The learned District Judge of Akola held that the Malkapur Court had jurisdiction but that, as the appellant had submitted to the jurisdiction of the Nagpur Court, the appeal was untenable. The appeal was, therefore, dismissed and the applicant has come to this Court in revision.

The learned District Judge has relied on a case *Beni Madhubdas v. Jotindra Mohan Tagore* (1). Now in a case reported in the *Indian Law Reports* series *Narayanan Nair v. Cheria Kathri Kutty* (2) the decision in *Beni Madhubdas v. Jotindra Mohan Tagore* (1) was held to be incorrect. I agree with the opinion of the Judge of the Madras High Court. Where a plaint is wrongly returned for presentation to the proper Court, it does not appear equitable that the plaintiff should have to allow the period of limitation for presentation in another Court to pass, or else give up his right to challenge the order. A plaintiff, who has a good case, should not by an erroneous decision of a Court be made to face alternatives, acceptance of either of which may preclude him from obtaining investigation of his claim. The learned District Judge has suggested that the plaint could have been filed in Nagpur with some reservation or protest. It appears to me that the plaintiff can explain the circumstances to the Nagpur Court if his appeal succeeds. I am, therefore, of opinion that the appeal was tenable and should have been decided on the merits. It is urged before me that this Court has no power to interfere in revision. I remark that the Madras High Court was prepared to interfere in revision. In my opinion, where the District Judge wrongly thinks an appeal is untenable this Court should interfere.

It is next urged that the District Judge was wrong in thinking that the Malkapur Court has jurisdiction. I am

referred to a judgment of the Privy Council, *Soniram Jeetmull v. Tata & Co.* (3). Their Lordships quote with apparent approval the following opinion of Tyabji, J. :

"Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is."

Now, the plaintiff, while on a visit to Nagpur, agreed to advance money. He subsequently, after return to his home, wrote out a hundi which he sent to the defendant. An inference can be drawn from the necessities of the case that the parties intended that payment should be made to the creditor at the place where he carried on business. As their Lordships in the case cited state, S. 49, Contract Act, does not get rid of inferences which should justly be drawn from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. It was known that the plaintiff was a mere visitor to Nagpur and, when the defendant promised to pay the creditor, he must be considered to have promised to pay him at his place of business. The defendant failed to pay and the Malkapur Court had jurisdiction. I, therefore, set aside the order of the learned District Judge and direct that the Malkapur Court should receive and try the plaint. In Miscellaneous Judicial Case No. 48 of 1929, the applicant asks that the suit should be transferred from the Nagpur Court to the Malkapur Court. I direct that the Nagpur Court should return the plaint to the plaintiff in order to enable him to present it at the Malkapur Court. Costs of this application will be borne by the non-applicant.

P.N./R.K.

Revision allowed.

(1) [1907] 11 C. W. N. 765.

(2) [1918] 41 Mad. 721=45 I. C. 89=34 M. L. J. 397.

(3) A. I. R. 1927 P. O. 156=5 Rang. 451=54 I. A. 265 (P.C.).

A. I. R. 1930 Nagpur 209

MACNAIR, A. J. C.

Shamsherkhan—Plaintiff—Appellant.

v.

Abdul Wahid—Defendant — Respondent.

Second Appeal No. 40 of 1927, Decided on 29th November 1929, from judgment of Addl. Dist. Judge, Chanda, D/- 19th October 1926.

(a) C. P. Land Revenue Act (2 of 1917), S. 108—Leases and kabuliyats drawn by Settlement Officer under S. 108—Civil Court cannot question terms of such lease.

Where under the provisions of S. 108 the Settlement Officer enquires into the conditions under which the villages are held and draws up written leases and kabuliyats by which the theka-jamas are enhanced considerably, the civil Court has no jurisdiction to question the terms of the lease and kubuliyats. [P 210 C 1]

(b) C. P. Land Revenue Act, S. 109 (c)—Words "protected thekadar" shall be entitled on the expiry of his lease to a renewal and on the occurrence of any such renewal the provisions of S. 108 shall apply" do not mean that no enquiry under S. 108 shall be made unless lease has expired.

Words "protected thekadar shall be entitled on the expiry of his lease to a renewal and on the occurrence of any such renewal the provisions of S. 108 shall apply" refer to the expiry of the lease before the enquiry under S. 108 has been made and does not lead to the inference that no enquiry under S. 108 should be made unless the lease has expired. The only inference that can be drawn is that a valid lease affords some protection to a protected thekadar and that on the expiry of that lease, his position requires special consideration. [P 210 C 1]

M. R. Bobde and *V. V. Kelkar*—for Appellant.

K. V. Deoskar—for Respondent.

Judgment.—The judgment in this appeal will govern the disposal of Second Appeal No. 41 of 1927 (*Mt. Ashrafbi v. Abdul Wahid*). Abdul Wahid is the zamindar of the Gewardha estate. His predecessor, in 1880, executed perpetual leases in favour of Shamsherkhan and Gafoorkhan. In 1902-1903 Gafoorkhan and Abdul Rahman, son of Gafoor Mahomed, were declared to be protected thekadars under the provisions of S. 65-A, C. P. Land Revenue Act 18 of 1881. These thekadars held on small rents, the reason being that they were connexions of the lessor. At the recent settlement the Settlement Officer, purporting to act under the provisions of S. 108, C. P. Land Revenue Act of 1917, enquired into the conditions under which the villages were held and

drew up written leases and kabuliyats by which the theka-jamas were enhanced considerably. The thekadars brought suits for declarations that the action of the settlement department was ultra vires. The lower appellate Court directed that these suits should be dismissed; the thekadars have filed second appeals.

It was urged before me that the appellants should not be considered to be protected thekadars. *Mt. Ashrafbi*, the mother of Abdul Rahman who is declared a protected thekadar, was not herself declared protected. The other appellants, it is said, obtained no benefit from the declaration and were not consulted. It is sufficient to say that this argument is not raised by any of the grounds of appeal to this Court and I see no reason for allowing it to be now raised. It is next urged that, since S. 108, Land Revenue Act, authorises proceedings if a thekadar has been declared to be protected under S. 107, sub-S. (1) of the Act of 1917, it did not authorise enquiry where the thekadars had been declared to be protected under the provisions of the former Act. This argument does not appear in the grounds of appeal, and S. 229 of the Act of 1917 states that all rights acquired under the former Act, shall be deemed to have been acquired under the Act of 1917. This ground then fails.

It is next urged that S. 108 authorises an enquiry into the conditions under which the village is held. The enquiry showed that the village was held under perpetual leases. Under Cl. (3) of the section then the Settlement Officer had jurisdiction only to draw up a lease embodying the result of his enquiry. But S. 108 directs the officer enquiring to ascertain the theka-jama to be paid and the period to elapse before enhancement. Apart from this, the lease must embody the conditions on which the village will be held in future years. The Settlement Officer then has to enquire into the conditions on which the village will be held in future years.

The next and the main argument is that the Settlement Officer had no power to vary a valid agreement into which the thekadar and the proprietor entered. Now, S. 65-A of the Act of 1881 authorises the Settlement Officer to declare a thekadar to be protected for the purposes of the section, notwith-

standing any contract to the contrary. The declaration involved many substantial changes in the status of the thekadar; for instance, it materially affected the succession and thus took away rights from persons who would otherwise have inherited leasehold rights. It seems quite clear then that any contracts which existed previously became of no effect in so far as they were inconsistent with the provisions of S. 65-A. The thekadars, after being declared protected, were precluded from applying to the civil Courts to the extent laid down in S. 65-A or by Chap. 9 of the Act of 1917, which modifies the directions of S. 65-A. Under S. 108, Land Revenue Act, then, it was for the Settlement Officer to enquire into the conditions on which the village was held and the theka-jama which was to be paid. It was for that officer to decide how far the agreement between the proprietor's predecessor and the thekadar should be enforced. That officer was to draw up a written lease and kabuliyat, and Cl. (4) states that the terms of such lease and kabuliyat shall be binding on the parties and shall not be called in question in a civil Court so long as the thekadar remains protected. The civil Courts then have no jurisdiction to question the terms of the lease and kabuliyat.

The appellants' counsel refers to the provisions of S. 109 (c), Land Revenue Act of 1917, which states that a protected thekadar shall be entitled, on the expiry of his lease, to a renewal and that, on the occurrence of any such renewal, the provisions of S. 108 shall apply. Clearly, this refers to the expiry of the lease before the enquiry under S. 108 has been made. No inference can be drawn that an enquiry under S. 108 should not be made unless the lease has expired: the only inference that can be drawn is that a valid lease affords some protection to a protected thekadar and that, on the expiry of that lease, his position requires special consideration. The appeals, therefore, fail and are dismissed. Costs on the appellants.

P.N./R.K.

*Appeals dismissed.***A. I. R. 1930 Nagpur 210**

MACNAIR, A. J. C.

Raghubar—Appellant.

v.

Hukumchand—Respondent.

Second Appeal No. 296 of 1928, Decided on 13th January 1930, from decree of Addl. Dist. Judge, Damoh, D/- 1st March 1928, in Civil Appeal No. 42 of 1927.

(a) C. P. Land Revenue Act, S. 2 (6)—**Lambardar may include person subsequently ceasing to be proprietor.**

The definition of lambardar may include a person who has been appointed a lambardar and has subsequently ceased to be a proprietor of a mahal. [P 211 C 2]

(b) C. P. Land Revenue Act, S. 189—**Lambardar continues to be so even after he ceases to be proprietor.**

Where a person who is a proprietor and is appointed a lambardar, the appointment continues even after he ceases to be a proprietor till he is removed from office under S. 189: *A. I. R. 1928 Nag. 123, Rel. on. A. I. R. 1923 Nag. 153, Expl.* [P 212 C 1]

M. R. Bobde and Deoskar—for Appellant.

P. S. Kotval—for Respondent.

Judgment.—The subject of dispute is an absolute occupancy holding which was subject to a mortgage. In 1920 Mulchand, the recorded lambardar, sued the tenants for arrears of rent. The holding was brought to sale and was purchased by the plaintiff on 26th September 1922. The plaintiff is the son of Mulchand, and after Mulchand's death obtained execution of the decree for rent, but it does not appear material that he was the decree-holder as well as the auction-purchaser. The plaintiff obtained possession in 1924. After this the right of the tenants were put to sale in execution of a decree passed on the mortgage. The defendant purchased these rights on 29th April 1926 and obtained possession. The plaintiff's suit was dismissed by the trial Court. It was held that by an award in the year 1919 Mulchand lost his rights in the village and therefore ceased to be the lambardar, he had then no right to sue the tenants for rent, and the mortgagees who were not impleaded were entitled to disregard the suit for rent and the sale in execution of the decree passed in that suit.

In first appeal it was held that, although by a partition effected in 1919 Mulchand lost his right to a share in

the village, the family property was not then divided by metes and bounds nor were the members of the family placed in separate possession of the shares allotted to them. The village share, then, did not pass from Mulchand's possession, and Mulchand could not be treated as a trespasser while he remained in possession. He therefore continued to be lambardar and could maintain the rent suit. The learned Judge added that even if Mulchand was no longer a proprietor of the village he continued to be the lambardar until his death. The plaintiff was given a decree for possession of the holding.

On the first four grounds of the second appeal it is urged that Mulchand lost his rights in the village on 9th August 1919 and was therefore no longer the lambardar; the mortgagees, then, who were not impleaded in the suit for rent could disregard this suit and the consequent sale. S. 2(6), C. P. Land Revenue Act of 1917, defines a lambardar as the proprietor of a mahal appointed to discharge the duties imposed on a lambardar by this Act; and it is argued that a person who has been appointed to discharge the duties imposed on a lambardar but has subsequently ceased to be a proprietor, does not come under this definition. Reliance is placed on *R. S. Ramkrishnapuri v. Tanba* (1). at p. 63 (of 19 N. L. R.) The facts which were considered in that case were these: Jasodabai was the lambardar of a mahal, the mahal was partitioned and Jasodabai subsequently accepted a person as tenant of a holding in one of the pattis. It was held that as Jasodabai was never appointed lambardar of Tanba's patti after it came into existence and the suit for appointment of a lambardar after the division of the mahal was a patti, she could exercise no powers in the patti. The learned A. J. C. remarked:

"But she never was appointed and never could be appointed lambardar of a patti in which she had no share. Her appointment as lambardar came to an end as far as Tanba's patti was concerned by her ceasing to have any interest in it, just as much as her appointment as lambardar of the mahal would have come to an end if she had sold her share in it."

The statement regarding the consequences of a sale of Jasodabai's share is clearly an obiter dictum.

In *Raoji v. Mt. Girjabai* (2) Findlay,

(1) A. I. R. 1923 Nag. 153=19 N. L. R. 59.

(2) A. I. R. 1923 Nag. 123.

J.C., held that until a plaintiff's appointment as lambardar is upset he must, when in possession of a share, be presumed to have all the powers of a lambardar. Counsel have not been able to refer me to any other judgment in which the question was considered, and I have not been able to trace any revenue ruling on the point.

In my opinion the definition of lambardar may include a person who has been appointed a lambardar and has subsequently ceased to be a proprietor of a mahal. The intention of the Act is clearly that the revenue authorities should appoint a lambardar to discharge the duties of the post and that it should not be open to the civil Courts to raise the question whether or not the person appointed was, in reality, the lambardar. S. 187 of the Act provides for the appointment of a lambardar; S. 189 provides for his removal by the revenue authorities; it is nowhere stated that the person appointed ceases during his life to be lambardar before he is removed. If the lambardar loses his rights in the village he should ask that another person should be appointed or a proprietor should apply for his removal. Until action is taken on such an application he is still bound to discharge the duties imposed on a lambardar and remains in enjoyment of the privileges. It would be highly inconvenient that the question whether or not the recorded lambardar continued to occupy the post should depend on a decision of a civil Court on the point, possibly a difficult point, whether or not the recorded lambardar had lost all interest in the village.

No serious inconvenience appears involved in a proprietor continuing to be lambardar until an application is decided after he has sold his interest. He would continue to be lambardar if he retained a single pie of his share, and in either case his acts as lambardar would be binding on the cosharers only if they were done in good faith. S. 220(p) takes away the jurisdiction of the civil Court regarding any claim in connection with the office of lambardar. It is admitted before me that the civil Courts cannot hold that the recorded lambardar is not a lambardar on the ground that he was not, when appointed, a proprietor of the village. It should be a matter for the re-

venue Court to decide whether the recorded lambardar has ceased to be a lambardar. The question whether he ceased to be a proprietor is decided by revenue Courts when an application for removal of a lambardar is entertained; but a person who has ceased to be a proprietor is removed from the office of lambardar and is not declared to have ceased to be a lambardar from the date on which he lost his proprietorship.

In my opinion, therefore, Mulchand who was a proprietor and was appointed lambardar continued to be lambardar even after he ceased to be a proprietor. He had then a right to sue the tenants for rent, and the holding was liable to sale for the satisfaction of the rent, a first charge thereon, in execution of the decree obtained : S. 9 (1). C. P. Tenancy Act 1 of 1920.

It is urged that after Mulchand's death his son, who was not appointed a lambardar, had no right to execute the decree. This point was not raised at the trial. As the learned Additional District Judge says, the right of the plaintiff to execute the decree was impeached only on the ground that his father Mulchand had no right to sue for rent in Suit No. 7 of 1920. The question cannot now be considered. There does not appear to be an express admission that Mulchand's son was not appointed lambardar. The other grounds of appeal are not pressed. The fact that the plaintiff executed the decree in the rent suit is not material. His claim is based on the fact that he is an auction-purchaser. The fact that Mulchand and his son, the plaintiff, continued in possession of a share in the patti is only material in so far as it negatives the idea that there was any fraud connected with the institution and prosecution of the suit for rent. The appeal fails and is dismissed. Costs on the appellant.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 212

SUBHEDAR, A. J. C.

Shankar—Appellant.

v.

Kutubuddin and others—Respondents.

Misc. Appeal No. 4-b of 1930, Decided on 24th January 1930, from order in execution of 1st Addl. Dist. Judge, Akola, D/- 8th September 1928, in Civil Suit No. 38 of 1909.

Civil P. C., O. 22, R. 10—Preliminary decree for partition of certain revenue paying fields passed specifying shares and directing that commissioner be appointed to effect partition on application—Application to effect partition pending—Application by person as purchaser of one of such fields to be made party falls within O. 22, R. 10.

A preliminary decree for partition of certain revenue paying fields was passed specifying the shares to which the parties were entitled and directing that on application for execution by one such party a commissioner shall be appointed to make the partition. During the pendency of the application for effecting partition a person as purchaser of one of the fields applied to be made a party to the proceedings relating to partition.

Held: that the application fell within O. 22, R. 10 and the person should be made a party.

[P 213 C 1]

V. N. Bapat—for Appellant.

M. R. Bobde and *M. Y. Shareef*—for Respondents.

Judgment.—In First Appeal No. 69-B of 1921 which was an appeal against a preliminary decree for partition passed in Civil Suit No. 38 of 1909 on the file of the First Additional District Judge, Akola, a decree was passed by this Court specifying the shares to which the parties to the suit were entitled and directing that on an application for execution by any member of the family being presented, a commissioner shall be appointed to make the partition. Some of the property comprised in the suit consists of fields assessed to revenue and no partition could be effected except through the Collector of this kind of property. An application for effecting the partition was presented on 11th March 1928 by one of the parties to the suit praying that the property be partitioned. But this application was dismissed for default of parties on 29th September 1928. Another application for execution by one of the parties to the suit for realisation of costs was also presented on 17th March 1928, but this was likewise dismissed for default of parties on 8th September 1928.

During the pendency of the above two applications an application was presented by one Shankar on 25th April 1928 stating that, as he had purchased S. No. 180 at an auction sale in execution of a decree against Kutubuddin, who is one of the parties to the partition suit, he should be made a party to these proceedings relating to the partition so that the field purchased by him may be allotted to the share of Kutu-

buddin. The lower Court, however, rejected this application on the ground that Shankar could not be made a party "to a suit in execution proceedings." It is against this order that the applicant Shankar had filed a miscellaneous appeal to this Court on 27th November 1928. But by an order of Kinkhede, A.J.C., this was registered as civil revision No. 335-B of 1928.

The original application of Shankar was one made under O. 22, R. 10, Civil P. C., and therefore the order passed thereon was appealable under O. 43, R. 1 (1), Civil P. C. Therefore the order passed for registering this appeal as civil revision was admittedly wrong. I therefore direct that the matter be registered as miscellaneous appeal.

It is admitted on behalf of the respondents that no final decree for partition of the revenue paying estate is yet made in the case. It is also admitted that the partition of the fields in suit, one of which is admittedly purchased by the appellant, could not be effected except through the Collector. It follows therefore that the application of the appellant Shankar dated 25th April 1928 for being joined as a party fell within the purview of O. 22, R. 10, Civil P. C., and that he should have been made a party. The order appealed against is therefore set aside and the lower Court is directed to entertain the application of the appellant and dispose of it according to law. Under the peculiar circumstances of this case each party should bear its own cost in this Court.

P.N./R.K.

Order set aside.

A. I. R. 1930 Nagpur 213

JACKSON, A. J. C.

Ganpat—Defendant—Appellant.

v.

Raje Laxmanrao—Plaintiff—Respondent.

Second Appeal No. 94-B of 1929, Decided on 4th February 1930, against decree of Addl. Dist. Judge, Buldana, D/- 30th January 1929.

(a) Berar Land Revenue Code, S. 4 (17)—"Alienated" explained.

A grant in the soil is not necessary to make a village "alienated": 42. *Bom.* 112 and 43 *Bom.* 77, *Rel. on.* [P 214 C 1]

(b) Berar Land Revenue Code, S. 221—Survey settlement introduced in alienated village—Holder becomes as if occupant.

On the introduction of a survey settlement into an alienated village the holders of land are placed in the same position as if they were occupants in an unalienated village: 43 *Bom.* 77 and 44 *Bom.* 110, *Foll.* [P 214 C 2]

(c) Berar Land Revenue Code, S. 221—S. 221, not being retrospective, cannot be applied to alienated village into which survey settlement was introduced under Berar Settlement Rules of 1865.

Provisions of S. 221 are prospective and not retrospective. Hence where a survey settlement was introduced into an alienated village under the Berar Settlement Rules of 1865 long before the Code was passed the provisions of S. 221 of the Code cannot be made applicable to that village. [P 215 C 2]

Hari Singh Gour and *V. Bose* and *P. N. Rudra*—for Appellant.

Y. M. Kale—for Respondent.

Judgment.—This appeal arises from a suit by a jaghirdar to eject a tenant from a field in the jaghir village of Kingaon Jatu under S. 79, Berar Land Revenue Code, 1896. A decree has been passed by the trial Court and the defendant's appeal to the District Court has been dismissed. He now prefers this second appeal and the main contention is that by reason of the survey settlement of 1868, which the plaintiff admits, under S. 221, Berar Land Revenue Code, the holders of all lands in the village have obtained the same rights and are affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by, and that he is not liable to ejectment as an annual tenant.

Before coming to the main contention, I propose to deal with another that has been raised on behalf of the defendant, namely, that the village is not an alienated village because the plaintiff holds it as a jaghirdar. I have been referred to two Privy Council decisions in *Raghojirao Saheb v. Lakshmanrao Saheb* (1) and *Ram Narain Singh v. Ram Saran Lal* (2), in support of this contention; but I find nothing in those rulings that does support it. In the former it was said the term jaghir implied no grant in the soil, but a personal grant only of the revenue to the grantee; but I do not think that it necessarily follows that there was no grant in the soil in the present case. The

(1) [1912] 36 *Bom.* 639=16 I. C. 239=39 I. A. 202 (P.C.).

(2) A. I. R. 1913 P. C. 203=16 Cal. 653=16 I. A. 83 (P.C.).

jaghir was given for personal maintenance and the grant was confirmed by the British Government under Inam R. 5, a perusal of which will lead to the conclusion that there was a grant in the soil. Even if there were not, the village would still be "alienated", as that expression is defined in S. 4 (17), Berar Land Revenue Code. In *Pandu v. Ramchandra Ganesh* (3), the Bombay High Court has gone so far as to hold that the definition of "alienated" in the Bombay Land Revenue Code (which corresponds exactly with that in the Berar Code) did not apply when there had been a grant of the soil and not merely of revenue, because more had been transferred than the definition contemplates. In *Dadoo v. Dinkar Vishnu* (4), however, what, with due respect to the learned Judge who decided *Pandu v. Ramchandra Ganesh* (3), I consider to be the sounder view was taken, that the words:

"transferred in so far as the rights of Government to payment of the rent or land revenue are concerned"

in the definition of "alienated" prescribe a certain minimum requirement, and where that minimum requirement is satisfied, the definition also is satisfied, notwithstanding that the transfer may cover certain other interests over and above those contained in the minimum requirement. At least, it is clear that a grant in the soil is not necessary to make a village "alienated."

The village being an alienated village, the effect under S. 221 of the so called survey settlement of 1865 has to be considered. That section provides that, when a survey settlement has been introduced and the provisions of S. 220 or of any law, rule or order for the time being in force, into an alienated village, the holders of all lands, to which such settlement extends, shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by under the provisions of the Code. S. 220 (1) provides that the provisions of the Code relating to survey settlements shall not be applied to any alienated village except for the purpose

of determining and registering the proper full assessment on all lands included therein, as provided in S. 88 (3). Sub-S. (2), however, makes those provisions applicable to certain alienated or partly alienated villages and sub-S. (3) enables them to be extended to any alienated village on an application in writing being made by the holder of the village. The lower appellate Court, finding that the village in question is not one of any kind specified in sub-S. 2 to S. 220 and that there is nothing to show that a survey settlement was introduced on the application of the holder as required by sub-S. 3, has held that S. 221 is not applicable, because the survey settlement has not been introduced under that section. In appeal it is sought on behalf of the plaintiff to strengthen the position of the lower appellate Court by pointing out that the Berar Land Revenue Code was not in force at the time of the survey settlement, which was made under the Berar Settlement Rules of 1865. S. 221, however, does not apply only to survey settlements introduced under S. 220 but to any survey settlement introduced under the provisions of any law, rule or order for the time being in force; and it is argued on behalf of the defendant that S. 221 would thus apply, even though the survey settlement had been introduced under the Berar Settlement Rules of 1865.

Accepting that position for the time being, I do not understand the lower appellate Court to hold that, if S. 221 did apply, the holders of the land in the village would not, on the introduction of the survey settlement, acquire the same rights as occupants in unalienated villages, though that appears to be the position taken up in argument on behalf of the plaintiff. It is a position which is quite untenable in view of the wording of the section; and the corresponding provision in the Bombay Land Revenue Code, S. 217 has been interpreted in *Dadoo v. Dinkar Vishnu* (4) and *Dhondo Vasudev v. Secretary of State* (5), as meaning that on the introduction of a survey settlement into an alienated village the holders of lands are placed in the same position as if they were occupants in

(3) [1918] 42 Bom. 112=43 I. C. 733=20 Bom. L. R. 16.

(4) [1919] 43 Bom. 77=47 I. C. 745=20 Bom. L. R. 897.

(5) [1920] 44 Bom. 110=53 I. C. 193=22 Bom. L. R. 247.

an unalienated village. I am not impressed by the argument that this interpretation makes the provisions of S. 223 superfluous; the two sections refer to different sets of conditions. As the lower appellate Court has pointed out, a survey does not necessarily mean the introduction of a survey settlement. It may be made under S. 88, sub-S. (3) for the purpose of determining and registering the proper full assessment on the land in the village, though that assessment is not to be levied. In such a case S. 223 applies and entitles an inferior holder or tenant who has personally or through his predecessors-in-title held land in the village from a period anterior to the alienation to pay no more than the proper assessment, other inferior holders or tenants being left to make their own arrangements with the holder of the village. If, however, the survey is followed by the introduction of a survey settlement under S. 91, S. 223 will no longer apply, but S. 221 will; and all holders of land in the village will acquire the same rights as occupants in unalienated villages.

The lower appellate Court's view is that, in fact, no survey settlement has been introduced into Kingaon Jatu; and, if that view is correct, it has rightly held that S. 221 does not apply. In argument on behalf of the defendant it was treated as admitted that there had been such introduction. The pleading on behalf of the plaintiff in the trial Court was that the fact of the survey settlement of 1868 was admitted but that settlement does not amount to conferring or admitting any occupancy rights on the tenants of jaghir villages. That does not seem to me to be a clear admission of the introduction of a survey settlement; and the expression "survey settlement," which is not used in the Berar Settlement Rules, 1865, has probably been used loosely, and what really took place may have been merely a survey for the purpose stated in S. 88 (3) of the Code of 1896. I need not, however, pursue the question, as there is another ground on which, in my opinion, S. 221 must be held inapplicable in the present case.

I return here to the fact that, if there was a survey settlement, it was introduced under the Berar Settlement Rules, 1865. There was then no provision

corresponding to S. 221 of the Code of 1896; and I consider that it cannot have been intended to give that section retrospective effect. Prior to the enactment of that section, the introduction of a survey settlement or what then corresponded to it, in an alienated village, would not have altered the rights of the holders of land; and it seems to me out of the question to hold that the holders of land in Kingaon Jatu had their rights enlarged by the enactment of S. 221, twenty-eight years after the alleged survey settlement. It was not a mere change of procedure that was introduced; the enactment altered the rights of the holder of the village and the holders of land therein on the introduction of a survey settlement; and such an enactment must be interpreted as being prospective, unless it contains words that clearly make it retrospective. There are no such words in S. 221; and I hold that the defendant cannot get the benefit of that section. His appeal consequently fails and is dismissed with costs. Second Appeal No. 95-B of 1929 and Second Appeal No. 96-B of 1929, which were argued with this appeal and in which the same question arises for decision, will also be dismissed with costs.

S.N./R.K.

Appeal dismissed.

* A. I. R. 1930 Nagpur 215

SUBHEDAR, A. J. C.

Bajirao—Applicant.

v.

Daulatrao and others — Non-Applicants.

Civil Revn. No. 305-B of 1928, Decided on 3rd April 1930, against order of Dist. Judge, Akola, D/. 25th September 1928.

* (a) Provincial Insolvency Act. S. 6 (b)—**Hindu father, governed by Mitakshara, heavily indebted—He effecting voluntary partition between himself and minor sons without providing for debts—Such partition is transfer of property constituting act of insolvency.**

Voluntary partition of the joint family estate by a father governed by the Mitakshara Law, who is a debtor, between himself and his minor sons without making adequate provision for settlement of his debts amounts to transfer of his property with intent to delay and defeat his creditors and so constitutes "an act of insolvency" which would entitle his creditor to present an insolvency petition against him; *A. I. R. 1925 Pat. 127*; *A. I. R. 1924 P. C. 50*; *A. I. R. 1928 Mad. 657 (F. B.)*;

A. I. R. 1928 Bom. 232; A. I. R. 1925 P. C. 18, A. I. R. 1926 Mad. 994 (F. B.); A. I. R. 1926 All. 447 and A. I. R. 1926 Nag. 355, Ref.

[P 216 C 2]

*(b) Provincial Insolvency Act, S. 2 (d)—Scope—Provincial Insolvency Act, S. 6 (b).

The insolvent's property includes also in the case of a Hindu father his disposing power over his sons' undivided interest. [P 217 C 2]

V. Bose and M. R. Bobde—for Applicant.

W. R. Puranik, G. G. Hatwalne and V. N. Bapat—for Non-Applicants.

Order.—This application for revision arises out of insolvency proceedings and requires decision on a point of law of considerable importance. The facts concurrently held proved by the two Courts below are shortly these. The applicant Bajirao, who is 50 years of age, has two wives, Tanai and Radhai; from the former he has a son aged 16 and from the latter another son, Purushottam, three years old. Bajirao and his sons formed a joint Hindu family, governed by the Mitakshara Law, of which Bajirao was the manager. The family possesses considerable property both moveable and immovable. Bajirao was heavily indebted to several creditors, his total debts amounting to Rs. 37,640.

On 8th January 1926 Bajirao, of his own free will and accord, executed a deed of partition (Ex. A-1) whereby he purported to divide the joint estate between himself and his two minor sons under the guardianship of their mothers, the reason assigned being that he was old and it was likely that after his death disputes might arise between his wives. The deed recites that the properties falling to the share of the minors are placed in possession of their respective mothers as their guardians and that thenceforward they are to manage the same for and on behalf of the minors. It is to be noted that not only no provision is made by Bajirao for payment of his heavy debts, but their very existence is not even mentioned in the deed of partition.

On 6th April 1926 one of the creditors, Rao Sahib Daulatrao, whose debts amounted to Rs. 16,000, moved the insolvency Court under S. 9, Provincial Insolvency Act, to declare Bajirao an insolvent, the act of insolvency alleged being the execution of the deed of partition by the debtor within three months

before the presentation of the application whereby the debtor made a transfer of his property or part thereof with intent to defeat or delay his creditors. The application was opposed by the debtor on two principal grounds:

(1) that the partition effected by him was not a transfer of property within the meaning of the Provincial Insolvency Act, and

(2) that even if it was a transfer, the intention with which it was effected was not to defeat or delay the creditors.

Both these contentions were, however, overruled by the insolvency Court which, on 2nd February 1927, passed an order declaring Bajirao an insolvent. The District Judge, Akola, to whom an appeal was preferred having upheld the order of the insolvency Court, Bajirao has now moved this Court in revision.

The principal question for determination is whether the voluntary act of partition of the joint family estate by a father governed by the Mitakshara Law, who is a debtor, between himself and his minor sons without making adequate provision for settlement of his debts, constitutes "an act of insolvency" which would entitle his creditor to present an insolvency petition against him under the provisions of the Provincial Insolvency Act. Unfortunately, there is no reported case available in which the question under consideration directly arose for decision. But on a careful consideration of the provisions of the Provincial Insolvency Act with the aid of such authorities as were cited in arguments on both sides, it is clear to me that the question must be answered in the affirmative.

Under S. 6 (b), Provincial Insolvency Act a debtor commits an act of insolvency:

"If in British India or elsewhere he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors."

The word "property" is defined in S. 2 (d) of the Act as:

"'property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

By S. 2 (f) *ibid* "transfer of property" is defined to include a transfer of any interest in property.

The main argument advanced on behalf of the applicant by his learned

advocate, Mr. Bobde, was that a partition does not constitute a transfer within the meaning of S. 3, T. P. Act, because it does not change the rights of the parties in the subject matter of the partition but merely effects a change in the mode of enjoyment thereof. This is perfectly true as far as it goes, but it hardly touches the point under consideration.

It is not denied that under Hindu Law the father has the right to sell the whole estate to pay off his antecedent debts provided they are neither illegal nor immoral: *Amolak Chand v. Mansukh Rai* (1). In *Brij Narain v. Mangal Prasad* (2) it was also laid down by the Judicial Committee that if the managing coparcener is the father he may, by incurring debt, so long as it is not for immoral purposes, lay the joint estate open to be taken in execution proceedings upon a decree for payment of such debt and the son will be prevented from asserting that his own share is not liable "to purge that debt."

It is not contended that the debts which the applicant had to pay in the present case were of such a nature as were not binding upon the minors' shares in the coparcenary property and it therefore follows that he could have effectually disposed of the whole of such portion of the joint estate as was necessary for payment of the said debts if he so desired. It has also been conceded, though it is not of much significance to the decision of the question in issue, that even after partition properties allotted to the shares of minor coparceners at the partition could be followed up by the father's creditors for the satisfaction of his debt: *Subramania Ayyar v. Sabapathy Ayyar* (3) and *Annabhat Shankarbat v. Shivappa Dundappa* (4).

This power of disposal over the joint family estate, which a Hindu father, governed by the Mitakshara Law possesses, was considered by their Lordships of the Privy Council in *Sat Narain v. Behari Lal* (5) to fall within the purview of S. 2 (e), Presidency Towns Insol-

veny Act, which is identical in language with S. 2 (d), Provincial Insolvency Act. At the top of p. 22 of the report, after saying that

"Property is defined as including any property over which any person has a disposing power which he may exercise for his own benefit,"

their Lordships go on to say,

"and it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power."

In *Sat Narain v. Sri Kishan Das* (6) which was a case under the Presidency Towns Insolvency Act 2 of 1909, it was held that when at the commencement of his insolvency a father has the power to enforce by the sale of the whole joint family estate the pious obligations of his sons to discharge out of their interest his then existing untainted antecedent debts, the capacity of the insolvent vests in the receiver after adjudication, whatever may be the technical effect of the adjudication upon the coparcenary in its other aspects. Since the decision of the above Privy Council case it has been held in a series of cases that under Provincial Insolvency Act (5 of 1920) on the insolvency of a Hindu governed by the Mitakshara Law, his power to sell his sons' shares for paying his just and proper debts also vests in the Official Receiver though the said shares themselves do not vest in the receiver: *Balavenkata Seetarama Chettiar v. Official Receiver, Tanjore* (7), *Chairman, District Board, Monghyr, v. Sheodutt Singh* (8) and *Om Prakash v. Moti Ram* (9).

I am, therefore, clearly of opinion that the legislature in using the phraseology it did in S. 2 (d), Provincial Insolvency Act, did intend to enact that the insolvent's property includes also in the case of a Hindu father his disposing power over his son's undivided interest. It follows then that, by the partition brought about by Bajirao between himself and his sons, which undoubtedly had the effect of depriving him of the power of disposal over 2-3 of the joint estate, he did make a transfer of "an interest in property" within the meaning of the definition contained in S. 2 (f), Provincial Insolvency Act.

(1) A. I. R. 1925 Pat. 127=3 Pat. 857.

(2) A. I. R. 1924 P. C. 50=16 All. 95=51 I. A. 129, (P. C.)

(3) A. I. R. 1928 Mad. 657=51 Mad. 361 (F. B.).

(4) A. I. R. 1928 Bom. 232=52 Bom. 376.

(5) A. I. R. 1925 P. C. 13=6 Lih. 1=52 I. A. 22 (P. C.)

(6) A. I. R. 1926 Lih. 261=7 Lih. 276.

(7) A. I. R. 1923 Mad. 901=19 Mad. 849 (F. B.).

(8) A. I. R. 1926 Pat. 433=5 Pat. 476.

(9) A. I. R. 1926 All. 447=18 All. 409.

The next question to be considered is if the partition by the applicant was effected with intent to defeat or delay his creditors so as to bring the case within the purview of S. (6) (b), Provincial Insolvency Act. Mr. Bobde argued that, in the absence of any evidence on the record, the affirmative finding of the two lower Courts on this point was ultra vires and illegal. It is indeed difficult to uphold this contention. Both the Courts below have detailed the facts and circumstances and have given excellent reasons, with which I entirely concur, for coming to a unanimous conclusion that the object of Bajirao in executing the deed of partition was clearly to delay and if possible to defeat his creditors. On the face of it the case is undoubtedly redolent of fraud, and the preposterous circumstances, under which the father attempted to keep 2/3 of the joint property outside the reach of his creditors are too obvious to require emphasis.

During 1½ years that the proceedings dragged on in the insolvency Court and for 2½ years after that till now Bajirao has not either paid or arranged to pay anything towards the debts. This in itself fully confirms, if any confirmation is at all needed, the belief entertained by the two lower Courts that the deed of partition was mala fide. I may notice in passing that in *Chhotelal v. Seth Lakhmichand* (10) a partition effected by a father with his minor son, under circumstances similar to those in the present case, was held by this Court to come within the principles underlying S. 53, T. P. Act. The result is that the order sought to be revised is upheld and this application for revision is dismissed with costs. Pleader's fee Rs. 100.

S.N./R.K.

Revision dismissed.

(10) A. I. R. 1926 Nag. 355

A. I. R. 1930 Nagpur 218

JACKSON, A. J. C.

Yashoda—Appellant.

v.

Shamji and others—Respondents.

Second Appeal No. 111-B of 1925, Decided on 2nd January 1930, against decree of First Addl. Dist. Judge, Akola, D/. 23rd December 1924.

(a) Hindu Law—Debts—Necessity—Widow is justified in selling property for payment of all mortgage debts incurred by her hus-

band of which one was payable a month or so after sale was effected and the others after a year or so.

A widow must be allowed some latitude in the exercise of her powers of alienation and she is right in providing beforehand for payment of the mortgage debt incurred by her husband shortly to become due and she cannot be blamed for making at the same time a comprehensive arrangement for the settlement of all the mortgage debts on the property of her husband in her hands, even though some of them did not require to be paid for a year or so: 20 C. W. N. 210; A. I. R. 1922 P. C. 356 and 18 Bom 534, Rel. on. A. I. R. 1925 Bom. 91 and A. I. R. 1928 Oudh 237, Dist. [P 219 C 2]

(b) Hindu Law—Debts—Necessity—Widow—Act done for purpose of satisfying debt not immediately payable can still be of defensive nature.

Though any act for which the character of "legal necessity" or of "benefit to the estate" can be claimed must be an act of a defensive nature, but it does not follow that an act is not of a defensive nature which is done for the purpose of satisfying a debt which is not immediately payable: A. I. R. 1930, Nag. 96, Ref. [P 219 C 2]

D. W. Kathaley and V. N. Bapat—for Appellant.

V. Bose, M. R. Bobde, M. B. Niyogi, M. B. Kinkhede and S. T. Bhawe—for Respondent.

Judgment.—The question for decision in this appeal relates to the validity of a sale by a Hindu widow. Four fields, to which she succeeded on the death of her husband, Vinayak, on 8th May 1896 were sold by Mt. Umabai for Rs. 1,300 on 16th March 1901 to one Trimbak Motiram Jaitmal. The property was again transferred by Trimbak Motiram and the present appeal arises out of a suit brought by a daughter of Vinayak and Umabai against the subsequent transferees of two of the fields, to have the sale declared invalid and for possession. A similar suit was brought against the subsequent transferees of the other two fields and Second Appeal No. 262-B of 1928 arises out of that suit.

Both the lower Courts have found that the sale was for legal necessity to the extent of Rs. 1,117-0-6, and the lower appellate Court has dismissed the plaintiff's suit but ordered the transferees to pay a sum of money on account of the portion of the consideration that has been found not to be for legal necessity.

Considering that the sale by Umabai took place in 1901 and that the defendants were not parties to that transac-

tion, it was not to be expected that they could produce very clear and cogent evidence as to the purposes for which the sale was effected. Bearing the circumstances in mind, I consider that the lower Courts have rightly come to the conclusion that the evidence adduced to prove that the sale was effected to satisfy debts incurred by the deceased Vinayak and for the marriage of the plaintiff by Umabai was sufficient; that evidence has been discussed in detail by both the lower Courts and I do not propose in second appeal to question their findings of fact. One small point has been raised as regards the lower appellate Court's finding and that is that a sum of Rs. 27-12-0 has been taken into consideration twice over. I do not find that this is the case; and, in any case, it would only reduce the amount found for legal necessity by an inconsiderable sum and would in no way invalidate the sale.

Another point raised is that the purchase price was inadequate. It is pointed out that four years later the purchaser sold the fields for Rs. 2,300. The point does not appear to have been raised before the lower Courts, and there is, consequently, nothing on record to show why the price increased so much between 1901 and 1905. It does not follow from the increase that the price paid in 1901 was inadequate at that time, and I cannot proceed on the basis that it was.

The main argument against there being legal necessity for the sale is that there was no pressure on the estate at the time when the sale was effected. Some 80 per cent of the amount found to have been required for legal necessity was due in respect of three mortgages executed on 22nd April 1899, 24th March 1901 and 20th February 1901. The amount due on the earliest of these mortgages did not become payable until 23rd April 1901, i. e. a month after the sale was effected, and those due on the other two not until a year or more later. It is argued that, as at the date of the sale there was no necessity for payment of any of the mortgage debts there was no legal necessity for the sale.

This view appears to find some support in *Hanamgowda Shidgowda v. Ir-*

gowda Shivgowda (1), where a sale, ostensibly for satisfaction of a mortgage debt not payable for another two years, was held to be without legal necessity, and in *Ram Kishore v. Baij Nath* (2), where the mortgage to be redeemed had seven years to run. But both these cases are distinguishable from the present case in which the largest of the mortgage debts was to become payable within a very short time after the sale by Umabai. It was held in *Venkaji Shridhar v. Vishnu Babaji Beri* (3) that a Hindu widow must be allowed a reasonable latitude in the exercise of her powers of alienation, and it seems to me that Umabai was right in providing beforehand for payment of the debt shortly to become due and that she cannot be blamed for making at the same time a comprehensive arrangement for the settlement of all the mortgage debts on the property, even though two of them did not require to be paid for a year or so.

It does not in fact seem to me to be correct to hold, as a general proposition, that it is necessary for the existence of pressure on the estate that the time for payment must actually have arrived. I have been referred to a decision of my own in *Nagraj v. Ganpat* (4), in which I followed *Shankar Sahai v. Bechu Ram* (5) in holding that any act for which the character of "legal necessity" or of "benefit to the estate" can be claimed must be an act of a defensive nature. But it does not follow that an act is not of a defensive nature which is done for the purpose of satisfying a debt that is not immediately payable. It has been held in *Upendra Nath v. Bindesri Prasad* (6) that the existence of legal necessity in the narrow sense of actual pressure on the estate is not the only test, and their Lordships of the Privy Council in *Ramsumran Prasad v. Shyam Kumari* (7), have laid down that necessity does not mean actual compulsion, but the kind of pressure which the law recognizes as serious and sufficient.

(1) A. I. R. 1925 Bom. 9=18 Bom. 654.

(2) A. I. R. 1928 Oudh 237=3 Luck. 593.

(3) [1894] 18 Bom. 534.

(4) A. I. R. 1930 Nag. 86=26 N. L. R. 56.

(5) A. I. R. 1925 All. 333=47 All. 381.

(6) [1916] 20 C. W. N. 210=32 I. C. 468=22 C. L. J. 452.

(7) A. I. R. 1922 P. C. 356 = 1 Pat. 741 = 49 I. A. 342 (P. C.).

These rulings seem to me to support the view that I have stated above that, though none of the mortgage debts had become payable at the time of the sale, yet Umabai was justified, seeing that one of them was to be paid in some weeks, in obtaining the money to pay it and providing at the same time for payment of the other debts also. In my opinion, the lower Courts are correct in holding that the sale was a valid one. In view of this decision it is unnecessary for me to consider what the rights of the defendants would be as regards compensation if the sale were invalid.

Certain cross-objections have been filed by respondents 1 to 3 on 27th March 1926. They were served with notice of the appeal on 26th October 1925 so that the cross-objections were filed four months late. I have been asked to extend time, but there is no good ground for doing so. The reason given for failure to file the cross-objections in time is that the respondents were ignorant of the fact that the lower appellate Court's judgment contained findings unfavourable to them and did not come to know it until they consulted counsel. This is obviously mere negligence on their part and they are not entitled to any consideration. I dismiss both the appeal and the cross-objections with costs.

P.N./R.K.

*Appeal dismissed.***A. I. R. 1930 Nagpur 220**

JACKSON AND MOHIUDDIN, A.J.C's.

Mt. Mankarnikabai—Defendant 1—Appellant.

v.

Nandlal Achaldas—Plaintiff—Respondent.

First Appeal No. 73-B of 1928, Decided on 18th November 1929, from decree of Addl. Dist. Judge, Khamgaon, D/- 27th April 1928, in Civil Suit No. 7 of 1924.

(a) Hindu Law—Alienation—Widow mortgaging property—Mortgagee suing to enforce mortgage against reversioner—Mortgagee must prove that mortgage was of nature binding on reversioner.

Where a widow having life estate in the property mortgages it and the mortgagee sues to enforce the mortgage against the reversioners after her death, the onus is on the mortgagee to show that the debt was of such a nature as to make the mortgage binding on the reversioners.

[P 221 C 1]

(b) Hindu Law—Alienation—Widow—Negotiations by possible reversioner—Immediate reversioner assenting—Alienee's pleader advising that legal necessity existed—Alienee can assume legal necessity.

A person took a mortgage from a widow at the time when there was a pressure on the estate. The negotiations for the mortgage loan were opened by one who might be a reversioner and the immediate reversioner signified his assent. The mortgagee had the advice of a pleader that there was legal necessity for the mortgage.

Held: that the mortgagee was entitled to assume that the mortgage was for legal necessity.

[P 222 C 2]

(c) Civil P. C., Sch. 3, Para. 11—Collector's power over property attached in execution of decree terminates as soon as payment sufficient to satisfy decree is made.

Collector's power over property attached in execution of a decree terminates as soon as a payment sufficient to satisfy the decree has been made and alienation, effected after that payment, is not invalid merely because the proceedings before the Collector formally continued: 8 N. L. R. 182; A. I. R. 1925 Nag. 455; A. I. R. 1924 Nag. 216, Ref.; 3 N. L. R. 171 and 16 N. L. R. 194, Dist.

[P 223 C 2]

V. N. Bapat and *Rajwade*—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—This appeal arises from a suit to enforce a mortgage executed on 11th July 1912 by Rukhmabai, the widow of Ganpat Patel, in favour of the plaintiff for Rs. 15,000. Ganpat Patel died in 1893 and was succeeded by his widow Rukhmabai. One Jasraj Shriram of Khamgaon had obtained a decree against Rukhmabai; and her property was about to be sold by the Collector in execution of this decree when the mortgage dated 11th July 1912 was executed. To prevent the sale Sadu Janji, who is a son of Ganpat's separated brother, came with others to Mr. Pimplikar (P. W. 1), a pleader of Malkapur, to arrange for a loan to Rukhmabai. Mr. Pimplikar approached the plaintiff's munim, who, after consulting his master at Khamgaon, agreed to advance Rs. 15,000 on a mortgage of Rukhmabai's property. The consideration was paid on the day when the mortgage deed, with Bhau Patel, the husband of Ganpat's daughter, by another wife, Krishnabai, as surety, was executed. Rs. 12,610-15-0 were paid into the treasury in satisfaction of the decree of Jasraj Shriram and the balance of Rs. 2,391-1-0 was paid in cash before the Sub-Registrar. Not long after the mortgage Rukhmabai died

and was succeeded by Krishnabai, her stepdaughter. Krishnabai died in 1918 and was succeeded by the first two defendants, Mankarnikabai, the widow of Pandhari, the son of Bhau Patel, but stepson of Krishnabai, and Bhuli Pandhari's full sister. These defendants deny that the mortgage in suit is binding on them because it was executed by a person holding a widow's estate without legal necessity. The plaintiff relies on the pleas that the mortgage had the consent or the ratification of the reversioners and that the plaintiff made adequate enquiries before giving the loan.

It is argued on behalf of the defendants that Ganpat Patel left a large estate when he died and that there thus can have been no necessity for his widow to incur any debt. The evidence shows that Ganpat was indeed a fairly wealthy man at the time of his death, but this does not lead to any inference as to the condition of his estate when the mortgage was effected nearly 20 years later. On the other hand, it is definitely proved that the mortgage was effected by Rukhmabai with the aid of her relatives in order to prevent the property she had inherited from Ganpat being sold in execution of a decree. The evidence does not show why the debt to Jasraj Shriram was incurred, and it may be that it was not one that would entitle Rukhmabai to alienate more than her own limited interest in the estate she inherited from Ganpat. The onus would of course lie upon the plaintiff to show that the debt was of such a nature as to make the mortgage binding on the reversioners, if the decision of the case turned upon that point. We are, however, satisfied that the plaintiff must succeed on any one of three grounds, namely, that he acted on information sufficient to justify his giving the loan, that the attitude of the reversioners towards the mortgage was such as to validate it, and that it was ratified by Krishnabai.

It is alleged by the plaintiff that Krishnabai, the next reversioner, assented to the mortgage before it was effected, and this would appear to be the case from the very fact that her husband, Bhau Patel, signed the deed as surety. It is argued, however, that the assent of Krishnabai alone is insufficient. In *Var-*

jivan v. Ghelji (1) a widow sold property left by her late husband with the consent of her daughter, the next reversioner, who would, under the Bombay School of Hindu Law, take an absolute estate. It was, nevertheless, held that this consent was of no avail and those persons, who would have succeeded to the property after the widow in the event of her daughter's predeceasing her, were allowed to challenge the sale; but in the present case we have not merely the consent of the next reversioner. As we have already pointed out, Sadu Janji, one of the persons who would have been entitled to succeed if Krishnabai had predeceased Rukhmabai, opened the negotiations that ended in the mortgage. Again, shortly before Krishnabai's death on 14th June 1918, an agreement was entered into by six persons, Ramji Ambu, Awadhut Ambu, Raghu Kukaji, Lakshman Kukaji, Sadu Janji and Tulsabai, regarding the management of Krishnabai's estate. These persons are the children and grandchildren of Ganpat's brothers and the agreement was entered into on the mistaken assumption that they would succeed to the property on Krishnabai's death. In the agreement they made arrangements for paying off the mortgage debt due to the plaintiff and this serves to show that not only Sadu Janji, who opened negotiations for the loan, but the others who stood in the same position as himself assented to or acquiesced in the mortgage being effected. It may be noted here that Ramji Ambu, one of the parties to the agreement, was not only the nephew of Ganpat but also the father of Mankarnikabai, defendant 1.

After the mortgage was effected payments were made in respect of it on six occasions; on 8th August 1913 Rs. 1,700 was paid through Bhau Patel, the husband of Krishnabai, and on 5th July 1914 Rs. 4,044 was paid, also through Bhau Patel; on 19th April 1916 Rs. 3,000 and on 6th December 1916 Rs. 2,400 were paid through Ramji Ambu; on 25th November 1917 Rs. 3,000 was paid through Yeshwanta (D. W. 2) and on 8th March 1919 Rs. 1,985 was paid through Ramji Ambu. An attempt has been made by the defence to show that these persons had no authority to act for Krishnabai or Mankarnikabai. It is de-

(1) [1881] 5 Bom. 553.

nied that the Yeshwanta referred to in the plaintiff's account books is that Yeshwanta who has given evidence as D. W. 2, but this fact is proved by the evidence of Dewoodas (P. W. 11). It is clear from the evidence of Mr. Pimplikar (P. W. 1) and Motiram (P. W. 3), a member of the family, that Krishnabai's husband, Bhau Patel, and after him Mankarnikabai's father Ramji Ambu managed the estate. Vithal (P. W. 10) deposes that Ramji Ambu had represented himself to be the agent of Krishnabai; and it is clear from the evidence of Yeshwanta himself (D. W. 2) that Bhau Patel was acting in management of the estate from as early as 1908, in which year he engaged the witness. We feel satisfied that if Mankarnikabai had produced the books in her possession the above payments would be found mentioned in them and it would be clear that Bhau Patel, Ramji Ambu and Yeshwanta acted as agents for Krishnabai and Ramji Ambu for Mankarnikabai. Yeshwanta has denied that books are kept, but the evidence of Mankarnikabai herself shows that Yeshwanta's evidence is false and the suppression of the books tells against the defence.

We have said enough, we think, to establish the fact that the mortgage was effected not merely with the consent of Krishnabai, the next reversioner, but of the whole body of reversioners, a consent sufficient to validate the transaction, and that, if ratification was necessary, Krishnabai ratified it. Our attention has been directed to *La Banque Jacques-Cartier v. La Banque D'Epargne De Montreal* (2) where it is laid down that acquiescence and ratification must be founded on a full knowledge of the facts, and to *Hari Kishen Bhagat v. Kashi Pershad Singh* (3), where it has been held that the consent of the reversioners must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests. In this case it seems to us that there is such evidence since it is proved that Sadu Janji, one of the reversioners, and Bhau Patel, the husband of the immediate reversioner, took part in the negotiations that led to the

mortgage. It would be impossible to show that each and every one of the reversioners had knowledge, but the agreement that they entered into some years later, Ex. P-29, would lead to the inference that they had. As regards Krishnabai, in particular, some stress has been laid upon the statement contained in that agreement that she had been "beside herself for a long time"; but there is no evidence at all to show that in 1912 her mental state was such as to make her incapable of understanding and agreeing to the mortgage or, when she succeeded to the property, of ratifying it. It is true that we have no direct evidence of Krishnabai's consent to or ratification of the mortgage, but we are dealing with a pardanashin lady and such evidence cannot be expected; and it seems to us that we have in this case the best evidence that can be expected, namely, the evidence as to what her husband and agent did on her behalf.

It has been held in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (4) that an alienation by a widow is not absolutely void but voidable at the election of the reversionary heirs who may affirm it or treat it as a nullity. We consider it proved that Krishnabai not only consented to the mortgage before it was effected but also ratified it after she had succeeded to the estate. She took, as we have already said, an absolute estate and her ratification would bind her successors. Her immediate successor, Mankarnikabai is therefore bound and as a matter of fact has recognized her liability by making payment towards the mortgage debt. It is only in the defence of this suit that her liability has been denied.

It is certainly proved that the plaintiff acted on sufficient enquiry; there was pressure on the estate, a part of which was about to be sold in execution proceedings; the negotiations for the loan were opened by one who might be a reversioner and the immediate reversioner signified her assent through her husband, Bhau Patel, signing the deed as surety. The plaintiff had the advice of Mr. Pimplikar, a pleader, that there was necessity for the mortgage and we think that the plaintiff, on the information that was available to him, was

(2) [1888] 13 A. C. 111=57 L. J. P. C. 42.

(3) A. I. R. 1914 P. C. 90=42 Cal. 876=42 I. A. 64 (P.C.)

(4) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424 (P.C.).

entitled to assume that the mortgage was for legal necessity.

It is argued on behalf of the defence that the mortgage is, nevertheless, invalid, because it was effected during the pendency of the Collector's proceedings. In connexion with this argument the first point to be considered is when the Collector's power to deal with the property under attachment ceased. For the defence it is contended that the mere deposit in Court of the amount due under the decree does not terminate the Collector's proceedings and that in the present case those proceedings continued at least until 17th July 1912, when the papers were returned by the Tahsildar to the Sub-Divisional Officer, with a report that the decree had been satisfied. It is not, however, the date on which the proceedings formally terminated that is material, but the date on which the Collector ceased to have power to deal with the property; and that date, in our opinion, is the date on which the deposit was made in full satisfaction of the decree. Against this view the decision in *Murray v. Murat Singh* (5) has been cited in which a case was treated as remaining pending before the Collector until the decree-holder filed a receipt acknowledging full satisfaction; but in that case the question does not seem to have arisen whether it was on that date only that the Collector's power terminated. In *Mahadeo v. Krishnaji* (6) it was held that the Collector's power did not come to an end as soon as the property attached was sold by auction and fetched more than the decretal amount but existed at least till confirmation of the sale. That ruling, however, has no bearing in the present case, as until the sale was confirmed it could not be said that payment in satisfaction of the decree had been made. Nor do we think that the decision in First Appeal No. 10 of 1920, decided on 19th March 1921, has any application, as there it was merely held that the return of Form C for amendment does not cause a break in the Collector's proceedings. In *Ballabh Das v. Seba Singh* (7), a deposit by the judgment-debtor, illegally accepted by the Sub-Divisional Officer who was executing the decree was held not to have satisfied the

decree, and there is an obvious distinction between that case and the present one.

It is to be noted that the judgment in the last mentioned case contains a pronouncement that the moment the decree is satisfied in or out of Court the Collector's power is at an end. There is a similar pronouncement in *Sonba v. Ganesh* (8). Again in *Maruti v. Krishna Rao* (9), where a decree had been satisfied by a lease and the proceedings had been kept formally pending by the Collector till the lease terminated, it was held that the decree was fully satisfied as soon as the decree-holder accepted the lease, that nothing then remained to be done and that the Collector's power came to an end. We respectfully agree with the view taken in the three cases last mentioned and hold that the Collector's power terminates as soon as a payment sufficient to satisfy the decree has been made and that an alienation effected after that payment is not invalid merely because the proceedings before the Collector formally continued.

The question then arises whether the payment of the full amount, for the recovery of which the C form had been issued to the Collector, took place before or after the execution of the mortgage deed. It is established that both events took place on the same day. The mortgage deed recites that the sum of Rs. 12,610-15-0 has already been paid into the treasury and that the balance has been received in cash; but these recitals cannot be accepted at their face value, because the second one is clearly incorrect, inasmuch as it has been established that the balance was not paid before the execution of the deed but at the time of registration. There is, indeed, no evidence to show which event came first. We are asked by the defence to presume that execution came first, because the plaintiff would not pay such a large sum into the treasury before execution without taking a receipt for it. We are not satisfied that any such presumption necessarily arises when the payment and execution are to take place on the same day. On the other hand, in the absence of evidence, we think that it is possible to accept the

(5) [1907] 3 N. L. R. 171.

(6) [1920] 16 N. L. R. 194.

(7) A. I. R. 1924 Nag. 216.

(8) [1912] 8 N. L. R. 182=17 I. C. 337.

(9) A. I. R. 1925 Nag. 455.

presumption suggested on behalf of the plaintiff, that, where two transactions took place on the same day, they took place in such order as was necessary to make one of them valid; that would mean a presumption in this case that the deposit was made before the deed was executed.

We are not, however, prepared to draw this presumption at the present stage. The fact is that the question as to the order of the two events did not arise before the lower Court. It is clear that the parties did not understand the position to be such as we now hold it to be, and there was consequently no issue and no evidence as to the order of the two events. We consider that an issue should now be framed and remanded for a decision by the lower Court. The issue will be:

"Was Rs. 12,610-15-0 deposited in the treasury before or after the execution of the mortgage deed?"

The lower Court will record evidence on this point and return its finding by 8th April 1930. Objections, if any, to the finding should be filed by 15th April 1930, and the appeal will be further heard on 8th July 1930.

P.N./R.K.

Case remanded.

A. I. R. 1930 Nagpur 224

MACNAIR, A. J. C.

Atmaram and others—Appellants.

v.

Singhai Kasturchand and others—Respondents.

Second Appeal No. 812 of 1929, Decided on 21st February 1930, against decree of Dist. Judge, Jubbulpore, D/- 1st October 1929.

(a) Civil P. C., O. 7, R. 11—Plaint bearing no stamp must be rejected—Court-fees Act, Ss. 4 and 6.

Order 7, R. 11 does not refer to a plaint which bears no stamp. Such a plaint must be rejected in accordance with the provisions of Ss. 4 and 6, Court-fees Act. [P 225 C 1]

(b) Court-fees Act, Ss. 4 and 6—Client not coming to instruct pleader regarding court-fee—Pleader filing memo of appeal on court-fee of eight annas though it required court-fee of Rs. 90—Court is justified in rejecting appeal.

During the time allowed for the filing of an appeal the appellant should determine whether or not to incur expenses in disputing the decision against him. The Court will be slow to hold that he is permitted to oppose the decision by a document bearing an eight anna stamp and thus obtain additional time to decide whe-

ther it is worth his while to pay a considerable court-fee.

Where a pleader a few days before the expiry of the period of limitation files the memo of appeal on a court-fee of eight annas though it should have been written on court-fee of Rs. 90 as his client had not come to make any arrangements for court-fees, the Court is justified in rejecting the appeal: 1 *Lah.* 234; and 38 *Bom.* 41, *not Appr.*; 27 *M. L. J.* 677, *Rel. on.* [P 225 C 1, 2]

(c) Civil P. C., O. 7, R. 11—Appeal.

Order 7, R. 11 does not refer to appeals: 38 *Bom.* 41, *not Appr.* [P 225 C 2]

A. V. Khare—for Appellant.

Judgment.—The appellant filed a memorandum of appeal a day or two before the expiry of the period of limitation. The memorandum was signed by his pleader and contained the following note:

"The memo of appeal should have been written on court-fee of Rs. 90 but as the client has not come and has not been able to arrange for court-fees the memo of appeal is filed on a Court-fee of annas eight only. The deficiency will be paid on or before the date of arguments."

It appears then that the appellant had failed to provide his pleader with funds or even to give him definite instructions. The appeal was filed on a stamp of a trivial value with the object of leaving it open to the appellant after the period of limitation had expired to pay the court-fee or to decide to take no further steps, the pleader expended eight annas. The learned District Judge rejected the memo of appeal because it was insufficiently stamped and no sufficient ground was shown for extending the time for supplying the proper court-fee. He remarked that the filing of the appeal on an eight-anna stamp was a mere evasion.

In second appeal it is urged that the lower appellate Court was bound to give time for payment of the additional court-fee. Under O. 7, R. 11, Sch. 1, Civil P. C., when a plaint is written upon a paper insufficiently stamped, it must be rejected only after the plaintiff has been given time to supply the requisite stamp paper and has failed to do so; but in the present case it is an appeal and not a suit that was filed. In *Achut Ram Chandra v. Nagappa Bab Balga* (1) it was held that a memorandum of appeal should be treated in the manner laid down for a plaint by O. 7, R. 11. The learned Judges, at p. 44, remarked:

(1) [1914] 38 *Bom.* 41=21 *I. C.* 337=15 *Bom. L. R.* 902.

Section 107, sub-S. 2 of the Code, which reproduces S. 582 of the old Code, provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein.

But they have stated (at p. 45) that S. 149, Civil P. C., was substituted for S. 582-A of the old Code. O. 7, R. 11 and S. 107, sub-S. 2, of the new Code, reproduce sections of the old Code. These sections in the old Code did not govern the procedure with regard to insufficiently stamped memoranda of appeal; for S. 582-A laid down a different procedure. In my opinion, then, these sections, reproduced in the new Code, do not govern the procedure, since S. 582-A is not omitted but is replaced by a section which gives somewhat different instructions regarding the treatment of documents such as memoranda of appeal. The learned Judges of the Bombay High Court next remark that, unless the authority to reject such a memorandum of appeal as this is referred to O. 7, R. 11 (c), there is not, so far as they were aware, any authority to which such action of the Court could be referred. With due respect I express my opinion that Ss. 1, 4 and 6, Court-fees Act, authorize the action; the Courts cannot receive a memorandum unless proper fee has been paid; they must, then, reject it unless some special provision in the Code directs that time should be given. I add that O. 7, R. 11, does not refer to a plaint which bears no stamp; surely such a plaint must be rejected in accordance with Ss. 4 and 6, Court-fees Act, and these sections do not distinguish between a document in respect of which no fee has been paid and a document in respect of which the fee paid is insufficient.

A view opposed to the view taken in *Achut Ramchandra v. Nagappa Bab Balga* (1) has been taken in a number of cases. I mention *Lekh Ram v. Ramji Das* (2) and *Narayan Rao v. A. Seshamma* (3). I respectfully disagree with the reasoning on which the Bombay decision is based. The time given to an unsuccessful litigant for the filing of an appeal, an application for review or the like is short. During this period he should determine whether or

not to incur expense in disputing the decision against him. I should be slow to hold that he is permitted to oppose the decision by a document bearing an eight anna stamp and thus obtain additional time to decide whether it is worth his while to pay a considerable court-fee.

The Judge, then, was not bound to allow the appellant to pay the court-fee on a subsequent date, but S. 149 of the Code gave him discretion to do so. The learned District Judge has refused to do this, and I am of opinion that he exercised discretion properly. It is suggested that he should have allowed time until limitation for filing the appeal had expired. He was not asked to do so: the note states that the deficiency would be paid on or before the date of argument. Further there was no need to do so: the appellant could have filed a properly stamped memorandum as, the one bearing an eight anna stamp had been rejected. The appeal fails and is dismissed without notice to the respondents.

P.N./R.K.

Appeal dismissed.

* A. I. R. 1930 Nagpur 225

FINDLAY, J. C. AND SUBHEDAR, A. J. C.

Trimbakdas and another—Plaintiffs—Appellants.

v.

Mt. Mathabai and another—Defendants—Respondents.

First Appeal No. 66-B of 1928, Decided on 4th March 1930, from decree of Addl. Dist. Judge, Akola, D/- 21st June 1928, in Civil Suit No. 1 of 1927.

(a) Civil P. C., O. 14, R. 5 (1)—Court's power to amend or frame additional issues is very wide.

Under O. 14, R. 5 (1), the Court has got very wide powers to amend the issues or frame additional issues as may be necessary for determining the matters in controversy between the parties at any time before passing of a decree. [P 228 C 2]

(b) Evidence Act, S. 101—Where all material facts are before Court, question of burden of proof is not pertinent.

Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent and this is more so at the appellate stage: *A. I. R. 1920 P. C. 67*; *A. I. R. 1922 P. C. 292* and *A. I. R. 1922 Cal. 160, Foll.* [P 228 C 2, P 229 C 1]

(2) [1920] 1 Lah. 234=57 I. C. 235.

(3) [1914] 27 M. L. J. 677=26 I. C. 33.

(c) Evidence Act, S. 90—Scope.

There is no presumption under S. 90 with regard to unsigned accounts not purporting to be in the handwriting of any particular person: 33 *M. L. J.* 84, *Foll.* [P 229 C 1]

(d) Evidence Act, S. 90—Mere production of ancient document affords no proof of proper custody.

Mere production of an ancient document by a party affords no proper custody and it is for the party producing it to explain how the document came to be in his custody. [P 229 C 1]

(e) Hindu Law—Personal Law.

The law existing at the time of migration continues to govern the migrated members until it is renounced. [P 229 C 2]

* **(f) Hindu Law—Custom—Kinds of proof to establish custom—**In support of custom that among Swetambari Dasashrimali Jains of Balapur in Akola District, widow takes absolute interest in husband's self-acquired property, 15 instances of alienations by widows unchallenged by reversioners adduced—One of those alienations upheld by Bombay High Court—Many of those instances being of same locality and same sect of Jains—Custom held to be established.

Evidence in support of a custom should be such as to prove the uniformity and the continuity of the usage and the conviction of those following it that they were acting in accordance with law; and (2) evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted: 7 *M. H. C. R.* 250 (at p. 254), *Foll.* [P 229 C 2]

In support of the plea that, among the Swetambari Dasashrimali sect of the Jains, in Balapur, Akola District, there exists a custom whereby a widow takes absolute interest in the self-acquired property of her husband, 15 instances of alienations by such widows of their husbands' property, unchallenged by reversioners were adduced in evidence. In one of these instances this custom was upheld by the Bombay High Court (36 *Bom.* 396) and many of the instances were from the same locality and relating to the same sect of the Jains.

Held: that there was sufficient evidence to establish the custom among Swetambari Dasashrimali sect of the Jains: (*Case law discussed.*) [P 234 C 1]

*** (g) Hindu Law—Custom—Jains.**

If the custom that a widow takes an absolute interest in the self-acquired property of her husband is found to obtain in other sects of the Jains it will also bind the Swetambari Dasashrimali sect: 27 *Cal.* 379 and *A. I. R.* 1928 *All.* 656, *Rel. on.* [P 230 C 2]

(h) Hindu Law—Joint family—Ancestral property—Presumption about.

There is no presumption that the property in the hands of a member of a Hindu family is joint or ancestral property. The character of such property must be established by the plaintiff who seeks to lay a claim to it: 8 *N. L. R.* 82 and *A. I. R.* 1926 *Nag.* 389, *Foll.* [P 234 C 1]

(i) Hindu Law—Joint family—Ancestral property.

A house in which the members reside cannot in law furnish a nucleus for acquisitions so as to clothe them with the character of ancestral property: *A. I. R.* 1926 *Nag.* 389, *Foll.* [P 234 C 2]

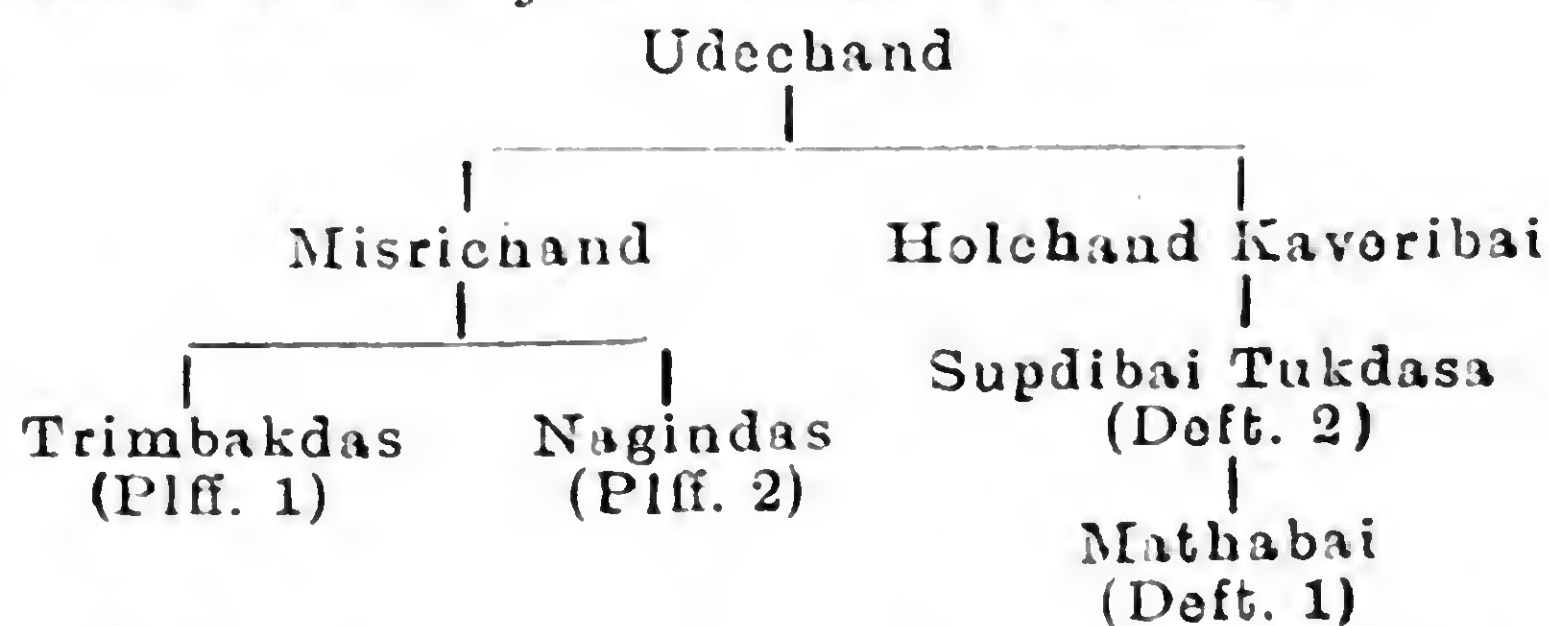
(j) Hindu Law—Joint family—Ancestral property.

Even the joint acquisitions of two brothers without the aid of any income from the ancestral nucleus would not make the property in their hands "ancestral property." [P 234 C 2]

V. Bose, M. R. Bobde, P. B. Gole and P. N. Rudra—for Appellants.

P. S. Kotval, A. V. Khare, W. B. Pendharkar and Y. R. Dongre—for Respondents.

Judgment.—This appeal by the plaintiffs and another one, First Appeal No. 62-B of 1928, by the defendants are against the decree passed by the Additional District Judge, Akola, in Civil Suit No. 1 of 1927. The parties to the litigation are residents of Balapur of the Akola District and belong to the sect of Jains known as Swetambari Dasashrimali and they are related as under:



The plaintiffs' case was shortly this. That Udechand carried on a shop dealing with gold and silver and that after his death the same business was continued by his two sons, Misrichand and Holchand jointly. After the death of Misrichand there was a partition of the joint family property between the plaintiffs and Holchand and that Holchand died as a separated member in the year 1901, leaving behind considerable property, both moveable and immovable, to which his widow, Kaveribai, succeeded. It was alleged that, on 26th March 1918, Kaveribai was made to execute a deed of gift in favour of defendant 1, at the instigation of

defendant 2, bequeathing considerable moveable and immovable property to her and that, as a Hindu widow governed by the Mitakshara Law, she was not entitled to gift away the said property, in case the deed of gift was held voluntary and genuine. Mt. Supdibai admittedly predeceased her mother, Kaveribai, having died in the year 1915. Mt. Kaveribai died in the year 1923 and disputes arose between the plaintiffs and defendant 2 with regard to the property which was left by Kaveribai as the property of her deceased husband. The house with all its contents was attached by the Sub-Divisional Magistrate, Balapur, in proceedings under S.145, Criminal P.C. The plaintiffs as reversionary heirs of Holchand, therefore, filed the present suit to recover possession of the properties which were covered by the aforesaid deed of gift (Ex. D-9) and described in para. 1 of the plaint. After the institution of the suit a claim was also laid to all the moveables which were discovered in the said house, when it was opened by the order of the Court, and as described in Sch. A attached to the plaint.

The claim was resisted by the defendants on various grounds. They denied that the property left by Holchand at his death was ancestral and alleged that it was his self-acquired property without the aid of any nucleus of ancestral property which they said consisted only of a house which at the partition between the brothers was allotted to the father of the plaintiffs. The defendants further contended that, according to the custom prevailing in the caste to which the parties belonged, Kaveribai had full power of disposition over the property which she got from her husband, because it was non-ancestral, that on account of natural love and affection she had made a free gift of the said property to her granddaughter, defendant 1, and that consequently the plaintiffs could not lay any claim to it. With regard to the property discovered in the house, it was stated that the whole of it excepting ornament No. 253 of Sch. A belonged to the defendants and was not the property of Kaveribai. In respect to this ornament No. 253 it was alleged that Kaveribai had made a gift thereof orally to defendant 1 in the year 1918. The defendants also alleged

that the parties, having originally migrated from Gujrat, were governed by the Mayukha and not by the Mitakshara School of Hindu Law. In their reply the plaintiffs admitted that the family had migrated from Gujrat about 500 years ago and not about 100 years ago as stated by the defendants, but alleged that they were governed by the Mitakshara School of Law. They, of course, denied the custom set up by the defendants as to the widow's right in respect of the non-ancestral property of her husband.

A fair idea of the further pleadings of the parties will be gathered from a perusal of the following issues which were settled for trial:

"1. Whether property mentioned in the plaint, the list and Sch. A annexed to the same formed the ancestral property of Holchand, deceased, at his death?

2. What property mentioned therein formed the self-acquired property of Holchand deceased, at his death?

3. Whether the property mentioned in the list annexed to the plaint and Sch. A have vested in Holchand deceased husband of Mt. Kaveribai? Did the property or any portion thereof form the accretion to the estate of the deceased husband of Mt. Kaveribai?

4. Or did it form the personal property of Mt. Kaveribai, Supdabai, defendant 1 and Tukdasa respectively as alleged on behalf of defendants 1 and 2?

5. Whether there was a custom prevailing among Jains by which a widow took an absolute interest in the self-acquired property left by her deceased husband?

B. Whether the custom was prevalent or applicable to the subject of Jains to which the plaintiffs, defendants 1 and 2, and deceased Holchand belonged?

6. When did the ancestors of the plaintiffs and the deceased Holchand migrate to Berar?

7. By what School of Hindu Law were they governed when they came to settle in Berar?

B. If they were governed by the Mayukha School of Law was the same renounced and was the School of Hindu Law, Mitkshara as prevalent in Berar was the School by which the plaintiffs, the deceased Holchand and his widow and defendants 1 and 2 were governed?

8. Whether Mt. Kaveribai took an absolute interest in the moveable property left by Holchand at his death under the Mayukha School of Law?

9. Had she no right to transfer the property mentioned in the deed of gift dated 26th March 1918?

10. What right did defendant 1 get to the property mentioned therein by virtue of the said gift?

11. Whether the deed of gift dated 26th March 1918 was executed under the circumstances mentioned by the plaintiffs, and did Mt. Kaveribai execute the same without knowing its contents as alleged?

12. Did Mt. Kaveribai gift the ornament No. 253 to defendant 1 in the year 1918? What right did defendant 1 get to the same by such a gift?

13. Whether Kaveribai realized the debts other than those payable under the decrees, by one Nimbya on behalf of defendant 1 and were they non-existent?

14. When did defendant 1 come into the possession of the property gifted to her by Mt. Kaveribai?

15. Whether Supdabai, defendant 1, and defendant 2 were living with Kaveribai since before the deed of gift?

16. To what property were the plaintiffs entitled as the reversioners of Holchand, deceased?

The findings of the lower Court on the several issues were as under:

Issue 1. That the property left by Holchand was not ancestral.

Issue 2. That the entire property was the self-acquired property of Holchand.

Issue 3. That the same had vested in Holchand.

Issue 4. That the said property was not the property of Kaveribai or either of the defendants.

Issue 5. That the custom alleged was established in the case of Jains in general and that it also applied to the particular subject of Jains to which the parties belonged.

Issues 6 to 8. No finding was given on these issues.

Issue 9. That Kaveribai had power to dispose of the property mentioned in the deed of gift (Ex. D-9).

Issue 10. That defendant 1 had thus become the owner of the property gifted to her.

Issues 11, 12 and 15 were decided in the negative.

Issues 13 and 14 were decided in the affirmative.

As a result of the aforesaid findings a decree was passed in favour of the plaintiffs with regard to the property mentioned in Sch. A and the claim was dismissed with regard to the property which was covered by the deed of gift. Both the parties were dissatisfied with the decree and have preferred the present appeals. Both the appeals were argued together at considerable length, the hearing lasting for three days.

We shall take up the plaintiffs' appeal first. Four definite points, which were urged by their counsel, are:

(1) that the lower Court erred in adding new and recasting some old issues thereby throwing the burden of proof wrongly upon the plaintiffs;

(2) that the learned Judge wrongly rejected three documents which the plaintiffs had tendered in evidence in the course of the trial;

(3) that in view of the well recogni-

zed rules of evidence regarding proof of custom the materials on record were insufficient to sustain the finding of the lower Court that the custom alleged in the present case was proved;

(4) that the character of the property which came into the hands of Kaveribai was not established as non-ancestral or self-acquired so as to validate the deed of gift relied on by the defendants.

Point 1. On 2nd November 1925, six issues were framed by Mr. Moghaonker. On 19th February 1926, he rejected an application of the defendants for recasting the issues. On 15th September 1926, when Mr. Amraotker took over charge of the case a fresh application was presented by the defendants for resettling the issues on the ground that the issues as framed were wrong and did not cover the entire pleadings. After hearing the pleaders of the parties, the learned Judge allowed the application by an order dated 20th December 1926, and recasted the issues as they stand now. It cannot be denied that under O. 14, R. 5 (1), Civil P. C., the Court has got very wide powers to amend the issues or frame additional issues as may be necessary for determining the matters in controversy between the parties at any time before the passing of a decree. It is to be noted that, in the present case, the issues were remodelled before the bulk of the evidence was recorded. It is frankly admitted by the learned advocate for the plaintiffs that no prejudice, in the shape of shutting out any evidence, which the plaintiffs desired to present in the case, has resulted to them by the amendment of issues.

The order passed by the lower Court on 20th December 1926 in this matter seems to us to be perfectly just and sound as the old issues were indeed not sufficiently explicit and did not fully cover the pleadings of the parties as the remodelled issues do. Moreover where, as here, the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent: *Sethuratan Aiyar v. Venkatachella Goundan* (1). Also, when the entire evidence is once before the Court, the debate as to onus

(1) A. I. R. 1920 P. C. 67=43 Mad. 567 = 47 I. A. 76 (P.C.).

of proof is purely academical: *Chidambara v. Pandara* (2), and this is more so at the appellate stage: *Shib Chandra v. Gour Chandra* (3). We therefore, overrule the contention that the lower Court erred in law in resettling the issues.

Point 2. The 'three' documents which were rejected by the lower Court are. (1) a bond for Rs. 25 dated 12th June 1863 standing in the name of creditors "Holchand Misrichand"; this was tendered on 3rd November 1925 by the plaintiffs along with other documents and entered in the list of documents relied upon by them; and (2) account books, khata bahi and roj bahi, of the year 1869-70 of the firm Popatlal Parashram of Balapur tendered by the plaintiffs' witness 2, Girdharilal, a munim of the said shop, purporting to contain a khata of "Holchand Misrichand."

It is urged that the lower Court ought to have admitted these documents in evidence under S. 90, Evidence Act, for the simple reason that they were more than 30 years old and were produced from proper custody. The first document was rejected by the lower Court "as not produced from proper custody" and although no express reasons were assigned for the rejection of the two account books, it seems to us that they were rightly rejected because there is no presumption under S. 90, Evidence Act, with regard to unsigned accounts not purporting to be in the handwriting of any particular person: *Naina Pillai v. Ramanathan* (3a). Girdharilal (P. W. 2) distinctly stated that he could not say in whose handwriting the relevant entries were. As to the bond the reason for rejection is perfectly sound. Mere production of an ancient document by a party affords no proof of proper custody and it was for the plaintiffs to explain how the document came to be in their custody, which was admittedly not done in the present case. The lower Court was, therefore, quite correct in refusing to exercise its discretion under S. 90, Evidence Act, of drawing the inference that the bond was duly executed and attested by persons

by whom it purported to be executed and attested.

Point 3. It was on this point that a battle royal was really fought at the Bar between counsel on both sides. It was, however, agreed that unless the alleged custom was proved, the parties, though Jains, would be governed by the Hindu Law. It is further clear that, since the family of the plaintiffs originally migrated from Gujrat, it would be governed not by the Mitakshara but by the Mayukha School of Hindu Law: Mulla's Principles of Hindu Law, Edition 6, S. 12 (2) and the cases cited thereunder.

It is equally clear that on migration to Berar the plaintiffs' family presumably carried with it its personal law, that is, the laws and customs as to succession and family relations prevailing in the province of Gujrat, until a contrary is alleged and proved, the principle being that the law existing at the time of migration continues to govern the migrated members until it is renounced: Mulla's Principles of Hindu Law, S. 14 (2) (3).

It is not denied on behalf of the defendants that the burden of proving the alleged custom by clear and unambiguous evidence rested heavily upon them. The quantum of proof which would be sufficient to establish a custom has never been stated with any precision anywhere; but the decided cases do certainly lay down the kind of evidence required in such cases. For instance, in *Gopalayyan v. Raghupatnayyan* (4) (at p. 254) it was observed:

"that (1) the evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with law; and (2) evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."

In *Harnath Pershad v. Mandil Dass* (5) followed by this Court in *Mt. Sano v. Puran Singh* (6), it was laid down that judicial decisions recognising the existence of a disputed custom amongst

(2) A. I. R. 1922 P. C. 292=45 Mad. 536 = 49 I. A. 286 (P.C.).

(3) A. I. R. 1922 Cal. 160.

(3a) [1917] 33 M. L. J. 84=41 I. C. 788.

(4) 7 M. H. C. R. 250.

(5) [1900] 27 Cal. 379.

(6) A. I. R. 1925 Nag. 174.

the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different ; and oral evidence of the same kind is equally admissible, and that there was nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside. It is pertinent to note that in this case the learned Judges did not follow the view propounded in *Mandit Koer v. Phool Chand* (7) to the effect that instances from other provinces were not to be taken into consideration in proving the custom of the particular locality. In *Shimbu Nath v. Gayan Chand* (8) it was held that where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom.

Again, in *Parshottam Ganpat v. Venichand Ganpat* (9) (at pp. 760-61 of 45 Bom.) it was observed that

"if, then, the evidence shows that for a certain number of years, and some cases appear to lay down as a useful guide a period of twenty years, there have been a number of instances in which the alleged custom has been recognized, the presumption arises that the parties concerned have acted in that manner, not from the desire to set up a new custom, but because they are acting in accordance with the tradition of immemorial usage. *King v. Joliffie* (10) and *Brocklebank v. Thompson* (11) (at p. 350) and as long as texts are not cited and experts called to negative the alleged custom, it is unnecessary to cite texts or call experts to support it : see also *Raja Mahtab Chund Bahadur v. The Government of Bengal* (12) (at p. 499).

In *Venkata Mahipathi Gangadhar Rama Rao v. Venkata Kumara Mahipathi Surya Rao* (13) it was also observed that

"when a custom or usage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case."

(7) [1898] 2 C. W. N. 154.

(8) [1894] 16 All. 379=(1894) A. W. N. 123.

(9) A. I. R. 1921 Bom. 147=45 Bom. 754.

(10) [1828] 2 B. & C. 54=3 D. & R. 240=1 L. J. (O.S.) K. B. 232.

(11) [1903] 2 Ch. 344=72 L. J. Ch. 626=19 T. L. R. 235=39 L. T. 209.

(12) [1846-50] 4 M.I.A. 466=1 Sar. 335 (P.C.).

(13) A. I. R. 1918 P. C. 81=41 Mad. 778=45 I. A. 148 (P.C.).

This principle was approved and followed by this Court in the decision of *Mt. Sano v. Puran Singh* (6). It was also laid down in *Parshottam Ganpat v. Venichand Ganpat* (9), that the evidence of pandits and elders of the community in which the custom prevailed would be good evidence in proof or disproof of the alleged custom.

In *Ratilal v. Motilal Sankalchand* (14) instances over 25 years old were held sufficient to establish immemorial custom. In *Ali Mohammed v. Seikh Katu*, A. I. R. 1923 Cal. 200 evidence of enjoyment as of right for 30 or 40 years was held sufficient to prove antiquity. Their Lordships of the Privy Council have also held that where the existence of a custom for some years was proved by direct evidence, it could be shown to be immemorial only by hearsay evidence : *Rajendra Narain Dhanji Deo v. Gangananda Singh* (15).

That custom may be proved by hearsay evidence is also clear from the provisions of S. 32 (4), Evidence Act. Moreover, opinions, as to the custom or right, of persons who would be likely to know of its existence if it existed, are also declared relevant by S. 48 *ibid.* S. 49 *ibid.* likewise permits the Court to take into consideration the opinions of persons having special means of knowledge as to the usages and tenets of any body of men which may be in dispute : see also *Garuradhwaja Prasad v. Superundhwaja Prasad* (16).

Before discussing the evidence adduced in the case it is just convenient to dispose of at this stage, an argument advanced by the learned advocate for the plaintiffs to the effect that the Swetambari Dasashrimali sect stands distinct from other sects of Jains and that, if a custom of the type alleged by the defendants obtains anywhere in these subsects, it would not bind the parties in the present case. This argument is indeed very plausible, but there is not much substance in it.

In *Harnath Pershad v. Mandil Das* (5), it was held that the terms "Jain" and "Saraogi" are synonymous. Again in *Mt. Bulakan v. Ratan Lal*, A. I. R. 1928 All. 656 the four main divisions of the

(14) A. I. R. 1925 Bom. 380.

(15) A. I. R. 1925 P. C. 213=4 Pat. 738=52 I. A. 279 (P.C.).

(16) [1901] 23 All. 37=27 All. 238=7 Sar. 724 (P.C.).

Saraogi Jains are stated to be Parma, Oswal, Agarwal and Khandewal. According to Mr. Motichand, solicitor, the witness for the defendants examined on commission, who is himself a Visha Shrimali Swetambari Jain, the custom pleaded in the present case prevails in all the Jain castes and subcastes such as Dasa Shrimali, Visha Shrimali, Dasa Oswal, Visa Oswal, etc. Hirachand (P. W. 6) stated that Swetambari Jains of Balapur are Shrawaks and that there was no distinction between the rights of a Swetambari Jain widow and a Vaishnava Jain widow and that a Swetambari can become a Vaishnava and vice versa. Ishwardas (P. W. 10) also deposed to the conversion of a Vaishnava Jain into a Swetambari Jain and vice versa and further stated that :

"the wahiwat at Balapur and the wahiwat prevailing in Gujrat amongst my caste people is the same."

Ramji (P. W. 11) also testifies to the fact that the same practice prevails amongst all Jains including Porwal, Oswal, Dasa Shrimali and Visha Shrimali regarding the rights of a Jain widow in the property inherited by her from her husband. Baglal (P. W. 12) also made no distinction between a Swetambari and a Vaishnava Jain and the different subsects.

Most of the defendant's witnesses also testify to the fact that the practices in the several subcastes of Swetambari Jains, regarding right of inheritance of a Hindu widow and her power of disposition of her husband's property in her hands, are the same. Some of them even go to the length of stating that in this matter there is no difference between Swetambari and Digambari Jains in whom the difference lies only in respect of worship and ritual. In the latest *Privy Council* case of *Honasa v. Kalyanchand* (17), this distinction in the ritual was pointed to be that Digambari idols are worshipped in a state of complete nudity, while the idols of the Swetambaris are covered, draped and decorated with jewellery and ornaments. It will thus be seen that, if the custom pleaded in the present case is found to obtain among other subsects of Jains, it will certainly bind the section to which the parties in the present case belong.

(17) A.I.R. 1929 P. C. 261=25 N. L. R. 163 (P.C.).

We will now proceed to analyse the evidence that has been adduced in the case. Altogether the evidence on the record furnishes 15 following instances ranging from 17 to 52 years in the past of alienations by widows of their husbands' properties which were not challenged by the reversioners :

Instance 1. Gangabai sold houses to Jain temple 17 or 18 years ago. This is testified by Uttamchand (D. W. 1), Kalidas (D. W. 2), Supdasa (D. W. 3), Supdasa (D. W. 6), Basantlal (D. W. 7) and even by Lalchand (P. W. 9).

Instance 2. Harkuarbai sold away houses to a Jain temple 17 or 18 years ago. This is testified by Uttamchand (D. W. 1), Supdasa (D. W. 3), Basantlal (D. W. 7) and Lalchand (P. W. 9).

Instance 3. Fatribai sold a field to a Kunbi as is testified by Uttamchand (D. W. 1) and Lalchand (P. W. 9). The date of this alienation has not, however, been given by the witnesses.

Instance 4. Kovelbai sold a house 17 or 18 years ago as deposed to by Uttamchand (D. W. 1), Kalidas (D. W. 2), Basantlal (D. W. 7) and Lalchand (P. W. 9).

Instance 5. Shejabai gifted a field 17 or 18 years ago as testified by Kalidas (D. W. 2) and Ishwardas (P. W. 10).

Instance 6. Bayabai disposed of all property in charity 25 years ago as deposed to by Mr. Jaikumar (D. W. 4).

Instance 7. Chimabai of Karanja gifted a building inherited by her from her husband and the gift was upheld in the law Courts in these provinces as deposed to by Mr. Jaikumar (D. W. 4).

Instance 8. Mr. Jaikumar (D. W. 4) also testified to a gift by a Jain Digambari widow of property inherited by her from her husband.

Instance 9. Chandabai sold a field 20 years ago as deposed to by Panachand (D. W. 5).

Instance 10. Panabai sold a house 50 or 52 years ago to the uncle of Panachand (D. W. 5) and father of Supdasa (D. W. 6).

Instance 11. Gulabbai sold a house 25 years ago as deposed to by Panachand (D. W. 5) and Ishwardas (P. W. 10).

Instance 12. D. W. 8, Thakur-das' paternal aunt, had sold a house 40 or 50 years ago. The age of this

witness was 80 years old when he was examined.

Instance 13. Manibai sold a house.

Instance 14. Potelal's widow made a gift of two fields.

Instance 15. Kaveribai made a gift of a field. The last three instances are deposed to by Ishwardas (P. W. 10).

It may be noted that most of these instances are from Balapur itself where the parties to the suit reside. The most important instance is that of an alienation by a widow of Dasashrimali caste from Gujrat which was upheld by the Bombay High Court: see *Madanji Derchand v. Tribhowan Virchand* (18). In *Harnath Pershad v. Mandil Dass* (19) it was held that a childless Jain widow acquires an absolute right in her husband's separate property and that there is no material difference between the custom of the several sects of Jains. In *Sheo Singh Rai v. Dakho* (20) the same custom was upheld by their Lordships of the Privy Council in a case from Allahabad and on the basis of this decision the case of *Shimbhu Nath v. Gayan Chand* (8) was also decided, the evidence of the three transactions given there being held insufficient by itself to prove the custom. So far as the Central Provinces are concerned, there are two unreported decisions of this Court wherein a Jain widow's absolute right over the self-acquired property inherited from her husband was upheld by this Court as being based on an ancient custom: see *Moji Lal v. Mt. Gori Bahu* (21) and *Mt. Sano v. Puran Singh* (6).

We have scrutinised with some care the evidence in rebuttal given on behalf of the plaintiffs, but in our opinion that evidence fails in its purpose. As already noticed, some of the plaintiffs' own witnesses have testified to the several alienations noted above. The evidence on the point has been very carefully analysed by the learned Additional District Judge in para. 20 of his judgment and we need not, therefore, recapitulate it here. Sufficient it is to say that we entirely agree with

the learned Judge in his estimate thereof.

Over and above the instances given by the defendants' witnesses of the unchallenged alienation by Jain widows, six of the witnesses are from Balapur and they swear to the observance of the custom set up by the defendants not only in their own subsect but in Jains of other sects. Supdasa (D. W. 6) stated that he came to know of this custom from his Guru and his father. Moreover, two of the defendants' witnesses, viz. Messrs. Jaikumar and Motichand are graduates in law and leaders of Digambari and Svetambari sects respectively and who have made a special study of the customs prevailing in their community. They not only testify to the prevalence of the custom but give instances in which the custom was observed by the community as law. The evidence of these witnesses, therefore, comes well within the purview of Ss. 32 (4), 48 and 49, Evidence Act. All of them, moreover, are absolutely disinterested and their testimony must naturally carry great weight on the point under consideration.

We shall now briefly review the following cases, which were cited by the learned advocate for the plaintiffs apparently in support of his argument that the evidence on the record was insufficient to sustain the finding as to the existence of the custom set up by the defendants. Having carefully examined them, however, we are of opinion that as no single one of them lays down any new principle and as each one was decided on its own materials, they do not in any way support the plaintiffs' case on the point under consideration.

(1) *Ramalakshmi Ammal v. Sivanthaperumal Sethuraya* (22). All that was laid down in this case was that the best available evidence as to custom should be given in a particular case. Their Lordships considered, agreeing with the High Court, that the only evidence offered in the case, namely, the Collector's letter and summary, was not properly admissible and, if received, could not be safely relied on as affording clear and unambiguous proof of

(18) [1912] 36 Bom. 396=12 I. C. 892=13 Bom. L. R. 1121.

(19) [1900] 27 Cal. 379.

(20) [1876] 1 All. 688=5 I. A. 87=3 Suther 529=3 Sar. 807 (P. C.).

(21) Second Appeal No. 416 of 1897.

(22) [1870-72] 14 M. I. A. 570=17 W. R. 552= I. A. Sup. Vol. 1=3 Sar. 103 (P. C.).

existence of an ancient and invariable custom in the District.

(2) *Durga Charan Mahto v. Raghunath Mahto* (23). The custom of primogeniture set up in this case was held not proved for want of sufficient evidence.

(3) *Chotay Lal v. Chammo Lal* (24). There was no evidence led at all to prove the custom alleged in this case and, as appears from p. 751 of the report, even the finding arrived at by the Judge was not objected to.

(4) *Abdul Hussein Khan v. Sona Dero* (25). In this case the custom of excluding females from succession in a Mahomedan family in Sind was held not established, because prominent members of the families concerned denied the existence of such a custom.

(5) *Gettappa v. Eramma* (26). In this case the question was if a Jain widow could, by custom of the caste in the Madras Presidency, make a valid adoption of a son to her husband without the authority of her husband or consent of his sapindas. The custom was held not proved because there was a previous decision of the same Court negating such a custom in *Peria Ammani v. Krishnaswami* (27).

(6) *Mookka Rone v. Ammakutti Ammal* (28). In this case the custom set up was to exclude widows of a deceased last male owner of the Yadava caste, dying without issue, in favour of his nearest dayadhis. It was held upon the evidence recorded in the case that the custom was not proved and that, even if it existed in the past, it had ceased to be uniform and invariable by reason of inroads from time to time and it was too late in the day to revive it, especially as it seemed to be opposed to the present rules of equity and justice.

(7) *Palaniappa Chettiar v. Chockalingam Chetti* (29). The custom alleged in this case was held not proved because the evidence was given of only one definite instance and one vague instance of a very modern date and neither of them prior to the date of the suit.

(23) [1914] 18 C. W. N. 55=20 I. C. 810=18 C. L. J. 559.

(24) [1879] 4 Cal. 714=6 I. A. 15=3 Sar. 880 (P. C.).

(25) A. I. R. 1917 P. C. 181=45 Cal. 450=12 S. L. R. 104=45 I. A. 10 (P. C.).

(26) A. I. R. 1927 Mad. 228=50 Mad. 228.

(27) [1893] 16 Mad. 182=3 M. L. J. 109.

(28) A. I. R. 1928 Mad. 299=51 Mad. 1 (F.B.).

(29) A. I. R. 1930 Mad. 103.

(8) *Rahimatbai v. Hirbai* (30). In this case an attempt was made to prove a custom of inheritance among Khoja Mahomedans at variance with the rules of Hindu Law, by the opinion of the leading members of the caste. It was held that mere opinion without specific instances in which the custom was observed and followed was not enough to establish the custom.

(9) *Chandika Baksh v. Muna Kunwar* (31). In this case a family custom alleged to exist among Ahban Thakurs of Oudh in derogation of the ordinary Mitakshara Law was held not proved by four instances of the custom of comparatively modern date which their Lordships found to be the only portions of the evidence adduced which supported it.

(10) *Rama Nand v. Surgiani* (32). All that was laid down there at p. 223 was that in establishing a custom the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. The custom alleged was not established in this case.

(11) *Bulagan v. Ratan Lal* (33). In this case the custom of the kind which is set up in the present case was not pleaded during the course of the trial but was sought to be raised as a point of law in the course of the first appeal. It was held that, unless the special custom were pleaded and proved, it could not be considered.

(12) *Manohar Lal v. Banarsi Das* (34). In this case it was held that there was a custom prevailing among the Jain community by which a widow had power to adopt a son to her deceased husband without the special authority to that effect and that a married man may lawfully be adopted. Oral evidence of instances proving the exercise of such a

(30) [1879] 3 Bom. 34.

(31) [1902] 24 All. 273=29 I. A. 70 (P.C.).

(32) [1894] 16 All. 221=(1894) A. W. N. 47.

(33) A. I. R. 1923 All. 656.

(34) [1907] 29 All. 495=4 A. L. J. 407=(1907) A. W. N. 121.

right within the last 40 years was held sufficient to establish the custom.

(13) *Sardar Singh v. Kunj Bihari Lal* (35). In this case the alienation by a Hindu widow of a portion of the husband's estate for the purposes of the spiritual benefit of her husband was upheld because the alienation related to a very small part of the estate.

(14) *Mt. Bashirbi v. Abdul Sattar* (A. I. R. 1925 Nag. 179). In this case the custom set up was held not proved because the evidence consisted merely of the defendant himself and another witness who belonged to the same family as the defendant.

Looking therefore to the entire material upon the record in the light of the principles laid down in the decided cases noted above we think the conclusion is irresistible that the custom set up by the defendants has been clearly established in the present case. Apart from the oral evidence and instances given by the witnesses, we think on the principle adopted in *Shimbu Nath v. Gayan Chand* (8) wherein that Court decided the case solely on the strength of the earlier decision in *Sheo Singh Dalho* (20), this case can be decided solely upon the decision of the Bombay High Court in *Madonji Devchand v. Tribhowan Virchand* (18) which upheld the same custom among the same subject to which the parties in the present case belong, the more so, when the plaintiffs' own witness 10, Ishwardas, unequivocally stated that

"the wahiwat at Balapur, and the wahiwat prevailing in Gujrat amongst my caste people are the same."

Point 4. The matter involved in this point was the subject matter of issues 1 and 2 and has been dealt with by the learned Additional District Judge in paras. 10 to 15 of his judgment. On the pleadings of the parties and the materials on record, it is impossible to uphold the contention of the plaintiffs' learned advocate that the findings of the learned Additional District Judge on these issues are wrong.

There is no presumption that the property in the hands of a member of a Hindu family is joint or ancestral property. The character of such property must be established by the plaintiff who seeks to lay a claim to it: *Vithal v.*

Siva (36) and *Birdichand v. Popatlal* (37). It was pleaded by the plaintiffs that their grandfather, Udechand, had a house and did sarafi business in gold and silver, that at his death his house and the business came into the hands of his two sons, Misrichand and Holchand, and that they acquired the whole of the property in dispute out of this ancestral nucleus. It was, however, admitted at a later stage of the pleadings, that the ancestral house was only used for residence and did not yield any income.

There is no proof on record that Udechand was a sarafi and left any sarafi business at his death which was continued on by his sons. The ancestral house is admittedly in the possession of the plaintiffs. Whether it went to the plaintiffs' share at the alleged partition between them and Holchand, or whether the latter relinquished his claim over it, is absolutely immaterial for the determination of issue 1 in the case. It is obvious that the house could not, in law, furnish any nucleus in the hands of either party for acquisitions made subsequent to the death of Udechand so as to clothe them with the character of ancestral property: *Birdichand v. Popatlal* (37).

This then being the position, it is unnecessary to determine what property was acquired by Holchand so long as he did not separate from Misrichand or from the plaintiffs or to discuss the point of time when the separation between the two took place. Even the joint acquisitions of the two brothers without the aid of any income from the ancestral nucleus would not make the property in their hands "ancestral property." It is admitted that whatever property Holchand left at his death was his separate property. Whether it was in its origin his self-acquisition, or having been jointly acquired by him and Misrichand came to him at the partition, is not of any consequence for the decision of the present case, which rests solely on the plea that Kaveribai, a Jain widow, had, by force of immemorial custom, acquired an absolute right of disposal over the property inherited by her from her husband because it did not partake of the character of ancestral property of the husband.

(36) [1912] 8 N. L. R. 52=15 I. C. 933.

(37) A. I. R. 1926 Nag. 359=24 N. L. R. 68.

(35) A. I. R. 1922 P. C. 261=44 All. 503 (P.C.).

The plaintiffs' learned advocate appeared to be under a clear misconception of law when he tried to argue that, even if the property was acquired solely by the joint exertions of the two brothers without the aid of ancestral nucleus, it would still partake of the character of ancestral property if some of it went to Holchand at the partition between him and Misrichand or his sons. No authority has, however, been cited in support of this argument and, in view of the clearness of the law on the point, it is impossible to accept this contention as correct.

It was next suggested by the learned advocate for the plaintiffs that, in the absence of any good evidence that Holchand relinquished his share in the ancestral house, it must be presumed that he must have done so by getting its equivalent in cash from Misrichand and this would form ancestral nucleus in his hands so as to clothe his acquisitions with the character of ancestral property. In the absence of any authority in support of this contention we find it impossible to entertain such a violent presumption. Instances are not wanting where go-ahead members of a joint Hindu family, which does not possess any income-yielding ancestral property, relinquish their interest in the same in favour of their more indolent coparceners and go out into the world to make their fortunes. On such evidence as there is on record, Holchand seems to have possessed such a spirit when he left the ancestral house and began to do business on his own account. For the reasons given above, in addition to those given by the learned Additional District Judge, we hold, agreeing with him, that the property left by Holchand at his death was not his ancestral property so as to take the same out of the purview of the custom set up in the present case and successfully established. The plaintiffs' appeal must, therefore, fail and is dismissed with costs.

On the appeal of the defendants the only question to be determined is concerned with the ownership of the property covered by Sch. A. The plaintiffs claimed it as belonging to Holchand's estate, while the defendant alleged that it was theirs with the exception of item 253, which they said was gifted to defendant 1 by Kaveribai in 1918.

The finding of the Additional District Judge on this point as contained in para. 17 of his judgment is against the defendant, and Mr. Kotval, who appeared for them in this Court, urged that, as it was a perfunctory finding it should be set aside in appeal.

It is perfectly true that the learned Additional District Judge has not bestowed the same care and attention in sifting the evidence on record and weighing the probabilities bearing on this point, as he did in respect of the other questions which arose for decision and for the reasons to be given later, we agree with the learned advocate for the defendants that this finding must be set aside. (Here the judgment considered evidence on which the Additional District Judge had based his finding regarding the property covered by Sch. A, and concluded). For the reasons given above disagreeing with the lower Court, we hold that, excepting the article No. 253, all the property in Sch. A did not belong to the estate of Holchand but that the same was the personal property of the defendants. We, therefore, accept their appeal and order that the plaintiffs' suit, excepting the claim for article No. 253 aforesaid be dismissed with all costs in both Courts.

S.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 235

JACKSON, A. J. C.

Narayan Singh—Appellant.

v.

Keshosa and another—Respondents.

Second Appeal No. 24-B of 1929, Decided on 30th October 1929, against decree of Dist. Judge, Amraoti,

Evidence Act, S. 92 (4) — Mortgage providing interest at 2 per cent — Mortgagee making entries in his account at 1½ per cent—Mortgagee is not precluded from claiming 2 per cent—Agreement to receive 1½ per cent cannot be proved.

A mortgage deed was executed on 23rd March 1920 for a certain sum payable with interest at 1½ per cent per mensem on 15th April 1921 and liable in case of default to carry interest at 2 per cent per mensem. On 24th March 1923 certain payment was made and it was averred after that date, the mortgagee agreed to accept interest at 1½ per cent in proof of which the mortgagor pleaded that the mortgagee calculated in his books interest at the rate of 1½ per cent per mensem.

Held: that such calculation of interest in the mortgagee's books would not bind him to accept more than 1½ per cent per mensem and such agreement could not be proved under

proviso (4) to S. 92 : A. I. R. 1914 P. C. 27 and A. I. R. 1929 Nag. 194, Dist. [P 236 C 1]

T. L. Sheode—for Appellant.

M. B. Niyogi—for Respondents.

Judgment. — The only question raised in this appeal relates to interest. The plaintiff has claimed and been decreed interest according to the terms of the mortgage-deed. This deed was executed on 23rd March 1920 for a sum of Rs. 2,000 payable with interest at $1\frac{1}{2}$ per cent per mensem on 15th April 1921 and liable in case of default to carry interest at 2 per cent per mensem. On 24th March 1923 a payment of Rs. 1,390 was made, Rs. 400 of which was taken towards the payment of principal. It is the defendants' case that at the time when that payment was made, the plaintiff agreed to accept interest at $1\frac{1}{2}$ per cent per mensem. This agreement cannot be proved having regard to proviso (4) to S. 92, Evidence Act, but defendant 2 relies on S. 58, urging that the plaintiff has admitted the agreement and so no proof is necessary. The plaintiff, however, has not admitted the agreement as alleged by the defendant; he admitted a different agreement, namely, to accept $1\frac{1}{2}$ per cent if the balance due was paid off within eight days. It is said that in his evidence the plaintiff admits an unconditional agreement, but that is not the case. In his deposition he repeats the condition.

It is urged that the agreement in spite of proviso (4), S. 92 should be held proved because of the conduct of the plaintiff in calculating interest in his books subsequent to the payment of Rs. 1390 on 24th March 1923 at the rate of $1\frac{1}{2}$ per cent per mensem. Reference in this connexion has been made to *Mahomed Musz v. Aghore Kumar Ganguli* (1) and *R. B. Indraraj Singh v. Chaitram* (2); but in the present case there is no room for the application of any doctrine analogous to that of part performance. The calculation of interest in the plaintiff's books cannot bind him to accept no more than $1\frac{1}{2}$ per cent per mensem. The appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 236

MOHIUDDIN, A. J. C.

Babulal—Appellant.

v.

Badridas Jainarayan—Respondents

Second Appeal No. 170 of 1928, Decided on 13th January 1930, against decree of Addl. Dist., Judge, Bilaspur, D/- 22nd November 1927.

Contract Act, S. 25 (3)—Mere acknowledgment of time-barred debt does not amount to promise to pay and does not justify suit on its basis.

Where the debtor writes to the creditor acknowledging his liability to pay a debt which is time-barred but does not contain promise to pay, the writing cannot form the basis of a suit as it does not amount to a new contract: 2 N. L. R. 130 (P.C.) and A. I. R. 1927 All. 677, Dist. [P 237 C 1]

J. Sen—for Appellant.

D. N. Chaudhury—for Respondents.

Judgment.—This appeal arises out of a suit which the plaintiffs Rameshwar Lal and Pirulal, proprietors of the firm Badridas Jainarain, filed on 12th October 1926, in the Court of the First Sub-Judge, Bilaspur, to recover Rs. 726 from Babulal. The defendant borrowed Rs. 500 on 30th November 1918 and executed acknowledgments on 31st October 1921 and 11th January 1925 for Rs. 671-9-6 and Rs. 600 respectively. He contended that the debt was barred by time and that the suit was not maintainable. The Court of first instance held that there was no current and mutual account between the parties, that the sarkat dated 11th January 1925 for Rs. 600 was executed on account of the loan for Rs. 500 taken by the defendant on 30th November 1928, that the defendant had executed a sarkat on 30th October 1921, for Rs. 671-9-6, that the acknowledgment dated 11th January 1925 could not revive the debt borrowed on 30th November 1918 which was acknowledged on 30th October 1921 and dismissed the suit. The lower appellate Court relying on *Prahlad Prasad v. Bhagwan Das* (1), held that the writing dated 11th January 1925 contained a promise to pay and was a contract as laid down in S. 25 (3), Contract Act, and decreed the claim.

The only question which was pressed for consideration in this appeal is whether the writing executed by the appellant on 11th January 1925 is a contract which will give rise to a fresh cause of

(1) A. I. R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1 (P. C.).

(2) A. I. R. 1929 Nag. 194=25 N. L. R. 131.

action or is only an acknowledgment.

The entry is as follows:

"D. Babulal 600 rupaya anki chhesav baki dena raha, miti magh vadi 1 San 1981 E. samjkar baki nikala."

The lower appellate Court has translated these words as follows:

"Signed Babulal balance of Rs. 600 remains payable, dated Miti Bagh Badi 1, St. 1981 balance found after going through accounts" and has held that the word "payable" "means only one thing, namely that the executant was to pay the same in future."

The learned pleader for the appellant does not accept the translation as correct and contends that the words "baki dena raha" ought to be translated as "balance found due". It seems to me that the words "baki dena raha" have been correctly translated in the Court below, and indicate that a balance remains to be paid. These words acknowledge the liability to pay but do not contain a promise to pay a debt of which the creditor might have enforced payment but for the law for the limitation of suits. The words which were written by the appellant do not contain a promise to pay, and cannot form the basis of a suit, because they do not amount to a new contract.

The learned advocate for the respondents relied on *Maniram v. Seth Rupchand* (2), *Prahlad Prasad v. Bhagwan Das* (1), and Illus. (e) contained in S. 25, Contract Act. The Privy Council decision in *Maniram v. Seth Rupchand* (2) related to the validity of the acknowledgment which was passed within the prescribed period of limitation and laid down that an unconditional acknowledgment implied a promise to pay, but the point at issue in this case did not arise for consideration in that case and was not considered. In *Prahlad Prasad v. Bhagwan Das* (1), the facts were different. The endorsement which the debtor had made in that case contained an admission of the correctness of the balance found and also contained the following words: "Interest at 12 annas per cent per mensem." This was considered by the Judges of the Allahabad High Court to be a definite promise as to what the debtor intended to do in future. There is no such promise in this case and therefore the Allahabad decision does not afford any help in

deciding this case. I fail to see how Illus. (e) given under S. 25, Contract Act helps the respondents. It runs as follows:

"A owes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract."

It clearly states that there must be a written promise to pay, but there is no promise to pay in the writing executed by the appellant on 11th January 1925. S. 25, Cl. 3, Contract Act, refers to a promise to pay a timebarred debt, but a mere acknowledgment cannot be treated as a promise to pay a timebarred debt. As the writing dated 11th January 1925 does not contain any promise to pay, a suit cannot be based on it. The decision of the lower appellate Court is therefore incorrect and is hereby set aside. The appeal therefore succeeds and is allowed with costs. The respondents shall pay the costs incurred by the appellant in this Court and in the Courts below. The plaintiffs' suit is hereby dismissed.

P.N./R.K.

Appeal allowed.

A. I. R. 1930 Nagpur 237

FINDLAY, J. C. AND MACNAIR, A. J. C.
Nandlal and others—Appellants.

v.

Amboprasad and others—Respondents.

First Appeal No. 135 of 1928, Decided on 16th December 1929, from judgment of Addl. Dist. Judge, Nagpur, D/- 30th June 1928, in Civil Suit No. 24 of 1925.

• Civil P. C., Sch. 3, Para. 11—Part of property under Collector's management—Other part can still be mortgaged.

Where part of the judgment-debtor's property is under the Collector's management in execution of a money decree, the judgment-debtor can validly mortgage the rest of his property: *Nag. F. A. No. 15-B of 1912*; *Nag. F. A. No. 2 of 1915, Appr.*; *Nag. F. A. No. 118 of 1922, Foll.* [P 238 C 1, P 239 C 1]

*M. R. Bobde and S. T. Bhawe—*for Appellants.

*M. B. Kinkhede and W. R. Puranik—*for Respondents.

Judgment.—The main facts of the present mortgage suit are clear from the lower Court's judgment and it is unnecessary to repeat them at length here. The present four appellants are the minor sons of defendants 1 and 2, Dayal and Dharamraj, the executants of the mortgage deed in suit, and the main question which has been agitated on appeal concerns, in the present case, the

(1) A. I. R. 1927 All. 677=49 All. 496.

(2) [1906] 2 N. L. R. 130=33 Cal. 1047=33 I. A. 165 (P.C.).

effect and interpretation of para. 11, Sch. 3, Civil P. C. Under the mortgage deed, a large amount of property specified in para. 3 of the plaint was hypothecated including some six village shares. It is common ground between the parties to this appeal that, at the time of execution of the mortgage deed, two parcels of property hypothecated, viz., a two anna eight pie share in mouza Jolwadi and a one anna four pie share in mouza Wadhona, were under the Collector's management in execution of a money decree. The Additional District Judge held that the mortgage was, in the circumstances, void as regards these two village shares but valid as regards the rest of the property included in the mortgage deed. It is this view which has been strenuously contested on appeal.

The advocate for the appellants has suggested that, in view of the phraseology of para. 11, Sch. 3, Civil P. C., it necessarily follows that the mortgage deed was as a whole void. In this connexion we have been referred to the words:

"so long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property,"

and we have been asked to hold that it is immaterial whether, as a matter of fact, the Collector had attached the whole of the immovable property or had only attached, as was in reality the case, two parcels out of that property. It has been suggested in this connexion that the decision of Kotval, A. J. C., in *Gangaram v. Ramgopal* (1), does not, in reality, decide the question at issue in this case, but the remarks of the learned Judge at p. 133 thereof clearly do not support this contention. Similarly the decision of their Lordships of the Privy Council in *Gaurishankar Balmukund v. Chinnumiya* (2), is in no way conclusive of this question in the direction suggested on behalf of the appellants. A reference to the judgment of Batten and Stanyon, A. J. C's., in *Gaurishankar v. Chinnumiya* (3), will show that these learned Judges took precisely the opposite view from that which has been urged here for our acceptance. A similar view was taken by Batten, A. J. C.,

in *Seth Laxmichand v. Mt. Chitiabai* (4), and we agree with his conclusions in this connexion. We are of opinion, however, that the reasoning of Baker, J. C., and Hallifax, A. J. C., in their judgment, in *Baliram Singh v. Mohammad Abdul Sattar* (5), is conclusive on this point and we propose to reproduce here the essential part of that judgment:

"The matter of the competency of the appellants to alienate their property at the time the mortgage was executed has next to be considered. The rulings quoted in the judgment of the lower Court, which the learned Judge seems to have felt reluctance in following, are hardly required as authority for the proposition that if the Collector deals with the attached property only under para. 1, Sch. 3, and takes no action and begins no proceedings under para. 2, he can exercise or perform any of the powers or duties conferred or imposed on him by that schedule only in respect of that part of the judgment-debtor's property that is under attachment. To give the more extended meaning to the word "can" which the learned Judge thinks it ought to bear, would result in every person whose estate includes any revenue paying land being incompetent to transfer any portion of his whole estate without the written permission of the Collector, if there happened to be a decree outstanding against him. The Collector could in that sense, exercise the powers conferred by Sch. 3 against him, if proceedings for that purpose were properly instituted. But he cannot exercise even the powers he is given by para. 1 till proper proceedings have been instituted before him by a civil Court, and similarly he cannot exercise the powers conferred by para. 2 till he has instituted proper proceedings for that purpose himself. If there were any room for doubt on this point it would be set at rest by the three mentions of a 'part of the property' in para. 2 (1) which would be futile and meaningless if that paragraph meant what the learned Additional District Judge thinks it does and the appellants ask this Court to hold it does."

It is clear then that the appellants were not incompetent to mortgage the three villages which were not under attachment."

We may once more point out that, if the interpretation we have been asked to put on para. 11, Sch. 3, were a correct one, the express mention, in the first subparagraph thereof in three places, of "part of the property" would be utterly unmeaning and inconsistent. At the moment the mortgage was executed, the Collector, having deliberately chosen to proceed against only a part of the judgment-debtor's property, was not in a position to proceed against the property which, it is now urged, should also be held to have been improperly hypo-

(1) A.I.R. 1922 Nag. 243=18 N.L.R. 131.

(2) A.I.R. 1918 P.C. 168=46 Cal. 183=14 N.L.R. 181=45 I.A. 219 (P.C.).

(3) First Appeal No. 15-B of 1912, decided on 20th April 1913.

(4) First Appeal No. 2 of 1915, decided on 11th May 1916.

(5) First Appeal No. 118 of 1922, decided on 31st January 1924.

thecated. We see no reason, therefore, to differ from these and other earlier decisions of this Court on the point and we are of opinion that the Court below was correct in the view it has taken on this question.

The next point urged is that the rate of interest stipulated for in the mortgage deed was unconscionable or penal and should be relieved against. The terms in question were that the debt was to be repaid in four years with compound interest at Rs. 1-2-0 per cent per mensem. The interest was to be payable year by year during these four years. No authority whatever has been produced in favour of this contention. The rate of interest is by no means an exceptionally high one and we can find no ground whatever for interference in this matter.

The next point urged is that if, as held by the lower Court, the mortgage operated on some of the mortgaged properties and not on others, a proportion of the mortgage debt could be recovered and that a rateable abatement should be allowed. Again, we are unaware of any authority for such a view. Here the parties apparently bona fide and by mutual mistake included, in the hypothecated property, two items which the mortgagors were incompetent to hypothecate. All that can happen, therefore, is that these two items are struck out just as if they never had existed. In such circumstances, it would indeed be a curious and inequitable incident if the mortgagees were to be entitled only to a proportion of the money advanced, that proportion to be arrived at by rateably abating the principal amount according to the value of the items of security which were found to have been invalidly hypothecated. No authority for the proposition has been advanced and we are unable to entertain it.

The last point urged on behalf of the appellants is that malik makbuza fields 49 and 56 of mouza Wadhona have been ordered to be foreclosed. These fields are included in the one anna four pie share of the village which, it has been found, was invalidly mortgaged. This was undoubtedly incorrect and the counsel for the respondents has admitted the fact. The decree of the lower Court will, therefore, be amended by excluding these two fields therefrom. In

other respects, the appeal fails. As we believe that the petty matter, on which the appellants have succeeded in this Court, could easily have been rectified otherwise, we are of opinion that they must bear all the respondents' costs in this Court. We order accordingly. Costs in the lower Court also as already ordered.

P.N./R.K.

Order accordingly.

A. I. R. 1930 Nagpur 239

MOHIUDDIN, A. J. C.

Secy. of State—Applicant.

v.

Singhai Kundanlal—Non-Applcant.

Civil Revn. No. 305 of 1929, Decided on 27th January 1930, against decree of Small Cause Court Judge, Saugor, D/- 29th April 1929.

Railways Act, S. 72—Consignment lost in transit on route of which there were frequent thefts from running trains, railway not taking special precaution to avoid same—Railway company is liable to pay compensation.

Where it appears from evidence produced in the case that thefts from running trains were frequent in the section through which the particular waggon in question passed at night, and in spite of such thefts precaution to prevent such theft was not taken by the railway authorities, the railway company is bound to compensate the consignor for the consignments stolen while in transit: *A.I.R. 1928 Nag. 73, Rel. on; A.I.R. 1929 Nag. 315; and A.I.R. 1928 Lah. 837, Ref.* [P 240 C 1]

*A. V. Khare and W. B. Pendharkar—*for Applicant.

*S. B. Gokhale—*for Non-Applcant.

Order.—This is a revision application under S. 25, Small Cause Courts Act, against the decree dated 29th April 1929, passed by Mr. O. P. Misra, Judge Small Cause Court, Saugor. In this case plaintiff sent 275 tins of ghee to Bombay on 5th January 1928, and out of the tins so sent, eight tins were stolen between Nandgaon and Igatpuri. The lower Court held that the defendant railway company's servants were negligent and decreed plaintiff's claim. The applicant's pleader cited *Harakchand v. Secy. of State for India* (1) and *Secy. of State v. Ghanaya Lal Sri Kishan* (2) and contended that there was no wilful neglect on the part of the railway company, so as to make it liable for the loss suffered by the consignor. In *Harakchand v. Secy. of State for India* (1), the plaintiff had failed to prove wilful neglect

(1) A.I.R. 1929 Nag. 315.

(2) A.I.R. 1928 Lah. 837=10 Lah. 329.

and in *Secy. of State for India v. Ghanaya Lal Sri Kishan* (2) the plaintiff had failed to show that the practice of sealing waggons had been proved to be an inadequate safeguard. These cases do not afford any assistance in the decision of this case. In this case it appears from the evidence produced in the case that thefts from running trains are frequent in the section through which the waggon in question passed at night and in spite of these thefts, sufficient precaution to prevent such thefts was not taken. The applicant, as pointed out in *Botoolal v. G. I. P. Ry. Co.* (3), ought to have shown that it took other sufficient precautions which would avert or prevent the consequences of such neglect. As this was not proved, the applicant was bound to compensate the consignor, and the compensation must include a reasonable rate of interest. Under these circumstances, I see no reason to interfere. The application is dismissed with costs. Pleader's fees Rs. 15.

V.B./R.K. *Application dismissed.*

(3) A.I.R. 1928 Nag. 73=23 N.L.R. 180.

A. I. R. 1930 Nagpur 240

MACNAIR, A. J. C.

Tikaram—Appellant.

v.

Okar—Respondent.

Misc. Appeal No. 44 of 1929, Decided on 6th February 1930, against order of Sub-Judge, First Class, Balaghat, D/- 20th August 1929.

Civil P. C., O. 34, R. 3—Court declining to extend time and making preliminary decree final—Interlocutory order declining to extend time cannot be appealed against.

Where after preliminary decree is passed, an application is made for extension of time but the Court refusing to grant time makes the preliminary decree final, no appeal lies against the order declining to extend time, because after a dispute has been finally settled by a decree, that decree cannot be ignored by filing an appeal against the interlocutory order: *A. I. R. 1926 P. C. 93, Rel. on. : A. I. R. 1921 Cal. 109 ; 37 Mad. 29 and 36 All. 532, Ref.* [P 240 C 2]

S. K. Ghosh—for Appellant.

P. S. Kotval and A. V. Khare—for Respondent.

Judgment.—By an order dated 5th September 1929 the trial Judge refused to grant time and made a preliminary decree final. In this Court an appeal

is filed against the order declining to extend time. I do not see how, after a dispute has been finally settled by a decree, this decree can be ignored and an appeal filed against an interlocutory order. I have been referred to certain rulings regarding appeals against preliminary decrees filed after final decree was passed: *Kulada Prasad v. Ramnand Patnik* (1), *Lakshmi v. Maru Devi* (2) and *Kanhaiya Lal v. Tribeni Sahai* (3). The point discussed in these rulings has been set at rest by a judgment of the Privy Council in *Jowad Hussain v. Gendan Singh* (4). The only decree which can be made final is the decree of an appellate Court if an appeal is filed and decided. It follows that a decree purporting to make final something which no longer exists is nullity. The decree I am considering cannot be considered a nullity merely because at the time it was passed it was still possible to appeal against an interlocutory order.

In the case I am considering the order refusing time is part of the order which directs that the decree should become final. The result of the order is that a final decree was passed and in appeal this decree must be challenged. I add that the appeal would have failed on the merits. There is nothing to show that the appellant told his pleader that he had almost completed the arrangement for raising the amount and desired a few days time. The affidavit of the pleader states only that he was given vague information that his client was arranging for money. Almost all defendants who ask for time make such allegations, and it is not material whether the pleader conveyed this information to the Court or not. The defendant made no application for time before the due date and subsequently was given time. The appeal is dismissed as incompetent. Costs on the appellant. Counsel's fee Rs. 30.

S.N.R.K.

Appeal dismissed.

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- (1) A. I. R. 1921 Cal. 109=48 Cal. 1036.
 (2) [1914] 37 Mad. 29 = 12 I. C. 664 = 21 M. L. J. 1063.
 (3) [1914] 36 All. 532=24 I. C. 827=12 A.L.J. 876.
 (4) A. I. R. 1926 P. C. 93=6 Pat. 24=53 I. A. 197 (P. C.).

A. I. R. 1930 Nagpur 241

SUBHEDAR, A. J. C.

Mt. Bhuribi—Appellant.

v.

Rahmatbi and others—Respondents.

Second Appeal No. 28 of 1928, Decided on 19th December 1929, against judgment of Dist. Judge, Nimar, D/- 22nd November 1927, in Civil Appeal No. 41 of 1927.

Limitation Act, Art. 182—Execution of decree conditional on payment of certain amount to judgment-debtor—Still application for execution without payment is valid.

Where payment of a certain amount to the judgment-debtor is a condition precedent to the making of the application for execution, an application made without fulfilling that condition is still valid. The fact that the application is dismissed for non-fulfilment of the condition is for purposes of limitation immaterial. 34 Bom. 189, *Rel. on.* [P 241 C 2]

Fida'husain—for Appellant.*Abdul Razak*—for Respondents.

Judgment.—This is an appeal by a judgment-debtor arising out of execution proceedings. The facts are shortly these: In Civil Suit No. 104 of 1920 the respondent decree-holder had claimed possession of certain properties after partition. The last decree in the suit was passed by this Court in second appeal No. 232 of 1922 on 5th April 1923 and it directed that the

"plaintiff's claim to get 19 1/4th share is subject to the payment of Rs. 131-15-1 as per proportionate share of the dower debt."

The first application for execution was made by the plaintiff decree-holder on 11th August 1923 without making any deposit of Rs. 131-15-1 for payment to the defendants judgment debtors. On 5th April 1924 the executing Court directed the plaintiff decree-holder to pay the amount by a certain date; but he never paid the amount and the application was dismissed for default of the parties' appearance on 12th July 1924. On 17th December 1926 a fresh application was made by the plaintiff decree-holder for execution. But it was contended by the judgment-debtors that the application was barred by time because it was filed more than three years after the passing of the decree by the High Court. The decree-holder stated that the application was within time because of the first application for execution which was made by her on 11th August 1923. The judgment-debtors replied that that application

was not an application in accordance with law because it was not accompanied with the deposit of the amount that the decree-holder had to pay to them.

Both the Courts below have held that the present application was within time because the first application was in order. It is contended here that the payment of money by the decree-holder in respect of the dower debt was a condition precedent to the making of the application. In other words that unless the application was accompanied by the deposit, the application was not in accordance with law and no execution could issue. The terms of this Court's decree, however, do not favour the interpretation sought to be put upon them by the appellant. As I read the decree it simply means that possession of the property that may fall to the plaintiff's share after partition shall not be made over to her unless she paid the amount of Rs. 131-15-1 to the judgment-debtors. It does not restrict the right of the decree-holder to present an application for execution of the decree for the purposes of effecting the partition of the common property and ascertaining her share unless it is accompanied with a deposit.

But assuming that the payment of the amount was a condition precedent to the making of the application, the first application was still valid in spite of the fact that no deposit was made. At p. 1005 of his Law of Limitation, Edn. 4, Mr. Rustomji observes as follows:

"If execution of a decree is conditional on prior payment (by the decree holder) of court-fees or (in case of a redemption suit) of the mortgage-debt or on discharge by the decree-holder of an incumbrance, in such cases an application by the decree-holder for execution without fulfilling the condition is nevertheless in accordance with law, it being open to the Court, on such application, to order execution on previous compliance (by the decree-holder) of the condition imposed by the decree. The fact that the application is dismissed for non-fulfilment of the condition is for purposes of limitation immaterial."

The facts in *Nathubai Kasandas v. Pranjivan Lalchand* (1) were more or less analogous to those of the present case and there it was held that the application without the necessary deposit was valid. For the reasons given

(1) [1910] 34 Bom. 189=5 I. C. 601=12 Bom. L. R. 13.

above the second appeal fails and is dismissed with costs. Pleader's fee Rs. 20.

P.N./R.K.

Appeal dismissed.

*** * A. I. R. 1930 Nagpur 242
Full Bench**

FINDLAY, J. C., MACNAIR AND
SUBHEDAR, A. J. C's.

Gobarya and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 215, 216 and 218 of 1929, Decided on 13th March 1930, from order of Sess. Judge, Hoshangabad.

* * (a) Evidence Act, S. 30 — (Per *Full Bench*)—If there is any other relevant matter implicating co-accused, Judge can consider confession along with that matter (*Subhedar, A. J. C.*)—Such confession can only be used when other proved facts fail by narrow margin to justify conviction.

The self inculpatory confession of an accused implicating his co-accused is fact upon which alone the conviction of his co-accused cannot be legally based. Nor can such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused form a legal basis for his conviction.

[P 251 C 1]

Per *Full Bench*.—But if there is any other relevant matter implicating the co-accused the Judge is permitted by S. 30 to consider confession along with the said matter and as a result of such consideration to convict the accused. (Per *Subhedar, A. J. C.*) Such confession can be legitimately used to corroborate other evidence and even to supplement the same in those exceptional cases in which without such aid the other evidence falls short by very narrow margin of that standard of proof which is requisite for a conviction.

[P 251 C 1]

Where the other evidence was to the effect that the accused were seen going on the night of the murder towards the place where the deceased lived and that there was general enmity between the accused and the deceased the evidence is insufficient to justify conviction of the non-confessing co-accused: 24 W. R. 42 Cr., and 9 C. P. L. R. 35 Cr., Appr: A. I. R. 1926 All. 377, Rel. on; other case law discussed.

[P 255 C 1]

(b) Evidence Act, S. 3—Evidence.

Per *Macnair, A. J. C.*—The word "evidence" in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the Court is convinced of these facts.

[P 251 C 1]

(c) Evidence Act, S. 30—Scope.

Per *Macnair, A. J. C.*—When S. 30 lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances.

[P 253 C 1]

(d) Evidence Act, S. 30—(Per *Full Bench*) Court can exclude confession by accused

altogether from consideration against co-accused (Per *Macnair, A. J. C.*) It cannot be said that word "may" gives Court right to exclude confession from consideration.

Per *Full Bench*.—Court has discretion to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed, Per *Macnair, A. J. C.*—The use of the word "may" does not show that every confession is of very small value against a co-accused. It cannot be said that the word "may" gives the Court right to exclude the confession from consideration if it is so disposed. The Judge is given a discretion but the discretion must be exercised in a judicial manner; if the confession would help in arriving at a decision that the accused is guilty he must do so. [P 252 C 2, P 253 C 1]

T. J. Kedar—for Applicant.

V. Bose—for Opponent.

Judgment

Jackson, A. J. C.—Five persons have been convicted of murder and four of them have been sentenced to death. Gobarya, his wife Kashi, his son-in-law Sitaram, and one Budhia are those who have been sentenced to death, and Asaram, Gobarya's son, has been sentenced to transportation for life. The person held to have been murdered is Fadal, brother of Gobarya.

On 21st August 1929, Fadal's body was recovered from a well near the ghana in which he had been living, and the medical evidence is that he died from strangulation. Sitaram, one of the accused, who admits his guilt, has described how he and the other accused came to strangle Fadal and throw the body into the well. It appears that there was ill-will between Fadal on the one side and Gobarya and his wife on the other on account of a partition which had recently taken place. As a result of that partition Gobarya had to pay some money to Fadal, and on 20th August he asked Sitaram to tell Gobarya and Kashi that he wanted the money. Kashi, who appears to have resented the fact that Fadal, who was a childless widower, shared equally at the partition with her husband, suggested that Fadal should be killed and all dispute thus ended. Sitaram was cajoled into taking a part, and all the five accused at night went to the ghana of one Sojar in whose employ Fadal was and there, while Gobarya sat on Fadal's chest and Kashi, Asaram and Budhia helped to hold him, Sitaram passed a rope twice round Fadal's neck, and Gobarya and Sitaram pulling on the ends of

the rope strangled him. His body was then carried to the well and thrown in after a blow had been struck on the head with a stone to make it appear that Fadal had been killed by accident in falling into the well. The bucket and rope of the well were thrown in after him, and two utensils were brought and left near the well to help the suggestion that Fadal had fallen in by accident while drawing water.

Sitaram made a confession to a First Class Magistrate on 2nd October 1929 to the above effect. He repeated his story to the committing Magistrate on 23rd September 1929, although on 16th September 1929 he is recorded as having declined to accept the conditions on which he could become an approver. He again repeated his story before the Sessions Judge, and in the Sessions Court he put in an application asking for a pardon, but this on the opposition of the other accused and of the prosecution was rejected. It is only in his grounds of appeal to this Court that he has put forward the plea that he was threatened by the police and tutored to tell the story implicating himself and the other accused, with a promise that, if he did so, he would be made an approver and acquitted. I am unable to accept the argument put forward on his behalf to show that his confessions were not voluntary and not true. Although his application was rejected by the Sessions Judge, he had been given an opportunity of becoming an approver in the Court of the committing Magistrate and he refused it for reasons which are not obvious. Nevertheless, the fact remains that until after his conviction he told the same story on three different occasions and when he was called upon to plead to the charge before the Sessions Judge his plea was one of guilty. It seems to me impossible to hold otherwise than that Sitaram was a party to the murder of Fadal.

As regards the other accused, it is argued that there is no evidence against them but Sitaram's confession and that there can be no conviction on the confession of a co-accused alone. The confession of a co-accused is certainly not evidence within the meaning of the definition of that term in S. 3, Evidence Act; but it is a matter which can be taken into

consideration under S. 30, and must be included in the matters before the Court that under S. 3 are to be taken into consideration before a fact is held to be proved or not proved. It has thus the practical effect of, and can be most conveniently referred to, as evidence. The question, however, arises whether it is substantive evidence or merely evidence that can lend assurance to other evidence incriminating the co-accused. It seems to me that such a confession being admissible under S. 30 must be regarded as substantive evidence if it clearly implicates the other accused in the crime, and that it cannot be treated merely as corroborative of facts otherwise proved, which would make S. 30 a mere nullity.

That is the view taken by Hallifax, A. J. C., in *Sapku v. Emperor A. I. R.* 1922 Nagpur 146. He sums up his review of the case law on the subject in the following paragraphs:

"10. Against the proposition that the confession of a co-accused can be used as a piece of substantive evidence and that we may start with it as a basis, proceeding to enquire how far it is corroborated, we have, therefore, the dictum of Stevens, J. C., in *Empress v. Karim Bux* (1) that of Ainslie, J., in *Empress v. Ashootosh Chuckerburthy* (2) which on examination works out very nearly to laying down 'rule touching the credibility of evidence' of which Heaton, J., speaks in the passage quoted above, the judgment of the Madras High Court in *Giddigadu v. Emperor* (3) which rests entirely on authority to which I cannot refer, and the dictum of Jenkins, C. J., in *Emperor v. Noni Gopal Gupta* (4), which apparently was not followed by Fletcher, J., in *Emperor v. Babar Ali* (5).

"11. On the other hand, we have reasoned and to my mind convincing judgments by Knox, J., and Richards, J., in *Emperor v. Kehri* (6), by a Bench of this Court in *Emperor v. Malhari* (7) by Heaton, J., Macleod, C. J., concurring, and, on this point, Shah, J., not dissenting, in *Gangapa Kardapa v. Emperor* (8). To these I might add the reasoning in the judgment of the learned Sessions Judge (Mr. F. K. Body) which is published as an annexure to *Gangapa Kardapa v. Emperor* (8). There is also the judg-

(1) [1896] 9 C. P. L. R. 37 Cr.

(2) [1879] 4 Cal. 483=3 C. L. R. 270.

(3) [1910] 33 Mad. 46 = 9 Cr. L. J. 404 = 1 I. C. 867.

(4) [1911] 38 Cal. 559 = 12 Cr. L. J. 286 = 10 I. C. 582.

(5) [1915] 42 Cal. 789=16 Cr. L. J. 321 = 28 I. C. 657.

(6) [1907] 29 All. 434=5 Cr. L. J. 360=(1907) A. W. N. 140.

(7) Criminal Appeal No. 38-B of 1911.

(8) [1914] 33 Bom. 156 = 14 Cr. L. J. 625=21 I. C. 673.

ment of Garth, C. J. in *Empress v. Ashcootash Chuckerbutty* (2), and indeed the unanimous decision of the Full Bench in that case that such a statement is substantive evidence. I have not mentioned the *Allahabad* case of *Queen-Empress v. Nirmal Das* (9) nor the Bombay case of *Queen-Empress v. Khandia* (10) as they may both be taken as overruled by the later decisions quoted. In any case, the reasons stated in the later rulings appear to me much more convincing. I concur entirely in the views expressed by the Allahabad High Court in *Emperor v. Kehri* (6) and by Heaton J. in *Gangaga Kardepa v. Emperor* (8), and hold that in this case the confession made by Shrawan can be treated as substantive evidence against Sapku Patil, and if it is found to be credible, because it is sufficiently corroborated by other evidence or matters proper for consideration, Sapku Patil can be convicted on it."

It is true that two other Judges of this Court disagreed with the view stated in that case, but I do not find their reasoning convincing. There was, however, agreement upon one point and that is that even if the confession of a co-accused can be treated as substantive evidence, it cannot by itself be made a basis for conviction of the other accused. In the present case there is corroboration of Sitaram's story as regards the throwing of the body into the well and the steps taken to make it appear that the death was accidental. There is also the evidence of Sarjuram (P. W. 5) who met Sitaram early in the morning after the murder returning to his own village from Dahua where the murder was committed. But such corroboration helps to implicate nobody but Sitaram. As regards Gobarya and Kashi, the corroboration of Sitaram consists of the evidence to show the ill-will that existed between Fadal and his brother and sister-in-law and of the evidence of Salak (P. W. 7) who on the night of the murder saw five persons, of whom Gobarya, Kashi, Sitaram and Buddhia were four, going towards the ghana where Fadal lived. The question is whether this corroboration is sufficient. I am satisfied that Sitaram took part in the murder; he could not have committed it alone; the motive for the murder was not his but Gobarya's and Kashi's; and, when it is proved that Gobarya and Kashi were seen on the night of the murder going with Sitaram towards the residence of the deceased, it seems to me impossible not to hold

that Gobarya and Kashi were among the persons who committed the murder. Similarly, in the case of Buddhia there is some evidence of enmity between him and Fadal which would make it probable that he would be willing to assist Gobarya and Kashi, and when he too was seen among the five persons going towards the ghana, it seems to me that his guilt also is manifest. My view is that the convictions and sentences of Sitaram, Gobarya, Kashi and Buddhia be upheld. As regard Asaram, there is no corroboration of Sitaram's confession and in my opinion he ought to be acquitted.

Mohiuddin, A. J. C.—I have read the opinion which my learned brother has recorded in this case, and I agree with him, for reasons recorded in para 3 of his opinion, that Sitaram was a party to the murder of Fadal. I would therefore confirm the conviction and sentence in Sitaram's case and dismiss his appeal. Regarding the other four co-accused Gobarya, Kashi, Buddhia and Asaram, there is no direct evidence of their complicity in the murder of Fadal except the confession of the co-accused Sitaram, and the question for consideration therefore is whether the confession is substantive evidence or merely a matter that can be taken into consideration, to lend assurance to other evidence incriminating the co-accused. S. 30, Evidence Act, is an exception to the rule of English law that a confession by an accused can be considered against others who may be tried along with him and was introduced into the Evidence Act in 1872, for the first time. Glover, J., in *Queen v. Jaffir Ali* (11), (at p. 64) made the following observation about this section:

"Section 30, Act 1 of 1872, introducing as it does an entirely new, and, I am inclined to think, rather dangerous element in the conduct of criminal trials, ought to be construed with great strictness,"

and Phear, J., in *Queen v. Sadhu Mundaul* (12), characterized it as "dangerous material."

The confession of an accused is not evidence within the meaning of that word as defined in S. 3, Evidence Act, but is a matter which can be taken into consideration by the Court, that is, it is

(9) [1900] 22 All. 445=(1900) A. W. N. 169.

(10) [1891] 15 Bom. 66.

(11) 19 W. R. Cr. 57.

(12) 21 W. R. Cr. 69.

an element in the consideration of all the facts in the case. It cannot be put on the same footing as the evidence of an accomplice who has become an approver, because his statement cannot be tested, developed, and explained by cross-examination and is not given on oath. Accomplice evidence has been made admissible under S. 133, Evidence Act, and we find in *Illus. (b)*, S. 114, Evidence Act, the rule of caution and prudence where it is declared by the legislature, that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But as the confession of a co-accused is not evidence but is only a matter which has been made admissible for consideration, it cannot be treated as substantive evidence and no amount of corroboration of that matter can put it on the same basis as the evidence of an accomplice. I am therefore of opinion that the confession of a co-accused, not being evidence, is only a matter which can be taken into consideration if there is other evidence in the case to lend assurance to that evidence, and cannot form the basis of a conviction, even though there may be corroboration of the statement of the co-accused.

I am fortified in this view by the only published decision of this Court, which is contained in *Empress v. Karim Bax* (1) and runs as follows:

"Section 27, Evidence Act, then, has no application to the case, but, as I have said, S. 30 does apply. At the same time the confession of a co-accused used under the provisions of the latter section stands on a perfectly different footing from the testimony of an accomplice. The latter is substantive evidence in the strict sense of the term, a conviction may legally proceed upon it without corroboration, though the general practice of the Court is to require corroboration, because a presumption naturally arises against such evidence from its tainted character. Whether corroborated or uncorroborated it may form the basis of a conviction. It is entirely otherwise with the confession of a co-accused. It is not in itself substantive evidence and we may not start with it as a basis, proceeding to enquire how far it is corroborated. It can be used only in a subsidiary manner in connexion with the substantive evidence adduced in the case."

This point was considered by a Bench of this Court, consisting of Batten and Stanyon, A. J. C's., in *Emperor v. Malhari* (7), and the relevant portion of their judgment runs as follows:

"The question then remains how far we

should act on it. We think that since we believe it to be the truth both as to what was done and as to the identity of the persons doing it, we are bound to use it as establishing the guilt of all the accused. A good deal has been written and said about the scope of S. 30, Evidence Act, 1872, and some of the earlier published decisions on the point would make the confession of an accused something less than evidence against his accomplice jointly tried with him for the same offence, so that no conviction of the latter could be sustained thereon if the other evidence would be insufficient to prove his guilt. We are unable to take this view. We do not think it was the intention of the legislature that S. 30, should provide a mere superfluity, to be used only in cases already established by other evidence. The later view that a statement admitted under S. 30, is a piece of evidence as relevant as any other kind of evidence, commends itself to us as the more correct interpretation of the law. It follows that a conviction based on the uncorroborated statement of a co-accused would not be illegal, because there is not one word in the Evidence Act which requires any specified quantity or description of relevant evidence to sustain a judicial finding. We have considered the recent case of *Emperor v. Kehri* (6), where the evidential value of a retracted confession is very fully considered. In our opinion it is a correct interpretation of the law, and we concur with every dictum laid down in it."

They observed that a statement admitted under S. 30 is a piece of evidence as relevant as any other kind of evidence, but I respectfully beg to point out, that the statement of a co-accused not being evidence at all under the Evidence Act, the view taken by the learned Additional Judicial Commissioners is not correct.

The next case in which the point was considered by a Bench of this Court, is *Sapku v. Emperor* (A. I. R. 1922 Nag. 146). In this case Hallifax, A. J. C., concurred entirely with the view expressed by the Allahabad High Court in *Emperor v. Kehri* (6), and held that the confession of a co-accused could be treated as substantive evidence, and if it was found credible, because it was sufficiently corroborated by other evidence or matters proper for consideration, other accused could be convicted on it. Prideaux, A. J. C., expressed the opinion that the confession of a co-accused could not be treated as substantive evidence. On account of this difference of opinion, the case was laid before Kotval, A. J. C. who concurred in the opinion expressed by Prideaux A. J. C.

This view was followed by Findlay, Offg. J. C., and Prideaux, A. J. C., in *Diwan Dhimar v. Emperor*, A. I. R. 1926

Nag. 229, as appears from the following passage:

"On behalf of the Crown reliance has been placed on the decision of Sanderson, C. J., and Beachcroft, J., in *Ah Foong v. Emperor* (13), as well as on the old decision of Garth, C. J., in *Empress v. Ashootosh Chuckerbutty* (2), and it has been suggested that the confessions in this case are practically equivalent to the evidence and can be accepted as affording proof within the meaning of S. 3, Evidence Act. Reliance has also been placed on the view taken by Hallifax, A.J.C., in *Sapku v. Emperor* (14), but the view of the majority of Judges in that case was that the confession therein concerned was not evidence under the Evidence Act as against a co-accused and the only fair inference was that the Court might take such a confession into consideration with, or supplementarily to, relevant facts which might form the basis of a judgment. We see no reason for differing from this view."

The published ruling of this Court contained in *Empress v. Karim Bar* (1); and the decisions of two Benches of this Court contained in *Sapku v. Emperor*, A. I. R. 1922 Nag. 146 and *Diwan Dhimar v. Emperor*, A. I. R. 1926 Nag. 229, are thus in favour of the view that the confession of a co-accused, which is made admissible in evidence, is not substantive evidence and cannot form the basis of a conviction.

Jenkins, C. J., in *Emperor v. Lalit Mohan* (4), at 588 clearly laid down that conviction on the confession of a co-accused alone would be bad in law, and that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Brett and Chatterjee, JJ., were the other Judges who formed the Bench in that case and concurred in the view expressed by Jenkins, C. J. It seems that the decision reported in *Emperor v. Lalit Mohan* (4), was not brought to the notice of the Divisional Bench, which decided *Emperor v. Babar Ali* (5), because Fletcher, J., made no reference to it in his judgment. I, therefore, venture to suggest, that the view of the Calcutta High Court, is the one which is contained in the Full Bench decision of that Court contained in *Emperor v. Lalit Mohan* (4).

The Madras view is to be found in *Giddigadu v. Emperor* (3), in which Benson and Sankaran Nair, JJ., laid down that the wording of the section shows that such a confession is merely to be an element in the consideration of all

the facts of the case, but do not do away with the necessity for other evidence. In Bombay High Court there was a difference of opinion on this point between Shah, J., on two occasions, and the cases were referred to a third Judge: see *Emperor v. Gangappa Kardeppa* (8) and *Emperor v. Sabitkhan Bahadurkhan* (15). The Allahabad view was followed in Bombay by a majority of the Judges in these two cases.

Taking it for granted, that the confession of a co-accused can be treated as substantive evidence, it seems to me that corroboration of such a confession must be better and stronger than what may be considered sufficient in the case of the evidence of an accomplice:

"The existence of general enmity and a desire, however strong or a motive however effective to procure the death of another person," as pointed out by Walsh and Dalal, JJ., in *Emperor v. Kalwa* (16):

"may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must point to the identification of the person charged with the particular act with which the direct evidence connects him."

Sitaram knew that there was ill-will between Fadal and Gobarya, and as he participated in the murder, he knew that the body of Fadal was thrown into the well and that steps were taken to make it appear that death was accidental. These facts cannot be considered as material particulars, which corroborate the confession of a co-accused. Sujaram (P. W. 5) met Sitaram early in the morning after the murder returning to his own village from Dahua, and Salak (P. W. 7) saw five persons, of whom Gobarya, Kashi, Sitaram and Budhia were four, going towards the ghana where Fadal lived. The corroboration raises a suspicion, but falls short of what is required to support a conviction. Similar facts were considered to be consistent with the innocence of the accused in *Emperor v. Babar Ali* (7), by Fletcher, J., as appear from the following passage in that judgment:

"The corroboration in the evidence in this case although it raises a case of suspicion, falls far short of what is required to support a conviction. It consists principally of statements of witnesses as to seeing the accused or some

(13) [1919] 46 Cal. 411=20 Cr. L. J. 91=45 I. O. 504.

(14) A. I. R. 1922 Nag. 146.

(15) [1919] 43 Bom. 739=20 Cr. L. J. 497=51 I. C. 65.

(16) A. I. R. 1926 All. 377=95 I. C. 74=27 Cr. L. J. 746=48 All. 409.

of them together on the night of the occurrence, and as against one of the accused, as to the identification of certain ornaments found with one of the accused which had some time or other been pledged with the deceased woman. These statements, though giving rise to suspicion, are consistent with the innocence of these four accused."

I am, therefore, of opinion that there is not such corroboration of the confession of Sitaram, as to make it safe to rely on his confession so far as his co-accused are concerned. This confession has also been retracted by Sitaram in this Court. For reasons given in paras. 2 and 12 of this order, I am of opinion, that Gobarya, Kashi, Budhia and Asaram should be acquitted.

(On difference of opinion case was laid before the Judicial Commissioner for referring it to another Judge under Ss. 378 and 429 Criminal P. C.).

Reference Order

Subhedar, A. J. C. — A point of law of considerable importance in the administration of criminal justice in these provinces is involved in these connected appeals which have been referred to me, under S. 429, Criminal P. C., for opinion on a difference of opinion arising between Jackson and Mohiuddin, A. J. C's., who formed the Bench and heard the said appeals. As I shall show later on, there has been a considerable divergence of opinion among the Judges of this Court in the matter of interpretation of the provisions of S. 30, Evidence Act. Both the learned Government Advocate and the counsel for the appellants have, therefore, moved me to refer the matter to the decision of a Full Bench in order that the conflict of views existing at the present date be set at rest and the law definitely laid down for the guidance of the Judges of this Court and Subordinate Courts in future. Accepting their suggestion I order that the case be laid before the Judicial Commissioner for favour of constituting a Full Bench to hear the matter.

The facts of the case are clearly given in the first three paragraphs of the opinion of Jackson, A. J. C., and need not therefore be repeated here at any length. Five persons were concerned in the alleged murder of one Fadal of whom one Sitaram alone made a confession implicating himself and the other co-accused. Excepting the con-

fessional statement of Sitaram, there was no other evidence which by itself established the charge against the confessing accused but the Sessions Judge convicted them practically upon the confession of Sitaram.

The principal question involved in the decision of the appeals before the Bench was if the self-inculpatory statement of the appellant, Sitaram, implicating the other four appellants who were his co-accused, was a piece of substantive evidence against them, or was merely a matter that could be taken into consideration with any other piece of evidence incriminating them.

Jackson, A. J. C., following the views of Hallifax, A. J. C. in *Sapku v. Emperor* (17) and of Batten and Stanyon A. J. C's, in *Emperor v. Malhari* (7) held that the confession of the co-accused was substantive evidence against the other co-accused while Mohiuddin A. J. C., following the dicta of Stevens, J. C., in *Empress v. Karim Bax* (1), of Kotval and Prideaux, A. J. C's., in *Sapku v. Emperor* (17) and of Findlay, J. C., and Prideaux, A. J. C., in *Diwan Dhimar v. Emperor* (18) held that the confession of the co-accused not being evidence was only a matter which could be taken into consideration if there was other evidence in the case to lend assurance to that evidence and could not form the basis of conviction of the other co-accused even though there might be corroboration of the statement of the co-accused.

Reference may also be made here to three other decisions of this Court, viz., that of Kotval and Kinkhede, A. J. C's. in *Shaikh Shero v. Emperor* (19), of Wadegaonkar, A. J. C., in *Raghunath v. Emperor* (20) and of Kinkhede, A. J. C., in *Necha v. Emperor* (21) in which the learned Judges followed the law as propounded in *Empress v. Karim Bax* (1). The cases from the other High Courts in which one or the other view was taken are cited at length by Jackson, A. J. C., in para. 5 of his opinion and by Mohiuddin,

(17) A. I. R. 1924 Nag. 143.

(18) A. I. R. 1926 Nag. 229.

(19) A. I. R. 1925 Nag. 78=81 I. C. 891=25 Cr. L. J. 1067.

(20) A. I. R. 1926 Nag. 119=89 I. C. 516=26 Cr. L. J. 1380=23 N. L. R. 62.

(21) A. I. R. 1928 Nag. 213=109 I. C. 801=29 Cr. L. J. 609.

A. J. C., in paras. 10 to 12 of his opinion and are not, therefore, again cited here.

I refer the following points to the decision of a Full Bench :

(1) Whether the self-inculpatory confession of an accused implicating his co-accused is substantive evidence upon which alone the conviction of his co-accused could legally be based and if not,

(2) whether such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused could form a legal basis for his conviction.

Opinion

Subhedar, A. J. C.—On account of the importance of the subject and the conflict of views held thereon by many eminent Judges of this Court and other High Courts in India the following points have been referred to the decision of the Full Bench:

(1) Whether the self-inculpatory confession of an accused implicating his co-accused is substantive evidence upon which alone the conviction of his co-accused could legally be based and if not,

(2) whether such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused, could form a legal basis for his conviction.

The points under reference really invite the decision of the sole question whether, under the provisions of the Evidence Act, which is unquestionably a self-contained enactment, not only defining and amending but also consolidating the law of evidence in India by repealing all rules other than those saved by the last portion of its second section, a self-inculpatory confession of an accused is or is not judicial evidence against his co-accused. If the answer to this question is in the negative it logically follows that the answer to both the points referred to must also be in the negative.

The matter was indeed argued very ably and exhaustively on both sides. The learned Government Advocate tried to maintain that there was practically no difference between the confession of a co-accused and the evidence of an accomplice and that a conviction could not be illegal if based solely upon such a confession, while Mr. Kedar, for the appellant, contended that such a confession, not being judicial evidence, no conviction could legally be obtained on its basis.

Section 30, Evidence Act, is worded as follows:

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

It is to be noted that under S. 5, Evidence Act

"evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

What is oral and documentary evidence is defined by S. 3 of the Act and it is obvious that a self-inculpatory confession of a co-accused does not fall within the category of this class of evidence. It is equally clear that such a confession as aforesaid has not been declared "relevant" by any of the several sections of Chap. 2, Evidence Act, which defines and declares what facts are relevant nor is it declared to be so by any other sections of the Act. To take only two of the many instances, S. 28, Evidence Act, declares the confession of an accused relevant against himself provided it escapes the attraction of Ss. 24 to 26 *ibid*; and S. 133 declares an accomplice to be a competent witness against an accused person. It follows therefore that since the self-inculpatory confession of a co-accused does neither fall within the definition of evidence nor is declared "relevant" by the Evidence Act, it is not admissible to prove the existence or non-existence of a fact in issue in a case. The matter may also be considered from another standpoint. Prov. 1, S. 165, Evidence Act, lays down in unequivocal terms

"that the judgment must be based upon facts declared by this Act to be relevant, and duly proved."

From this it is apparent that the confession of a co-accused, which is not declared either relevant or evidence by the Evidence Act, could not possibly form the basis of a legal judgment. Obviously therefore it must be rigorously excluded from consideration except to the extent permitted by S. 30 of the Act itself.

It further appears to me quite clear that the legislature has advisedly used the words "may take into consideration" in S. 30, Evidence Act, making it optional with the Court to use or not to

use the self-inculpatory statement of an accused against his co-accused. Giving the natural meaning to the terms of the said section it is apparent that the Court has got the right to exclude such a confession altogether from consideration against an accused person if it is so disposed. No such option is, however, left to the Court in respect of facts declared relevant or evidence under the Evidence Act and duly proved, and the Court is bound to consider these though it may reject them on their merits; otherwise its judgment would be vitiated.

The words "may take into consideration" in S. 30, Evidence Act, also connote the idea that there must be other material besides the confession of a co-accused to form the basis of the conclusion to be arrived at in a case. To my mind these words are deliberately inserted by the legislature so as to exclude the possibility of such a confession being used by itself against a non-confessing accused in the determination of his guilt.

In *Empress v. Govind* (22), Stevens, J. C., in setting aside the conviction which was based solely upon the confession of a co-accused made the following weighty observations :

"I think the conviction of this appellant is bad in law. The Magistrate is not correct in regarding a confession of an accused person implicating a co-accused under S. 30, Evidence Act, as the same thing as 'the testimony of an accomplice' which is referred to in S. 133 of the Act. It is plain from the words of the latter section that it contemplates that the accomplice shall be examined as a witness. This being so, the provision that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice' has not application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under S. 30."

Again, in *Empress v. Karim Bax* (1) the same eminent Judicial Commissioner expressed himself on the effect of S. 30, Evidence Act, as follows:

"It (the confession of a co-accused) is not in itself substantive evidence and we may not start with it as a basis, proceeding to inquire how far it is corroborated. It can be used only in a subsidiary manner in connexion with the substantive evidence adduced in the case. We have thus to have recourse in the first instance to the evidence of the witnesses."

The principles laid down in the above cases were followed by Prideaux and Kotval, A. J. C's., in *Saplu v. Emperor*,

(22) [1896] 9 C. P. L. R. 35 Cr.

A. I. R. 1922 Nag. 116; by Findlay, J. C., and Prideaux, A. J. C., in *Diwan Dhimar v. Emperor*, *A. I. R.* 1926 Nag. 229; by Kinkhede, A. J. C., in *Necha v. Emperor*, *A. I. R.* 1928 Nag. 213, and by Mohiuddin, A. J. C., in the case out of which this Full Bench reference has arisen.

I shall now briefly refer to some of the most important cases of the other High Courts which were cited at the Bar and otherwise discovered by me and which bear upon the question under consideration. The earliest view of the Calcutta High Court was expressed by Phear, J., in *Queen v. Sadhu* (12) where the learned Judge characterized S. 30 of the Act as "dangerous material" and held that it was discretionary with the Judge to act upon it or not. Jackson, J., in construing the words "may take into consideration" appearing in the said section remarked as follows in *Queen v. Chandra Bhattachari* (23) :

"The section does not provide as has been repeatedly pointed out by this Court, that such confession is evidence ; still less does it say that it may be the foundation of a case against the person implicated. The legislature very guardedly says that it may be taken into consideration, and I think that the obvious intention of the legislature in so saying was that, when, as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence. In this case, the Judge has proceeded in the inverse way, and has taken the confession of a fellow prisoner as the basis of a case against the appellant."

This view was dissented from by that Court in the Full Bench case of *Empress v. Ashootosh* (2) wherein it was laid down that under S. 30, Evidence Act, the confession of a co-accused was evidence proper on which a conviction could legally be based. However, the earlier view of that Court, that such a confession was not evidence but was matter only to be taken into consideration to lend assurance to other evidence, was upheld in *Emperor v. Lalit Mohan* (4) where at p. 588 Jenkins, C. J., expressed himself in these words:

"The language of the section is guarded, and the history of this Act leaves me no doubt that this section was designedly framed in these terms. While 'admissions,' a word which

(23) 24 W. R. 42 Cr.

embraces confessions, are by S. 21 relevant, and may be proved as against the person making them, all that S. 30 provides is, that the Court may take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is that the Court can only treat a confession as lending assurance to other evidence against a co-accused."

It is true that in *Emperor v. Babar Ali* (5), Fletcher, J., observed that the confession of an accused "can be taken into consideration" against other accused provided it is corroborated, but whether as a matter of precaution or as a rule of law is not made clear. Since no reference is made in this case to the decision in *Emperor v. Lalit Mohan* (4) it cannot be said that the law as propounded therein was overruled in this case.

Coming to the decision of the Bombay High Court it appears that serious conflict of opinion arose amongst the several Judges of that Court in the following two notable cases:

Emperor v. Gahappa Kardeppa (8) and *Emperor v. Sabitkhan Bahadurkhan* (15). In the first case Macleod and Heaton, JJ., held that the confession of a co-accused was substantial evidence, while Shah, J., held the contrary view. In the second case Scott, C. J., to whom the case was referred on a difference between Heaton and Shah, JJ., held that if the confession of a co-accused was substantially corroborated by other evidence it could form the basis of a legal conviction.

The earlier view of the Allahabad High Court as expressed in *Empress v. Nirmal Das* (9) was that such confessions could only be taken into consideration along with other evidence in the case, but in *Emperor v. Kehri* (6) this view was dissented from and it was held that they were substantive evidence in a case and a conviction based solely thereon was not illegal. Again, in *Emperor v. Kalwa* (16) the learned Judges who formed the Bench declined to apply the law as laid down by that Court in *Kehri's* case but preferred to follow the view of Garth, C. J., in *Empress v. Ashootosh* (2).

The view of the Madras High Court on this question appears to have been consistent throughout. In 7 *Mad. H. C. App.* 15: *Weir* 740 (*Anonymous*) it was held that S. 30 was an exception,

and its wording showed that the confession of an accused was merely to be an element in the consideration of the evidence and that unless there was something more, the conviction of a co-accused based upon it would still be a case of no evidence and bad in law. The latest pronouncement of that Court to the same effect is to be found in *Giddigadu v. Emperor* (3).

In *Devendra Bhattacharya v. Emperor* A. I. R. 1927 Pat. 257 a Divisional Bench of the Patna High Court approved and followed the view of the Calcutta High Court on this point as propounded in *Emperor v. Lalit Mohan* (4).

It only remains to notice the two unreported cases of this Court in which the view propounded in *Emperor v. Kehri* (6) and some of the *Bombay* cases already noticed was followed by some of the Judges of this Court. They are the decisions of Hallifax, A. J. C., in *Sapku v. Emperor* (17), of Batton and Stanyon, A. J. C's., in *Emperor v. Malhari* (7), and of Jackson, A. J. C., in the case out of which the present reference has arisen. With due deference, I regretfully differ from the learned Judges who held the view contrary to that expressed in *Empress v. Karim Bax* (1) as I find their reasoning unconvincing.

For reasons given in paras. 4 to 8 above and relying on those decisions of the other High Courts which follow the views similar to those propounded in *Empress v. Karim Bax* (1), I am of opinion (a) that the confession of a co-accused is not substantive evidence, like the testimony of an accomplice, upon which alone the conviction of an accused could legally be based; (b) that no conviction could also be legally based upon such a confession even though it be corroborated by other evidence which by itself would not sustain the conviction; and (c) but such a confession may be taken into consideration along with other evidence in the case as bearing upon the truth or sufficiency of that evidence or as lending assurance to it.

Using the word "evidence" in the popular sense, the confession of a co-accused not having the sanctity of oath nor the test of cross examination behind it, is, from its very nature, evidence of the very weakest and subsidiary char-

acter and the Court should not, in the first instance, start with it proceeding to enquire how far it receives corroboration from other evidence on record. It may, however, be legitimately used to corroborate other evidence and even to supplement the same in those exceptional cases in which without such an aid the other evidence falls short by a very narrow margin of that standard of proof which is requisite for a conviction. It is not possible to lay down any hard and fast rule as to the extent to which the confession of a co-accused may be used to supplement the substantive evidence in a case and it must be left open to the Court, in each case, in the exercise of judicial discretion, to decide for itself under what circumstances and to what extent it should be so used. My answer to both the points referred to is, therefore, in the negative.

Macnair, A. J. C.—I have had the advantage of reading the opinion of my brother Subhedar. Although my answers to the questions do not differ widely from the answers given by him, I find it desirable to deliver a separate opinion. The first question as framed makes use of the word "evidence" in a sense in which it is not used in the Evidence Act. Evidence is defined in S. 3 of the Act. I entirely agree with the following commentary on this definition in Woodroffe and Ameer Ali's Law of Evidence, 8th Edn. p. 108 :

"The word 'evidence' as generally employed is ambiguous : (a) It sometimes means the words uttered and things exhibited by witnesses before a Court of justice : (b) at other times it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved : (c) again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry (Steph. Intro., 3, 4). The word in this Act is used in the sense of Cl. 1. As thus used it signifies only the instruments by means of which relevant facts are brought before the Court (viz., witnesses and documents), and by means of which the Court is convinced of these facts."

Section 30, Evidence Act, mentions the necessity for proof of a confession, and the word "evidence," as defined in the Evidence Act, means the oral or documentary evidence by means of which a confession is proved. It appears to me desirable to use words in accordance with the definitions in the Evidence Act when discussing the meaning of a section of that Act, and I am not

certain in what exact sense the word "substantive" is used. I therefore consider that the first question should be stated :

"Whether the self-inculpatory confession of an accused implicating his co-accused is a fact upon which alone the conviction of his co-accused could legally be based ?"

The proposition that S. 30, Evidence Act, allows consideration of a confession against a co-accused only when there is other matter for consideration against that co-accused has been accepted by many eminent Judges. I may refer to *Queen v. Chunder Bhutacharjee* (23) at 43 ; *Emperor v. Lalit Mohan Chuckerbutty* (4), *Giddigadu v. Emperor* (3) and *Emperor v. Gangappa Kardeppa* (8) at 66 by Shah, J. I think the main reasoning of these Judges may be stated as follows : The confession of a co-accused is a statement made by an accomplice : that accomplice has confessed that he is guilty, but a very common reason for confession is that the evidence is so strong that denial is futile and that, if no trouble is given to the prosecution and the Court, there is a possibility of a lenient sentence ; the statement, then, should be treated with caution for reasons similar to those which apply to the evidence of an accomplice ; the statement in the confession has not been tested by cross-examination ; it is natural, then, that the Evidence Act should place restrictions upon the use of this confession : S. 30 which allows the confession to be used is framed in very guarded language : it is hardly possible that this language was intended to allow a Court to make as full a use of the confession as of any evidence given by witnesses : the section read as a whole means that the confession can be considered along with other matter.

It appears to me that this reasoning has considerable force, but, in my opinion, when the language of S. 30 is closely considered, it is clear that it allows consideration only in this manner. It allows a Judge to take the confession into consideration against a co-accused, and there is no reason to imagine that the words "take into consideration" were loosely used for the word "consider." In my opinion, a Judge cannot take a fact into consideration unless he is at the time considering other facts ; it would be incorrect to say :

"I take into consideration all the proved facts"

instead of "I consider all the proved facts." The words of S. 30, then, do not allow a Judge to consider the confession of a co-accused against that co-accused unless there are other relevant facts under consideration. I therefore answer the first question in the negative: S. 30 does not allow the confession to be used in the manner suggested.

The opinions of the learned Judges who have taken the opposite view are entitled to respectful consideration. With due respect I venture to give my opinion that they have not given due weight to the argument that the framers of the Act would have simply stated that the confession was "a relevant" fact or "could be proved" against the co-accused if that was what they intended to convey; and that these Judges have not appreciated the meaning of the words "take into consideration." Heaton, J., in *Emperor v. Gangappa Kardappa* (8) at 163 states:

"These words, in my judgment, are exactly appropriate to making the confession, which is already evidence in the case, evidence against the person implicated as well as the other accused."

Macleod, J., (at p. 175) disagrees with the argument that S. 30 must be read as if it said that the confessions might only be taken into consideration along with other evidence against the accused "evidence" is used in a wide sense as meaning any matter which the Court may consider. I add that the use of the ambiguous word "evidence" has facilitated the conclusion that the confession can be used in the same way as statements made by witnesses. Had the word "fact" which has no technical meaning been used it would have been more easy to see that S. 30 allowed this fact to be used only in a particular manner.

The second question referred to the Bench must also, in my opinion, be answered in the negative. S. 30 permits the confession to be taken into consideration along with other relevant facts; it does not permit consideration of the confession in the way indicated by this question.

But I think an answer in the negative is not a full answer to the point which it was intended to refer to the

Full Bench. There should be an answer to the question:

"If there is other relevant matter implicating the co-accused, but insufficient to justify a conviction can the confession be used to supplement this matter and render a conviction proper?"

In my opinion, S. 30 which lays down that the confession can be taken into consideration against a co-accused, furnishes a clear answer in the affirmative. S. 30 is clearly intended to provide for the case where a Judge, if he were to leave the confession out of consideration and consider the other proved facts, might not convict the co-accused. I approve of the remarks of Jackson, J. in *Queen v. Chunder Bhattacharjee* (23) and Stevens, J. C., in *Empress v. Karim Bax* (1) quoted by my learned colleague Subhedar.

My brother Subhedar holds that the confession can only be used when the other proved facts fail by a very narrow margin to justify a conviction. He has quoted with approval the opinion of Jenkins, C. J., in *Emperor v. Lalit Mohan* (4) to the effect that the confession can only be treated as lending assurance to other evidence against a co-accused. Jenkins, C. J., has laid stress on the fact that S. 30 states that a Court may take the confession into consideration. Now, the word "shall" could not have been used since there might be no consideration into which the confession could be taken. Again, it is frequently the case that the Court has already dealt with the confession as affecting the accused who confessed before dealing with the case against the co-accused. The Judge may have formed the opinion that the confession was of no value for any purpose or was entirely unreliable in so far as it implicated the co-accused. Again, the Judge might hold that the other matter for consideration was so conclusive against the co-accused that the confession need not be considered. It appears to me, then, that the use of the word "may" does not show that every confession is of very small value against a co-accused. I do not think it can be said that the word "may" gives the Court the right to exclude the confession from consideration if it is so disposed. The Judge is given a discretion but the discretion must be exercised in a judicial manner; if the con-

cession would help in arriving at a decision that the co-accused is guilty (and the Judge is allowed to consider the confession) he must do so. My brother Subhedar's opinion appears to be based partly on the view that the confession does not fall within the definition of "evidence" and is not declared relevant by the Evidence Act. I have pointed out that the relevant facts on which a judgment can be based are not evidence as defined in the Act. In my opinion when S. 30 lays down that a Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances. In S. 27 of the Act the declaration that certain matter is relevant is made by stating that the matter may be proved. It can equally be made by stating that matter may be considered; for the idea that a fact not proved against an accused should in any way be considered against him cannot be entertained for a moment. S. 30 appears to me to lay down that, before deciding to what extent the evidence adduced is reliable and whether the facts proved by that evidence are sufficient for a conviction the Judge may take the confession into consideration. I can find no support in the words of the section for the view that this can only be done if the other evidence is very nearly sufficient for a conviction. My answer to the question is that, if there is any other relevant matter implicating the co-accused, the Judge is permitted by S. 30, Evidence Act, to consider the confession along with the matter, and as a result of such consideration to convict the co-accused.

Findlay, J. C.—I have had the advantage of perusing the opinions of my learned brothers Macnair and Subhedar, A. J. C's. I would also answer the first question referred to us in the negative, and I concur with Macnair, A. J. C., that if, in that question, the word "fact" had been used instead of "evidence," the position would have been clearer.

As regards the second question referred to the Bench, I am disposed to agree with Macnair, A. J. C., that it has been unfortunately phrased and as it stands it has to be answered in the negative. If, however, it were framed in the terms proposed by Macnair, A. J. C., viz:

"if there is other relevant matter implicating the co-accused, but insufficient to justify a conviction, can the confession be used to supplement this matter and render a conviction proper?"

I should undoubtedly answer it in the affirmative. In my opinion the use of the words "take into consideration" is most suggestive. The phraseology in question, to my mind, connotes that the framers of the Evidence Act had, in their mind, the case where the other matter, on which a conviction could be based, was, to some extent, dubious or insufficient, under which circumstances the Court is entitled to take the confession into consideration. In a particular case the confession may complete the picture and render the conviction of the accused possible and proper, or again the confession may introduce inconsistency and throw doubt on the other matter on which the conviction was attempted to be based. I find it impossible, however, to lay down any definite or precise rule as to the quantum of evidence or other matter which must in the particular case be on record against the accused before the confession can be taken into consideration for the purpose of convicting the co-accused.

With all deference, however, I am unable to agree with Macnair, A. J. C., that S. 30 is a mandatory one and that the Court is bound to take such a confession into consideration. It seems to me that the phraseology used clearly implies that the Court has a discretion in the matter and can either take the confession into consideration as against the other co-accused. If the matter be looked at from the historical point of view, it is pertinent to point out that prior to the passing of the Evidence Act material like this, what one learned Judge called "dangerous material," could not be used at all against an accused person. The Act introduces a novel provision in this connexion, but I do not think that the framers of the Act intended anything more than to bestow a discretion upon the Court to take such confession into consideration if it so sees fit. Apart from this, however, I am in agreement with Macnair, A. J. C., that:

"if there is other relevant matter implicating the co-accused, the Judge is permitted by S. 30, Evidence Act, to consider the confession along with the said matter and, as a result of such consideration, to convict the co-accused."

To the questions, however, in the forms in which they have been referred to this Bench, my answers are, as already stated, in the negative.

Order

Subhedar, A. J. C.--The following five accused were convicted by the Sessions Judge, Hoshangabad, of murdering one Fadal and the first four were sentenced to death while the fifth received the sentence of transportation for life:

(1) Gobarya, the separated brother of the deceased Fadal.

(2) Mt. Kashi, wife of accused 1.

(3) Sitaram, son-in-law of the first two accused,

(4) Budhia, not related to any of the accused.

(5) Asaram, the son of the first two accused.

Besides the confession of Sitaram fully implicating himself and the other accused, there is the following evidence on the record:

(1) The evidence of Salok (P. W. 7) that on the night following the bhu-jaria (Wednesday) about two months prior to his examination at the Sessions trial he had seen the first four accused on the Chindwara road near a banian tree going in the direction of the river. The time was when people generally go to bed.

(2) The evidence of Bhabutram (P. W. 2) and Sojar (P. W. 10) that there was ill-feeling existing between the first two accused and the deceased since the partition between them was effected last year and the evidence of Sojar (P. W. 10) and Madho (P. W. 4) that Budhia had some quarrel with Sojar since about 20 years.

All the five accused persons preferred appeals to this Court which were heard by Jackson and Mohiuddin, A. J. C's., with the result that the conviction of Sitaram was maintained and that of Asaram set aside. The learned Judges having, however, differed in their conclusions on the appeals of the remaining three appellants their cases have been referred to me, under S. 429, Criminal P. C., for opinion. Jackson, A. J. C., starting with the confession of Sitaram and holding that it was sufficiently corroborated by the aforesaid evidence was of opinion that the conviction of the first three appellants should be upheld. Mohiuddin, A. J. C., on the other hand,

holding that the confession of a co-accused was not substantive evidence though corroborated in some particulars was of opinion that the convictions of these appellants should not be upheld. In the alternative he also held that the two facts mentioned above did not amount to any corroboration of the confession of Sitaram.

As there was serious conflict of views with regard to the true scope of the provisions embodied in S. 30, Evidence Act, I had referred the following two questions for the decision of the Full Bench:

1. "Whether the self-inculpatory confession of an accused implicating his co-accused is substantive evidence upon which alone the conviction of his co-accused could legally be based, and if not.

2. Whether such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused, could form a legal basis for his conviction."

Both these questions have been answered in the negative by the Full Bench which consisted of the Judicial Commissioner, Macnair, A. J. C., and myself. I, therefore, proceed to examine how far the evidence referred to in para. 2 above, connects the appellants whose appeals are before me with the crime of which they stand convicted. The evidence of Salok (P. W. 7) is on the face of it very vague and stands alone. The place where the witness met the first four accused is described in the map (Ex. P. 5) as No. 3 and is roughly, half a mile from No. 1, the ghana where Fadal is alleged to have been murdered. This evidence is in serious conflict with the confessional statement of Sitaram on the very important points of time and the number of persons. Whereas Sitaram stated that the whole party of murderers started from the house of accused 1 for going to Sojas's ghana where Fadal lived at about 12 midnight" Salok (P. W. 7) stated that he had met them at a time when all people generally go to bed" which expression does ordinarily mean 10 p. m, at the latest. Further, whereas Sitaram stated that all the five accused had gone together, Salok makes mention only of the first four accused. It is also worthy of note that Sitaram makes no mention of the fact that the party of five murderers had met Salok at any place en route to the ghana of Sojar.

Even if the evidence of Salok (P. W. 7) be believed in its entirety it fails, in my opinion, to establish any connexion of the present appellants with the murder of Fadal.

As to the next piece of evidence of a general enmity between the deceased, Fadal, and the first two accused, it is enough to say that by itself or even in conjunction with the first piece of evidence it is wholly insufficient to uphold the conviction. In *Emperor v. Kalwa* (16) it is observed that the existence of general enmity and a desire however strong or a motive however effective to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime.

In view of the principles now laid down by the Full Bench I must hold that for want of evidence in the present case the conviction of the three appellants, Gobarya, Mt. Kashi and Budhia, should not be upheld. I therefore agree with the opinion of Mohiuddin, A. J. C., that they should be acquitted. The records will now be returned to the Bench before whom the appeals are pending.

Order.—In accordance with the opinion of Subhedar, A. J. C. to whom the case was referred under S. 429, Criminal P. C., we direct that Gobarya, Kashi and Budhia be acquitted and set at liberty. The conviction of Sitaram is upheld and the sentence of death confirmed. Asaram's case has been disposed of separately.

P.N./R.K.

Order accordingly.

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SUBHEDAR, A. J. C.

Girdhari—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 12-B of 1930, Decided on 14th March 1930, against decision of Sub-Divl. Magistrate, Basim, D/9th January 1930, in Criminal Appeal No. 108 of 1929.

(a) Criminal P. C., S. 256—**Mere recording of reasons, if no good reasons are forthcoming, would not save trial from incurable irregularity if it results in prejudice to accused—Fact that Magistrate or prosecution witnesses had to leave place of trial immediately**

are not good reasons to take up case on Sunday—Criminal P. C., S. 537.

It is not so much the recording of the reasons as the adequacy thereof which should count in the determination of the question if the provisions of S. 256 have been complied with. If no good reasons are forthcoming, merely recording them in writing by the Magistrate would not save the trial from the taint of an incurable irregularity if it results in prejudice to the accused. The reasons that the Magistrate had to go out for urgent work or that the prosecution witnesses had to leave the place of trial immediately are not good reasons for taking up a case on Sunday and rushing through the trial without giving the accused proper opportunity to defend himself.

[P 256 C 2]

(b) Criminal P. C. (1923), S. 256—**Omission to follow new procedure inserted in S. 256 by amending Act of 1923 of requiring accused to state "at the commencement of next hearing" whether he wishes to cross-examine prosecution witnesses is irregularity vitiating trial—Criminal P. C., S. 537.**

The provision that the accused should be asked whether he wishes to cross-examine the prosecution witnesses on a date subsequent to that upon which he is called upon to plead to the charge, inserted in S. 256 by the amending Act of 1923 by words "at the commencement of the next hearing," is obviously intended to give the accused an interval of time to think out the lines of his defence before he is called upon to inform the Court how he intends to proceed and an omission of this new procedure is an irregularity which vitiates the whole trial : 7 L.L.J. 114, *Foll.* [P 833 C 2, P 257 C 1]

(c) Criminal P. C., S. 537—**Magistrate taking up case on Sunday—Accused not given opportunity to appoint pleader and to defend himself properly—Trial is void.**

There is very serious prejudice caused to the accused amounting to a failure of justice by the trying Magistrate rushing through and completing the trial of the accused on a Sunday without his consent and without affording him an opportunity of properly defending himself by appointing a pleader and so the whole trial is void : (1864) W. R. Cr. 2 and 17 Bom. L. R. 918, *Foll.*

[P 258 C 2]

(d) Criminal Trial—**Complainant's story so grotesque as to be on the face of it improbable—Accused convicted—Trial vitiated by irregularity prejudicing accused's case—Accused having served out more than half sentence retrial should not be ordered.**

Where a conviction is set aside on the ground of material irregularity of procedure, a retrial should ordinarily be ordered. But where the complainant's story is so grotesque that it is on the face of it improbable, and the accused has already served out more than half the sentence, retrial should not be ordered if the trial is vitiated by material irregularity prejudicing his case : 3 Pat. L. W. 224, *Rel. on.*

[P 259 C 1]

Abdul Razak—for Applicant.

Order.—The applicant, Girdhari Sonaji, aged 32, metal moulder by profession and resident of Khamgaon, Dis-

trict Buldana, has filed this application for revision of an order passed by Mr. Utgikar, Tahsildar and Magistrate Second Class, Basim, convicting him of an offence under S. 354, I. P. C., and sentencing him to six months' rigorous imprisonment and a fine of Rs. 25. This conviction was upheld in appeal by Mr. Sanyal, Sub-Divisional Magistrate, Basim. As the case involves a decision of substantial questions of procedure, it is necessary to state the facts at some length. There was a fair at Mouza Loni in the Basim taluq of the Akola district, where Mr. Utgikar and the Sub-Inspector, Police Station House, Risod, were on duty. On Sunday 1st December last at 12-30 p. m. Tulsi made a complaint to the police which was taken down by the Sub-Inspector (Ex. P-1), the official translation of which is as under :

"I had gone to the fair with my brother Kisan. I and the men and women, who accompanied us, were going in a line. And the man brought before me was going by the cross-road, who caught hold of my left breast amidst the crowd. I then began to cry, and when asked by Anjoni, I pointed out the man, who caught hold of my breast. Bhunga, Gangu have seen him in the act of catching my breast. I wish to file complaint."

Soon after this a challan was presented before Mr. Utgikar, who rushed through the trial and after examining only the complainant, her brother and one Mt. Gangu passed the judgment convicting the applicant as stated above. The order-sheet of the Magistrate runs as under :

"1st December 1929—Loni—Challan under S. 354, I. P. C.

Register.

Present—Accused in custody and all P. W's.

Evidence for prosecution recorded.

Accused examined. Charge framed. For reasons noted inside he is asked forthwith.

He pleaded not guilty but has no defence to make.

Judgment given. P. W's. allowed to go."

Being undefended by a pleader the applicant did not at all cross-examine the other two prosecution witnesses and put only a single question to the complainant which elicited the reply : "I pointed out the accused correctly to my brother and made no mistake." In the form which is prescribed for recording the plea of defence of the accused the trying Magistrate noted as under :

"(Complainant and witnesses are from Hyderabad State and are leaving the fair to-night I am leaving this tomorrow. So accused is asked forthwith.)

He does not wish to ask anything to any of the P. W's. any more."

The plea of the accused was recorded in the following words :

"I am innocent. I have no defence to make."

On 6th December 1929, Mr. Asgherali, pleader, presented an appeal on behalf of the applicant in the Court of the District and Sessions Judge, Akola, but the memorandum was returned to him on the same day for presentation to the proper Court. It was accordingly presented in the Court of Mr. Sanyal, Sub-Divisional Magistrate, Basim, on 9th December 1929, who immediately passed an order under S. 426, Criminal P. C., releasing the appellant on bail, till the decision of the appeal. The applicant, who had in the meantime reached the Akola jail, did not probably know that his relations had engaged a pleader and got the appeal presented and therefore on 10th December 1929 he filled up the prescribed form of appeal which was forwarded by the Superintendent of the jail to the Deputy Commissioner, Akola, who in his turn sent it on to the Sub-Divisional Magistrate, Basim, on 13th December 1929. On a slip attached to this memorandum of appeal there is an endorsement of Mr. Sanyal bearing date 20th December 1929 to the effect that "this has already been registered" implying obviously that he had taken cognisance of the appeal presented by Mr. Asgherali already.

Among other grounds two important questions relating to the procedure adopted by the trying Magistrate were raised in appeal before the Sub-Divisional Magistrate and it was contended that the trial was prejudicial to the accused and otherwise invalid. The first was that the case was taken up by the Magistrate on a Sunday evidently without the consent of the applicant, and the second was that no opportunity was allowed to the accused to engage a pleader to properly conduct the defence and cross-examine the prosecution witnesses.

Both these contentions were overruled by Mr. Sanyal and they are again pressed before me by the learned pleader for the applicant. While admitting that "the Magistrate ought not to have taken up the case on a Sunday."

Mr. Sanyal held that it did not cause any prejudice to the accused because, even if the case were taken up on the following day, the accused could not possibly have engaged a pleader. He further observed that

"the appellant had sent his appeal from the jail; therein he notes that he does not desire to be represented by a pleader on the 10th December 1929."

Mr. Sanyal has evidently a short memory and is certainly wrong in stating that in the memorandum of appeal sent from jail there is a note by the appellant to the effect that he did not wish to be represented at the hearing of the appeal. Having perused this memorandum of appeal I do not find any such note in it. As a matter of fact a proper appeal was already filed by Mr. Asgheralli, pleader, before Mr. Sanyal on 9th December 1929 on which date he himself passed an order for bail, and it appears from his order-sheet of 7th January 1930 that the appeal was argued on merits by the pleader on that date. Therefore the suggestion made by Mr. Sanyal, with reference to the memorandum of appeal from jail, that applicant was not in a position to engage a pleader, even if the case was not taken up on Sunday, is obviously incorrect and very misleading.

In para. 4 of the Judicial Commissioner's Criminal Circular IV-4 it is laid down that "the Courts are entirely closed on every Sunday." As far back as 1864 a Bench of the Calcutta High Court, in setting aside an order passed on a Sunday, made the following pertinent observations in *Grijamonee v. Ishur Chunder* (1):

"But, as a rule, the Magistrate should not sit as a Judicial Officer, and dispose of cases in the ordinary course of business on a Sunday, because, to put it upon no higher ground, Sunday is a recognized holiday throughout the country; and on that day judicial business is suspended in all the Courts, and parties might be put to great inconvenience if their cases were liable to be called up for hearing on that day at the caprice of a Magistrate, and much injustice might be done."

Again, this very point arose in *Baban Daud v. Emperor* (2) where the trial of an accused was commenced and practically finished on a Sunday, the accused being unable to engage a pleader, and the judgment convicting

him was pronounced on the following day. The conviction of the accused was set aside by a Bench of the Bombay High Court on the ground (1) that there was an irregularity in procedure which had prejudiced the accused who could not be said to have had a fair opportunity to defend himself; and (2) that the fact that the accused did not ask the Court to adjourn the case did not make any difference. These conclusions have my entire concurrence.

On the second question Mr. Sanyal held that the reasons assigned by the trying Magistrate for rushing through the trial were cogent and did not prejudice the accused and that, since they were recorded in writing there was sufficient compliance with the provisions of S. 256, Criminal P. C. I shall show later on that the reasons assigned by the Magistrate were absolutely inadequate and the trial most certainly prejudiced the applicant. It is enough for the present to say that it is not so much the recording of the reasons as the adequacy thereof which should count in the determination of the question if the provisions of S. 256, Criminal P. C., have been complied with. If no good reasons are forthcoming, merely recording them in writing by the Magistrate would not, in my opinion, save the trial from the taint of an incurable irregularity if it results in prejudice to the accused.

Section 256, Criminal P. C., enacts that the accused shall be required to state *at the commencement of the next hearing of the case* whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. The words underlined (here italicized) were inserted in the section by the Amending Act of 1923 and they clearly indicate the intention of the legislature that sufficient time should be given to the accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes *Ramchandra v. Emperor* (3). The provision that the accused should be asked whether he wishes to cross-examine the prosecution witnesses on a date subsequent to that

(1) [1864] W. R. Cr. 2.

(2) [1915] 17 Bom. L. R. 918=31 I. C. 352=16 Cr. L. J. 752.

(3) A. I. R. 1926 Pat. 216=5 Pat. 110.

upon which he is called upon to plead to the charge, is obviously intended to give the accused an interval of time to think out the lines of his defence before he is called upon to inform the Court how he intends to proceed and an omission of this new procedure is an irregularity which vitiates the whole trial: *Phuman v. Emperor* (4).

The complainant's story was indeed so grotesque that it was on the face of it improbable and it was therefore the more necessary that every opportunity should have been afforded to the accused to engage a pleader to conduct the defence properly. The indecent assault at midday in a public fair upon a girl who was in the company of her brother and another woman, by a man, who evidently had a shop of his own in the fair as appears from the second sentence of the memorandum of appeal from the jail where he states that "he was at his shop" seems very improbable. Having regard to the fact that at public fairs crowds of people rush about from one place to another, it is not inconceivable that the hand of the accused may in passing have come in such close contact with the left breast of the complainant that she and her companions may have fancied an indecent assault, or it may be a case of mistaken identity. No map of the scene of occurrence is on record nor any attempt has been made by the trying Magistrate to clear up several other points which, under the circumstances of the case, required elucidation and which could only be done by close cross-examination of the three prosecution witnesses and visiting the scene of the alleged occurrence before it could be said that the charge against the accused was fully established. It is indeed a matter of very great regret that a senior officer of Mr. Utgikar's standing had not even the ordinary fairness to question the accused, situated as he was in a foreign place and suddenly confronted with the serious charge, if he wished to engage a pleader to defend him, in spite of the fact that the unfortunate man protested that he was wholly innocent of the charge.

In answer to the rule issued by this Court the District Magistrate has forwarded without any comment the try-

(4) A. I. R. 1925 Lah. 339.

ing Magistrate's explanation the material portion of which runs as under:

"1. Discretion allowed by S. 256 (1), Criminal P. C. was exercised for reasons recorded in the plea and defence sheet. I must have returned to Basim by next evening (36 miles), viz. 2nd December 1929, to meet the Commissioner, Berar, on 3rd December 1929. The witnesses also were to leave the fair the same night.

3. As stated above (para 1) the case had to be taken up even on a Sunday and as I was there to do fair duty in all its aspects, immediate disposal of criminal cases was very necessary."

The above explanation cannot bear any serious examination. In taking up the case on a Sunday and hurrying through the trial Mr. Utgikar appears to have been moved more by a sense of looking to the convenience of the prosecution witnesses and himself than to the convenience of the unfortunate man who had the misfortune of being an accused before him to stand a trial for a serious offence. I fail to see how under the circumstances stated by the learned Magistrate "immediate disposal of criminal cases was very necessary." The reasons assigned appear to me to be wholly inadequate and were all avoidable. The prosecution witnesses were already in attendance and the provisions of the Criminal Procedure Code gave ample powers to the Magistrate to bind the witnesses down for future attendance and even if they failed to attend they could have been easily summoned or brought under arrest from the Nizam's Dominions as provided by the Judicial Commissioner's Criminal Circular IV.8 (1). The offence under S. 354, I. P. C., was a bailable one and even if the challan was presented by the Sub-Inspector on Sunday, Mr. Utgikar could have easily bailed out the accused and bound down the prosecution witnesses. At all events after the charge was framed he could have easily adjourned the case to a date suitable to himself and the prosecution witnesses if he had to leave the fair the next day in order to keep his appointment with the Commissioner on 3rd December 1929.

For reasons given above I hold that there was very serious prejudice caused to the accused amounting to a failure of justice by the trying Magistrate rushing through and completing the trial of the applicant on a Sunday without his consent and without affording him an

opportunity of properly defending himself. I therefore hold that the whole trial was void. I accordingly set aside the conviction of the applicant and order him to be set at liberty without further delay. The fine if paid will be refunded.

As a necessary consequence of my setting aside the conviction on the ground that it was void there should be a retrial, but in the special circumstances of the present case, when the applicant has served out more than half the sentence, I should be doing him more injustice by ordering his retrial than if I were to uphold the conviction and reduce the sentence to that already undergone which I consider would have been the proper measure of sentence to pass even on a valid conviction. I, therefore, accept the prayer of the applicant's pleader that there should be no retrial of the applicant: cf. *Bhase Singh v. Emperor* (5).

The present case furnishes a striking illustration of the way in which administration of justice suffers at the hands of overworked executive officers. It is, therefore, desirable that the superior executive officers should distribute the work of the two branches of administration among their subordinate officers in a manner that the latter may have no excuse whatsoever for rushing through their judicial work on account of the pressure of other work.

S.N./R.K. Order set aside.

(5) [1917] 3 Pat. L. W. 224=43 I. C. 109=
(1917) P. H. C. C. 87.

* A. I. R. 1930 Nagpur 259

FINDLAY, J.C., AND SUBHEDAR, A. J. C.
Sheikh Shafi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 6-B of 1930, Decided on 18th March 1930, against decision of Addl. Sess. Judge, Amraoti, D/- 11th January 1930.

(a) Evidence Act, S. 24—Approver in murder case making several statements implicating himself—At Sessions trial retracting confessions stating that he made them being tutored by police—His pardon withdrawn and he put on trial—No evidence to corroborate his retracted confessions—Confessional statements themselves wanting in natural details and contradicting each other on important points—There was no sufficient evidence to justify his conviction.

The weight to be given to a retracted confession must depend upon the circumstances

under which the confession was originally made and the circumstances under which it was retracted, including the reasons given by the prisoner for its retraction. Unless the confession is corroborated in material particulars by credible independent evidence, or unless the character of the confession and the circumstances under which it was taken indicate its truth it would be unsafe to rely on it.

The accused was appointed approver in a case of murder. He made several confessional statements implicating himself and the other accused in the murder. But at the Sessions trial he unreservedly retracted his previous statements as approver and that he knew nothing of the murder and that he was tutored by the police into making those statements which were false. The conditional pardon granted to him was withdrawn and he was put on his trial on the previous charge of murder. There was no evidence to corroborate his confession and further the various confessional statements made by him were wanting in those natural details which one would ordinarily expect in a free and voluntary confession. The statements also contradicted one another on several important points.

Held: that there was not sufficient evidence to justify his conviction: 31 *Mad.* 83; 13 *C. P. L. R.* 107; 20 *All.* 133; 15 *Bom.* 452; 22 *Cal.* 50; *A. I. R.* 1925 *Cal.* 587 and 53 *I. C.* 929, *Rel. on.* [P 260 C 2, P 264 C 1]

* (b) Evidence Act, S. 32 (3)—Scope.

Where a person sentenced to death for murder makes a statement to a Magistrate about the time of his being hanged that the approver appointed to give evidence in the case, who had previously retracted his confessions, was not involved in [the crime] the statement may be admissible under S. 32 (3): *A. I. R.* 1925 *P. C.* 52, *Rel. on.* [P 264 C 2]

N. G. Bose—for Appellant.

Vivian Bose—for the Crown.

Judgment.—This is an appeal by Sheikh Shafi, a young mill labourer aged 20, who has been convicted by Mr. K. B. Sheorey, Additional Sessions Judge, Amraoti, of murdering one Hanmanta and sentenced to death. The appeal was received from jail but the appellant was represented at the hearing by Rai Bahadur N. G. Bose. Hanmanta was in the employ of the Badnera Mill and had disappeared from his quarters in September 1928. On 23rd March, at the instance of the Mill authorities, Mahomad Akbar (P. W. 4), who was then Sub-Inspector in charge of the Badnera Police Station House, broke open the quarters which had been kept locked by the missing man and recovered from his room a lot of property valued at about Rs. 400 as described in Ex. P-1.

On the same day Mahomad Akbar proceeded on leave and was succeeded by Kevel Krishna (P. W. 2) and the latter suspecting that Hanmanta had been

murdered began an investigation which resulted in the arrest and prosecution of the appellant and two other mill employees Pirusha and Sheikh Mshebub as being concerned in the murder of the missing Hanmanta. On 14th April 1929 the appellant made a formal confession before a Magistrate (Ex. P-9) implicating himself and the other accused. On 3rd May 1929 he received a conditional pardon and was made an approver (Ex. P-15). On the following day he was examined in the committing Magistrate's Court as the second witness for the prosecution and adhered to his confession. On 23rd July 1929, however, when he was examined as the ninth witnesses for the prosecution in the Sessions Trial No. 18 of 1929, he unreservedly retracted his confession and previous statement as an approver and stated that he knew nothing of the murder and that he was tutored by the police into making his previous statements which were false (Ex. P-18). The trial of the other two accused ended in their convictions which were maintained by this Court in appeal and both of them were hanged on 18th December 1929.

On the termination of the aforesaid Sessions trial on 30th July 1929, the Public Prosecutor having issued a certificate under S. 339, Criminal P. C. (Ex. P-17) that the appellant had forfeited his pardon, he was proceeded against and was committed to take his trial before the Court of Sessions on the original charge of murdering Hanmanta. This trial, as already stated above, has ended in the conviction of the appellant which is, however, solely based upon his own retracted confession.

Rai Bahadur Bose for the appellant did not controvert the finding of the Additional Sessions Judge that Hanmanta was murdered but he strongly contended that, in the absence of any other evidence, the conviction of the appellant, based as it admittedly was on his own retracted confession, was unsound, the more so as the circumstances on record throw a cloud of suspicion on the question of the said confession being true and a voluntary one. Although the Additional Sessions Judge has not, in his judgment, even referred to any evidence in corroboration of the confession of the appellant, the learned Government Advocate endeavoured to urge be-

fore us that there were certain facts which afforded corroboration in some measure though very slight and he therefore, submitted that the conviction should not be disturbed. It was also argued for the Crown that the confession having been duly recorded and adhered to by the appellant in the committal proceedings in the previous case, there could be no doubt that it was a true and voluntary confession.

Before dealing with the question of corroboration it is necessary, in the first instance, to determine how far the contention of the pleader for the appellant that the confession was not true and voluntary is sustainable. It is now well settled that the weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally made and the circumstances under which it was retracted, including the reasons given by the prisoner for its retraction: *Queen-Empress v. Raman* (1) at p. 88.

While it is equally true that the use to be made of such a confession is a matter of prudence rather than of law, it has been held in a series of cases that it is unsafe for a Court to rely and act on a confession which has been retracted, unless after consideration of the whole evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true. This implied that, usually, unless the confession is corroborated in material particulars by credible independent evidence, or unless the character of the confession and the circumstances under which it was taken indicate its truth: *Empress v. Chutia* (2); *Queen-Empress v. Maikulal* (3); *Queen-Empress v. Dada Ana* (4) at p. 461 and *Queen-Empress v. Jagat Chandra Mali* (5) at p. 77; it would be unsafe to rely on it.

It is a matter of regret that the learned Additional Sessions Judge did not properly appreciate the principles enunciated in the several rulings cited by him in para. 7 of his judgment and, therefore, failed to apply them to the facts of the present case. It is not correct to say that *Empress v. Chutia* (2) stood overruled by the later decision in

(1) [1898] 21 Mad. 83.

(2) [1900] 13 C. P. L. R. 107.

(3) [1897] 20 All. 133=(1897) A. W. N. 224.

(4) [1891] 15 Bom. 452.

(5) [1895] 22 Cal. 50.

Bhaddu v. Emperor (6). In both the cases there was in fact other evidence which was considered to be sufficiently corroborative of the retracted confession. The fact that Ex. P-9, the confession in the present case, was recorded by Mr. Aminulla (P. W. 3) after taking the usual precautions did not, in our opinion, relieve the learned Judge of the necessity of probing into the circumstances both antecedent and subsequent to it in order to find out if it was really a free, voluntary and true confession and could be relied on in spite of its retraction and of the fact that there was little or no other evidence to corroborate it: *Jagran v. Emperor* (7). On a careful scrutiny of the materials on record it is abundantly clear to us that the confession of the appellant (Ex. P-9) as well as his statement made before the committing Magistrate (Ex. P-16) were inspired and made by him evidently under the influence of the police as stated by him in his evidence at the Sessions trial No. 18 of 1929 (Ex. P-18).

It is surprising that the attention of the learned Additional Sessions Judge was not drawn to Ex. P-6 which is on record and which goes to the very root of the whole matter. It is admitted by Kevel Krishna (P. W. 2) that, long before he inscribed his first information report (Ex. P-7) on 11th April 1929, he had, at the instance of Sheikh Mahebub, already arrested the appellant on 8th April 1929 at 5-30 p. m., and had questioned him and that two hours later while the appellant was still in his custody, he got the appellant's statement (Ex. P-6) recorded by Mr. Aminulla (P. W. 3) on oath in the Police Station House at Badnera. Neither the Sub-Inspector nor Mr. Aminulla have in their depositions given any reasons why it was thought necessary to take down the confessional statement of the appellant and that too on oath (Ex. P-6) in such a hurry and without, as admitted by the Magistrate himself, going through the prescribed formalities which he undoubtedly observed before he recorded Ex. P-9. Mr. Aminulla stated that he did not know if the appellant and Sheikh Mahebub were "formally then arrested or not." But surely it was as much his duty as a

responsible Magistrate to have enquired about this, as it was the plain duty of a responsible police officer in the position of Kevel Krishna (P. W. 2) to have informed the Magistrate that the appellant was already under arrest before he apparently prevailed upon the Magistrate to record the confessional statement of the appellant on oath.

It is conceded by the learned Government Advocate that Ex. P-6 could not, in the circumstances, be admissible in evidence but it can obviously be taken by us into consideration to find out if the subsequent formal confessional statement of the appellant (Ex. P-9) was or was not a free and voluntary statement as it purports to be. It is clear to us that after Ex. P-6 was taken it was not at all difficult to get Ex. P-9 recorded. In spite of his being sent to jail custody on 13th April 1929, the appellant could not have for gotten during the space of one day when he was not in police custody, that he had already made a statement on oath a week before and that it was not therefore possible or desirable for him to resile from it on the 15th idem when his confessional statement (Ex. P-9) was recorded.

The Sub-Inspector (P. W. 2) in his evidence states that on 30th April 1929, he made a recommendation to his District Superintendent of Police that the appellant should be made an approver by the grant of a conditional pardon. It is not stated by him why out of the two confessing accused, viz., the appellant and Sheikh Mahebub, the former alone should have been selected for being made an approver in the case. This course appears very likely to have been adopted with two objects. The challan was presented on 23rd April 1929, and the investigation had only disclosed that there was bare circumstantial evidence against Prusha and Sheikh Mahebub, while there was none whatsoever against the appellant. In order therefore to make the case against the other two accused complete by the introduction of direct evidence and at the same time to fulfil a possible promise made to the appellant to save him, the appellant was presumably selected for being made an approver. On account of his being only a raw youth of 20 he was possibly amenable to manipulation as would seem to have been the case, a matter

(6) [1918] 19 Cr. L. J. 861=46 I. C. 1005.

(7) [1909] 13 C. W. N. 861=2 I. C. 681=9 C. L. J. 663.

which will be clear when we examine his several statements.

The several confessional statements of the appellant, Exs. P-6, P-9 and P-16, are wanting in those natural details which one would ordinarily expect in a free and voluntary confession. To begin with, there is nothing to show if the appellant and Sheikh Mahebub and Pirusha were on terms of such intimacy either by reason of age, friendship or relationship, that the latter would take him into their confidence to commit such a diabolical crime. The murder was committed evidently for loot and some of the property of the deceased was traced to the two persons who have already paid the extreme penalty for the crime. In his confession, however, the appellant does not say that he was even told of this object by the principal actors or that they induced him to join them for mercenary motives. He merely states that some five or six days after the murder he was only paid Rs. 10 by Pirusha. In the next place a careful comparison of the aforesaid three statements reveals that each subsequent one is a distinct improvement over its predecessor in very material particulars, regardless of its being contradictory to the previous one. This clearly indicates that there was another brain working behind that of the appellant; each statement subsequent to Ex. P-6 seems to fit in with the case for the prosecution as it developed from time to time during the investigation by the police.

In Ex. P-6 the appellant had stated that, about the middle of the previous rainy season, one day, when the factory was closed, he, Sheikh Mahebub, Piry and with "one black man in a dhoti" and one Hanmanta Mahar had gone to the house of Piry. From there at 1.30 a.m. they started to go to Masan; that Piry had a hatchet, a spade and Hanmanta Mahar had taken a lathi in his hand; that Piry dealt the deceased a blow with the hatchet from behind; that Mahebub gave two blows with the head of the pick-axe on the back of the deceased; that he himself gave one blow with the head of the spade; that Hanmanta Mahar dealt two blows with his lathi; that Piry and the black man had taken off their clothes; that after Hanmanta was dead, Mahebub took off silver Kada from his hand and he the mudkis;

that Piry took away all the ornaments; that the deceased was wearing a patka, a shirt and had chappals on his feet and a dhoti on; that Piry paid him Rs. 10 five or six days after the incident, and that Piry had told him not to reveal the secret by brandishing his big knife.

On 15th April 1929 the appellant made the following confession :

"Peeru, Mahebub and I conspired four days before Pola at Peeru's house. Peeru said, 'We will kill Hanmanta'. On Tuesday Mahebub, Peeru and I went to bring Hanmanta. We brought him and went so far as the nala. We went to Peeru's house. From there we went along the nala. Peeru killed Hanmanta with an axe. He fell down. Then Mahebub and I struck him with sticks. He died within 25 minutes. The deceased had 2 mohurs, 2 Murkis and 2 kadas which Peeru kept with himself promising to pay me Rs. 10 and Rs. 4 to Mahebub. We put the corpse in a pit and covered it under earth. The pit was ankle deep, containing water. We three put the corpse into the pit and then covered it with earth. Having put the corpse along with its clothes into the pit, we started from there and returned (to our houses). Peeru gave me Rs. 10 on Sunday. He paid Mahebub also Rs. 4 on Sunday. I have nothing more to say. I showed the place where the corpse was buried to the police and recovered clothes from there, but I do not know what became of the corpse."

It is to be noted that in this confession the appellant is very definite in his date, introduces conspiracy without giving any details, drops the story of the black man and Hanmanta Mahar, is silent on the description of the clothes which Hanmanta was wearing and the threat given to him by Pirusha to keep the secret, introduces two gold mohurs and the payment of Rs. 4 to Mahebub and contradicts the previous story of the assault made by himself and Mahebub by substituting sticks for pickaxe and spade. Lastly he asserts that he showed the place to the police where the corpse was buried and the clothes were recovered. This assertion is proved to be false by the evidence of Kevel Krishna (P. W. 2), who clearly deposed that the appellant was unable to point out the place and that it was Mahebub who did so and that Mahebub pointed out the clothes.

In the last statement of the appellant as an approver (Ex. P-16) final touches are clearly noticeable obviously intended to make it conform fully with all the details of the prosecution story which, as a result of complete investigation, was ultimately presented to the Court.

This will be clear from the following extracts from Ex. P-16 :

"The deceased Hanmanta Lodhi used to live in the chawl of the mill about two or three rooms apart from the room of Sheikh Mahebub. He was neuter . . . Hanmanta used to put on two silver kadas one on each hand, 2 gold mohurs on the neck, 4 gold mudkis, 2 on each ear. . . . On Tuesday about seven months back at about 7 or 8 p. m. Pirush took me and Mahebub to the house of the deceased. . . . At about 8.30 p. m. myself, Piru, Hanmanta and Mahebub went to the house of Piru. . . . Hanmanta asked Piru to give some medicine which would cure him of impotency and promised to give him Rs. 20 if he gave proper medicine. Piru promised to give him that medicine. At about 11 p. m., we left for the burial ground as Piru had promised to cure Hanmanta there. . . . Oury gave me the stick, article 3, and he himself carried the axe and kudali articles C and D. Mahebub carried the stick, article F. . . . We all went to the masan. It was pitch dark then. . . . Hanmanta carried a hurricane lantern with him. . . . On the way the light got extinguished. When we reached the masan, Piru dealt a blow with the axe, article D on the neck of Hanmanta and he fell down. Piru then said "What are you seeing. Beat this fellow." I gave Hanmanta two lathi blows on the head. . . . Piru had a knife, article G tied to his loin cloth. He cut out the two gold mohurs from the neck of the deceased. He also took out the two mudkis from the ear. He asked us to take out the silver kada and I and Mahebub took out one kada each. I took out the kada of the left hand. Piru took the kadas from us saying that we had no pockets. He kept two silver kadas, 2 gold mohurs, and 4 gold mudkis in his pocket. . . . The deceased was putting on a red bordered dhoti, a white bandi, a black coat, a Marwadi shoe, and a red cap. Article H is the same dhoti, I the bandi, J the black coat, K the shoe and L the cap. . . . We returned to the house of Piru. It was about 1 or 1.30 a. m. then. Piru gave 1 gold mohur, a pair of mudkis and 1 kada to Mahebub. He himself retained 1 mohur, 1 kada and 1 pair of earrings. Piru promised to give me 10 rupees on Sunday when he came to Amraoti. He accordingly gave me Rs 10 on Sunday. . . . I can identify the ornaments. The mohur is article M, two earrings are article N and the silver kadas article O. Hanmanta had been putting these on when he was murdered. These articles had been given to Mahebub by Piru. Piru threw away the stick article F, after taking the same from the hand of Mahebub. It was thrown on a cactus hedge. Its end was splintered on account of beating and it had two splinters attached to it. My stick was taken away to his house by Piru."

It is very significant to note that while it was pitch dark and the lantern, which the party had taken with them, had been extinguished, and when the appellant himself had apparently no opportunity to handle the most ordinary and common articles which were on the person of the deceased i.e. the axe and

knife which Piru had with him, yet as an approver he was able to identify all these in the committing Magistrate's Court with absolute certainty. Kevel Krishna (P. W. 2) has not stated that the appellant was also able to pick out all these several articles from others of similar kinds as he is supposed to have done in the case of the bamboo stick article F. The end of this stick

"was splintered on account of beating and it had two splinters attached to it."

It must have been noticed that in his previous two statements the appellant did not make any mention of this stick which is supposed to have played such an important part in the murder.

It indeed requires a great deal of courage to put such an intrinsically improbable story as is contained in Ex. P-16 before a Court of justice, but it demands a greater degree of credulity on the part of a Judge to accept it as true. The statement in Ex. P-16 is undoubtedly fuller than the previous statement, but in very essential details it obviously contradicts the earlier ones. If it was a true statement, it cannot be explained why a different one on most of the essential points was made by the appellant on 8th April when his confessional statement was recorded by Mr. Aminulla (P. W. 3) in the Police Station House at Badnera. The only legitimate conclusion then to be drawn from all the circumstances is that the appellant gave out the truth when two-and-half months later, in his deposition at the Sessions trial he stated that his previous statements were false: see Ex. P-18.

As observed in *Emperor v. Panchkari Dutt* (8) S. 24, Evidence Act, does not require positive proof of improper inducement to justify the rejection of a confession, the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required, that anything ranging between the barest suspicion on the one hand and absolute certainty on the other may be sufficient to satisfy the requirements of the section for the rejection of a confession, and that if a prima facie confession is false, inconsistent, or absurd that might suggest that it is not voluntary. In another *Calcutta* case where a retracted confession

was rejected because the surrounding circumstances disclosed that it was obtained under police pressure, it was observed that it is always difficult for an accused person to prove ill-treatment or inducement by the police even when it is true: *Mobarak Ali v. Emperor* (9).

Having given our best consideration to all the facts and circumstances of the present case, we are far from convinced that the confession (Ex. P-9) of the appellant is true and was voluntarily made and, as the same is retracted, we deem it very unsafe to uphold the appellant's conviction only on its basis. It is rightly conceded by the learned Government Advocate that the first confessional statement (Ex. P-6) is totally inadmissible in evidence against the appellant. There then remains the appellant's statement as an approver. Since that deposition is also unworthy of credence for reasons already given and is also retracted, it cannot afford any corroboration of the retracted confession: *Empress v. Chutia* (2).

The learned Government Advocate had argued that the confession of the appellant was corroborated by the following facts:

(1) That the appellant pointed out the places where Hanmanta was buried and the articles H, B, F and J;

(2) that the lathi (article G) was picked up by the appellant from among the other lathis and the appellant testified that it was the lathi which Pirusha had given to Mahebub;

(3) that two women had seen a body being eaten by vultures in the neighbourhood where some bones and hairs were recovered.

As to the first fact both the Sub-Inspector Kevel Krishna (P. W. 2) and Govindrao, patwari (P. W. 5), have clearly stated that Mahebub and Shafi had gone together in the company of the police to show the place of the burial of the dead body of the deceased Hanmanta, but that the appellant was unable to locate the place saying that he had forgotten it "as it was dark." Both of them stated that it was Mahebub who pointed out the place as also the articles H, B, F and J. As to the second fact there is nothing on the record of this case to show when or wherefrom or by whom article G was picked up. Nor

is there any evidence to corroborate the statement of the appellant in Ex. P-16 that this lathi was given by Pirusha to Mahebub and subsequently thrown away. As to the third fact it is sufficient to state that, since the appellant was unable to locate the spot where the body of the deceased Hanmanta was thrown away, the evidence of these women affords no corroboration whatsoever to the confession of the appellant.

The above discussion is sufficient to dispose of the appeal, but we cannot refrain from remarking on one very significant fact which was that Mahebub, just before he was about to be hanged stated to Mr. Vaidya (D. W. 1), Magistrate, First Class, who had gone to witness the execution, that the appellant was not concerned in the murder and that he and Pirusha alone had committed the crime. Mr. Vaidya took care at once to write to Mr. Digby, the Sessions Judge, informing him of this incident: Ex. D-1. The learned Additional Sessions Judge refused to receive this statement on the ground that it did not come within the purview of S. 32 (1), Evidence Act. We are, however, of opinion, though not without some degree of doubt, that the statement in question could be admissible under S. 32 (3), Evidence Act. In *Umra v. Emperor* (10), where an accomplice incriminating himself and the appellant by a statement to the police about the crime, had subsequently died, his statement was admitted in evidence by the High Court under S. 32 (3), Evidence Act, and special leave for appeal to the Privy Council was rejected as the question was one of interpretation of certain sections of a statute. For the foregoing reasons we accept this appeal, set aside the conviction and order that the appellant, Sheikh Shafi, be set at liberty.

S.N./R.K.

Conviction set aside.

(10) A. I. R. 1925 P. C. 52=6 Lah. 45=52 I. A. 121 (P.C.).

(9) [1919] 20 Cr. L. J. 883=53 I. C. 929.

* * A. I. R. 1930 Nagpur 265

JACKSON AND MOHIUDDIN, A. J. C'S.

Bajirao and others—Plaintiffs—Appellants.

v.

Atmaram and others—Defendants—Respondents.

First Appeal No. 56-B of 1929, Decided on 15th April 1930, from decree of Addl. Dist. Judge, Amraoti, D/- 16th April 1929, in Civil Suit No. 62 of 1928.

(a) Hindu law—Schools of law—Berar is governed by Bombay School—Mayukha supplements Mitakshara when ambiguous

Berar is prima facie governed by the Bombay School of law : and, though the Mayukha has not the same authority there as in Gujraht it supplements the Mitakshara and where the text of the Mitakshara is ambiguous, considerable weight must be given to the Mayukha.

[P 266 C 2]

* * (b) Hindu law—Inheritance—Mitakshara—Samanodakas include all agnates whose descent from common ancestor can be traced.

Under the Mitakshara the samanodakas extend beyond the fourteenth degree from the common ancestor and include all agnates whose descent from the common ancestor can be traced : 40 *Mad.* 654, *not Foll.* : 10 *Bom.* 372 and 32 *All.* 594, *Rel. on.*, 9 *All.* 467 and 30 *All.* 510 (*P.C.*), *Expl.*

[P 267 C 1]

Hari Singh Gour and *V. N. Herlekar*—for Appellants.

M. B. Kinkhede, R. V. Brahma, P. B. Gole, R. K. Manohar, A. V. Khare and *T. L. Sheode*—for Respondents.

Judgment.—This appeal arises from a suit for possession of immovable property and for mesne profits. The property in question was owned by one Manikrao, who died on 27th October 1916. The plaintiffs' case is that on his death Vithoba, plaintiff 3, and Janrao, the father of plaintiffs 1 and 2, and the brother of Vithoba, were entitled to succeed as samanodakas. The lower Court has held that Vithoba and Janrao were not entitled to succeed as samanodakas and has dismissed the plaintiff's suit.

The decision of the question before us turns, in the first place, upon the interpretation of a text of the Mitakshara (Chap. 2, S. 5, placitum 6), which has been translated as follows :

"If there be none such, the succession devolves on samanodakas and they must be understood to reach to seven degrees beyond sapindas, or else as far as the limits of knowledge as to birth and name extend. Accordingly Vrihat Manu says : "The relation of the sapinda ceases with the seventh person ; and that of samanodakas extends to the fourteenth

degree ; or as some affirm, it reaches as far as the memory of birth and name extend. This is signified by gothra."

The lower Court understands that Vijnaneswara's own opinion is contained in the words :

"they must be understood to reach to seven degrees beyond sapindas "

and that the words

"or else as far as the limits of knowledge as to birth and name extend "

are intended to express the opinion of others. According to the appellants' learned counsel it is the latter words that express Vijnaneswara's true opinion. The view taken by the lower Court is that expressed in *Rama Row v. Kuttiya Goundan* (1), while that of the appellants is supported by *Bai Devkore v. Amritram Jamiatram* (2), *Ram Baran Rai v. Kamla Prasad* (3) and *Hira Singh v. Vir Singh* (4).

For the respondents *Naraini Kuar v. Chandi Din* (5), *Kalka Prasad v. Mathura Prasad* (6) and *Mewa Singh v. Basant Singh* (7) have also been cited as supporting the lower Court. In the first of these cases all that the Allahabad High Court held was that, according to the Mitakshara, a sister's son, who is a bandhu, cannot inherit until the direct male line down to and including the last samanodaka has been exhausted. The samanodakas were treated as ending with the fourteenth degree, but the persons who were held to be the nearest heirs to the last male holder in that case were well within fourteen degrees from the common ancestor and the question whether a person beyond the fourteenth degree from the common ancestor is entitled to inherit as samanodaka did not arise, so that the decision cannot be treated as authority for holding that he is not so entitled. The second decision is one by the Privy Council and their Lordships have not expressly declared that the samanodakas are confined to those within fourteen degrees of the common ancestor ; but it is argued that such a declaration

(1) [1917] 40 *Mad.* 654=30 *M. L. J.* 514=34 *I.C.* 294=3 *M. L. W.* 331.

(2) [1886] 10 *Bom.* 372.

(3) [1910] 32 *All.* 594=6 *I. C.* 698=7 *A. L. J.* 802.

(4) [1918] 47 *P. R.* 1918=111 *P. L. R.* 1918=43 *I. C.* 460=20 *P. W. R.* 1918.

(5) [1887] 9 *All.* 467=(1887) *A.W.N.* 118.

(6) [1908] 30 *All.* 510=35 *I. A.* 166=11 *O. C.* 362 (*P. C.*).

(7) *A. I. R.* 1918 *P. C.* 49.

is implied. In that case the plaintiffs claimed as the sons of one Sheo Sahai the property of one Gur Sahai after the death of his widow. The trial Court accepted the pedigree set up by the plaintiffs, which shows both Sheo Sahai and Gur Sahai in the seventh degree from the common ancestor, Partab Mal, and found that Sheo Sahai was entitled to succeed as the nearest heir. In appeal the Court of the Judicial Commissioner, Oudh, rejected the pedigree put forward by the plaintiffs and on another pedigree, admitted by the defendants, held that Sheo Sahai was a samanodaka of Gur Sahai, although he was sixteenth in descent from the common ancestor, but, as four other persons, who were alive at the death of Gur Sahai's widow, were related to Gur Sahai in the same degree as Sheo Sahai, it decided that Sheo Sahai was entitled only to a 1/5th share of the property in dispute. Their Lordships of the Privy Council restored the finding of the trial Court as to the degree of relationship in which Sheo Sahai and Gur Sahai stood towards the common ancestor; and it is argued that they would not have gone into this point if they had agreed with the Court of the Judicial Commissioner that Sheo Sahai was entitled to succeed as samanodaka even if he were beyond the fourteenth degree; but this does not follow. The question to be decided was whether Sheo Sahai was entitled to succeed alone or with four others and their Lordships had to decide in what degree each of the five stood. In deciding that question they came to the conclusion that the trial Court's finding was correct and, as that finding put Sheo Sahai well within the fourteenth degree, they were not called upon to decide whether he could succeed if he was beyond that degree.

Mewa Singh v. Basant Singh (7) is another Privy Council decision, in appeal from the High Court of Allahabad, and it contains the following passage:

"The family in question is governed by the law of the Mitakshara. Those who claim to be the reversionary heirs must bring themselves within the necessary number of degrees, viz, fourteen "

but their Lordships' decision turned on the fact that the plaintiffs had failed to prove their relationship. The question whether the samanodakas extend beyond the fourteenth degree does not

appear to have been raised, and there has been no reference to the conflict of opinion that has risen in India on the point and no discussion of the pros and cons. We do not think that there has here been enunciation of a principle that would bind the Courts in India.

It seems to us then that the respondents' case as to the interpretation of the Mitakshara text rests solely on the authority of *Rama Row v. Kuttiya Goundan* (1). We cannot agree with the view there taken that the words of Vijnaneswara "or else as far as the limits of knowledge as to birth and name extend" are merely a halting allusion to what others say on the definition of the term "samanodaka." As we have already pointed out, the contrary view has been taken in three other High Courts. *Ram Baran Rai v. Ramla Prasad* (3) cannot be dismissed as it has been in *Rama Row v. Kuttiya Goundan* (1) on the ground that it is only authority for the way in which the fourteen degrees are to be computed; nor is the authority of *Bai Devkore v. Amritram Jamiatram* (2) for the purposes of the present case weakened by the fact that it is a case from Gujrath where the Mayukha is paramount; it is in fact strengthened. The present case is from Berar and is therefore prima facie governed by the Bombay School of law; and, though the Mayukha has not the same authority as in Gujrath, it supplements the Mitakshara, and in the present case, where, in our opinion, the text of the Mitakshara is ambiguous, considerable weight must be given to the Mayukha. The text of the Mayukha on the point, as translated by Rao Sahib Vishvanath Mandlik, is given in *Bai Devkore v. Amritram Jamiatram* (2) as follows:

"All the sapindas and the samanodakas (follow) in the order of propinquity. Manu thus mentions them. (Ch. 5, v. 60): "The sapinda relationship ceases with the seventh person in the line) and that of samanodakas (i. e. those connected by an oblation of water) ends when births and names are no longer known." Saptame means the seventh (in the line) being included."

This seems to us to remove any possible doubt as to the rule that prevails under the Bombay School of law; and on the authorities we have considered the same rule prevails under other Schools governed by the Mitakshara

namely, that the samanodakas extend beyond the fourteenth degree from the common ancestor and include all agnates whose descent from the common ancestor can be traced.

That being so, we must hold that in the present case Vithoba and his brother Janrao were entitled to succeed to the property of Manikrao on the latter's death. The decree of the lower Court is accordingly reversed and the suit will be remanded for further trial. The appellants will get a refund of court-fee and other costs will be costs in the suit.

V.S./R.K. *Appeal allowed.*

A. I. R. 1930 Nagpur 267

JACKSON AND MOHIUDDIN, A. J. C's.
Ramchandra—Plaintiff—Appellant.

v.

Ramabai and *others* — Defendants—Respondents.

First Appeal No. 55 of 1926, Decided on 4th February 1930, against decree of Addl. Dist. Judge, Nagpur, D/-31st, March 1926.

(a) **Hindu law—School of law—Mere fact that resident in Nagpur is Maharashtra Brahmin does not mean that he is governed by Bombay School.**

The mere fact that a resident in Nagpur is a Maharashtra Brahmin does not mean, in the absence of proof of his immigration from Maharashtra, that he is governed by the Bombay School of Hindu law: *Special Appeal No. 270 of 1877*; 14 N. L. R. 82; A. I. R. 1921 P. C. 59 and A. I. R. 1924 Cal. 383; Dist. 11 C. P. L. R. 49 and 2 C. P. L. R. 18, *Rel on.*

[P269 C 1]

(b) **Evidence—Admissibility—Evidence Act S, 32 (5) and (6)**

Where evidence to support immigration of a Hindu family from one province in to another is of witnesses who have heard about it from deceased members of the family, it is inadmissible. Cl: (5) and (6) of S. 32, Evidence Act do not apply to it. [P 269 C 1]

M. R. Bobde, and *D. W. Kathalay*—for Appellant.

H. S. Gour, *M. B. Kinkhede*, *A. D. Mande*, *W. R. Puranik*, and *N. K. Alekar*—for Respondents.

Judgment.—The plaintiff, *Ramchandra*, is the maternal grandson of *Sadasheo Shirpurkar*, deceased. *Gopal* defendant 2, is *Sadasheo's* brother *Ramabai*; defendant 1, is *Sadasheo's* daughter and *Savitri*, defendant 3, is the widow of *Sadasheo's* son. The suit is for a declaration that the disposition of *Sadasheo's* estate by a partition deed (Ex. 4 D. 1) dated 10th March 1910, is invalid. The other defendant 4 to 6 were

parties to the deed; *Govind Atmaram Shastri*, defendant 6, being the father of the plaintiff, represented him as he was then a minor. The lower Court has found that the family of *Shirpurkar* is governed by the Bombay School of Hindu law and that, therefore, *Ramabai* as *Sadasheo's* daughter took an absolute estate and no disposition of the property by her can be questioned by the plaintiff.

The lower Court's finding, as to the School of Hindu law that applies, is based on another finding, that the ancestors of the *Shirpurkar* family, now resident in Nagpur, migrated there about a hundred years ago from the village of *Shipora* in the *Aurangabad District* of His Exalted Highness the *Nizam's* Dominions. Apart from that finding as to the migration, the lower Court was prepared to hold that the Bombay School of law applied on the simple ground that *Sadasheo Shirpurkar* was a Maharashtra Brahmin, and has remarked that that undisputed fact means that there was a time when the family lived in Maharashtra. The first argument that was addressed to us on behalf of the defence was based on this view and certain rulings have been cited to us in support of it. The first is that of *Grant, J. C.*, in *Mt. Larmi Bai v. Srikrishna Rao* (1). The effect of that decision is stated in the Digest of Special Rulings published in 1882 to be that in case of Maratha Brahmins residing at Nagpur the School of Hindu law to be followed is that of Western India. The decision is based on the following passage in the judgment:

"To come now to the question of law. The legality of the adoption of a sister's son may be first considered as the objection made to the defendant's title on this score goes to the root of the case, by opening up the question of the law to which the parties are subject. The family to which they belong, is of the Maratha or Dakhni Brahmin caste, and it is admitted that it has maintained its connexion with the present stock or tribe up to a very recent date, the plaintiff herself having been brought from Poona, the headquarters of the western Brahmin to marry her deceased husband. The plaintiff's case is, however, that the family has left its original seat so long ago, having settled first in Berar some three or four centuries since, as to have acquired a fresh domicile in the Nagpur country, and that the prevailing (Hindu) law in Nagpur is that of the Benares School. For the defendant on the other hand, it is contended that, as the

(1) *Special Appeal No. 270 of 1877.*

family belongs to Western India by race and by language, and that as it has continued to maintain its connexion with the parent stock up till now, the law by which it is governed in its family relations can only be that of the Western School. The importance of the point, as will be seen presently, is in the different view which these Schools take of the admissibility in adoption of a sister's son.

There can, I think, be no doubt that the view advanced on the part of the defendant is correct. Up to A. D. 1700 (according to the Central Provinces Gazetteer, article Nagpur), 'the bulk of the Nagpur population was undoubtedly Gond; but during his reign, and possibly to a slight extent before it, there had set in an immigration of Brahmins and Kunbis from Berar and the West and of Musalmans and Hindus of all castes from Hindustan. . . . yet the great influx of the Brahmins, Marathas, Kunbis, Koshties and Dhers doubtless did not commence until the usurpation of the Gond sovereignty by Raghoji in A. D. 1743. . . . The language of the bulk of the people is (now) Marathi. . . . The Marathas, Kunbis, Koshties and Dhers, are the classes forming the great bulk of the population.' It is thus clear that, even if the Hindu settlers from Upper India came in sufficient numbers to stamp their religion and laws upon the indigenous communities, which there is no reason to believe, they were subsequently outnumbered and swamped by a large volume of immigration from the West and that the prevailing and characteristic element in the population is now and has been for at least a century, the Maratha. Why then should it be supposed that a Maratha Brahmin family, settling among a mainly Maratha population, and taking service under a Maratha prince, should adopt the law and customs of a comparatively small body of Hindustani immigrants? These Hindustanis had never had exclusive or dominant possession of the country. They merely constituted one out of many streams of immigration, directed by a Gond Prince into a Gond country. It may be presumed that even on their first arrival, they had enough to do to hold their own, and it would be contrary to reason to suppose that scattered cultivating bodies or even occasional Government officials and artisans, such as made up their members, should have imposed their law, first upon the country to which they came as humble settlers and not the only settlers and then upon a vastly larger body of conquering invaders. I think it possible then that the Maratha conquerors found the country unoccupied by any of the Hindu Schools of law, and that they had no temptation or inducement to depart from their own codes."

In *Ganoo v. Beni* (2), there is an obiter dictum by Stanyon, A. J. C., that in the Central Provinces the Bombay School of law is applied only to Marhatta Brahmins in Nagpur and other places where it is specially found to be applicable. This may be simply based on the effect of Grant, J. C.'s, decision as stated in the Digest of Civil Rulings.

(2) [1918] 14 N. L. R. 82=43 I. C. 943.

A reference is made by Stanyon, A. J. C., to that ruling. That decision does not appear to have been examined and Stanyon, A. J. C.'s dictum does not seem to us to add anything to its weight. A more important ruling is that in *Balwant Rao v. Bajirao* (3) in the course of which their Lordships of the Privy Council remarked:

"Now it is found clearly by both learned Judges that Bapuji was a Maharashtra Brahmin. The District Judge says so in the first sentence of his judgment. The Judicial Commissioner says:

"It is common ground that Bapuji's ancestors had at one time lived in Maharashtra, in the Bombay Presidency. It is not known whether Bapuji and himself emigrated, or whether his ancestors had done so."

In the opinion of their Lordships, that in this case, settles the matter. His family was according to this admission subject to the law as expounded in Bombay."

We are not of opinion that the Privy Council decision warrants the view that the mere fact that a man is a Marhatta or Maharashtra Brahmin means that he is governed by the Bombay School of law; it is opposed to the presumption stated in *Jawahir Lal v. Jaran Lal* (4), that persons are governed by the *lex loci* of their residence. It is to be noted that in the case before the Privy Council the fact of migration from the Bombay Presidency was admitted and in the earliest decision cited, that by Grant, J. C., migration seems to have been assumed. That decision in Special Appeal No. 270 of 1877, was referred to by Neill, J. C., in a later case as laying down that in the case of Maratha Brahmins residing in Nagpur the School of law that is to be followed is that of Western India, and Neill, J. C., goes on to remark:

"I cannot see why the same rule should not apply to other Marathas settled in these parts."

This appears to follow logically from the remarks of Grant, J. C., quoted above; but the extension of the rule to others than Maratha Brahmins would mean that the Bombay School of Hindu law would be of very general application throughout the southern part of the Province. That it is the *lex loci* of the southern part of the Province was put before Stevens, J. C., in *Deorao Zamin-dar v. Mt. Sakhu Bai* (5), and rejected as being opposed to the view taken in

(3) A. I. R. 1921 P. C. 59=16 N. L. R. 187=43 Cal. 30 (P.C.).

(4) A. I. R. 1924 All. 350=46 All. 192.

(5) [1898] 11 C. P. L. R. 49.

Hiralal v. Mt. Tani Bai (6), now the accepted view, that the law of the Benares school is the *lex loci* of the Central Provinces. If we cannot assume that Marathas generally living in the Central Provinces are governed by the Bombay School, it seems to us that we cannot assume it with regard to Maratha Brahmins, about whom nothing is known except that they are Maratha Brahmins and live in the Central Provinces. Reliance was placed upon *Ramesh Chandra Sinha v. Muhammad Elahi Bukhsh* (7), in which it was held that proof of migration into Bengal was not necessary and that proof of the place of origin and the continuation of practice after migration is sufficient; but in that case again there does not appear to have been any doubt that there had been migration, though proof was not forthcoming of the actual fact.

We now come to the evidence to prove that the ancestors of Sadasheo Shirpurkar migrated from Shirpur. (Here the judgment considered evidence and proceeded). The evidence to support the migration is principally that of witnesses who heard about it from deceased members of the family and they vary as to what they did hear: Govind (2 D. W. 2) heard from the father-in-law of Gopal that the Shirpurkar family came from Berar; Baliram (2 D. W. 3) heard from Balambhat, the brother of Sadasheo and Gopal, that the family came from Shirpur in Berar; Gangadhar (2 D. W. 6) heard from Sadasheo that the family came from Shipora in Khandesh, Bhagwan Singh (2 D. W. 7) heard from Sadasheo that the family came from Shipora in Berar or, as he says in cross-examination, in Moglai territory; Damodar (4 D. W. 1), Sadasheo, (4 D. W. 2), Janardan (4 D. W. 16) and Bapuji (4 D. W. 18) heard Sadasheo say that the family came from Berar; Tukaram Janephalkar (4 D. W. 5) heard from Dadopant that the migration was from Shipora; Venkatrao Naik (4 D. W. 10) heard from Dadopant that the family came from Shipora in the Chikli Taluq of Buldana; Bajirao Shirpurkar (4 D. W. 11) and Pandurang Shirpurkar (4 D. W. 22) say that the family came from Shipora. The first of these two witnesses learnt this

from Sadasheo and the second from his own father.

There is evidence on the plaintiff's side of witnesses, also including members of the family, that Sadasheo used to assert that he had come from Shirpur not from Shipora; but even without that evidence to contradict it, we consider that the evidence to prove migration fails to do so. Not only is it weak but it is, in our opinion, inadmissible. For its admissibility we have been referred to Woodroffe and Ameer Ali's *Law of Evidence in British India*: (8th Edn.), pp. 337 and 338, where Cls. 5 and 6, S. 32, Evidence Act, are commented upon. Those clauses run as follows:

"(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised.

(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait, or other thing on which such statements are usually made and when such statement was made before the question in dispute was raised."

Clause (6) has obviously no application; and, as to Cl. (5), it is not statements by Sadasheo and others relating to the existence of any relationship of which they had special means of knowledge that evidence has been given. (Here again the judgment discussed evidence and concluded). Our conclusion is that migration from Shipora has not been proved; and, in view of what we have said in the opening part of this judgment, it must be taken that the family of Shirpurkar is governed by the Benares School of Hindu Law. The result is that the decree of the lower Court must be set aside and the case remanded for a fresh decision. As the trial Court's decision is based simply on the preliminary finding that the Bombay School of Law applies, a refund of court-fees will be granted to the appellant and other costs will abide the final result of the suit.

S.N./R.K.

Decree set aside.

(6) [1889] 2 C. P. L. R. 18.

(7) A. I. R. 1924 Cal. 333=50 Cal. 393.

A. I. R. 1930 Nagpur 270

MACNAIR, A. J. C.

Sk. Kasam—Appellant.

v.

Joharbi and others—Respondents.

Misc. Appeal No. 35 of 1929, Decided on 31st January 1930, against order of Addl. Dist. Judge, Wardha, D/- 19th July 1929.

(a) Practice — Precedent — Unreported decision of High Court is entitled to respect by lower Courts and should not ordinarily be differed from.

The Judge of the lower Court should treat with respect an unreported decision of the High Court. Even if it is a single and isolated decision he should not differ from it unless he is strongly of opinion that it is erroneous: but it is his duty to consider the point for himself and decide whether or not he should follow the decision. [P 270 C 2]

(b) Mahomedan Law — Dower — Non-payment of dower is no bar to suit for restitution of conjugal rights.

There is no reason why a husband should not be entitled to conjugal rights until he had paid dower. Dower is not prompt in all marriages, and when it is prompt the result appears simply to be that the wife can insist on its payment. Therefore non-payment of dower cannot be pleaded as a bar to a suit for restitution of conjugal rights: 8 All. 149, (F. B.); 11 Mad. 327; 17 Cal. 670 and 30 Bom. 122, Rel. on. [P 270 C 2]

Abdul Razak—for Appellant.

W. R. Puranik—for Respondents.

Order.—The plaintiff-appellant sued for restitution of conjugal rights. The trial Court held that the suit was maintainable even if the plaintiff had refused to pay prompt dower. The lower appellate Court considered itself bound to follow a decision of this High Court to the effect that, when dower is overdue and unpaid, the wife has a right to refuse herself to her husband. A summary of this decision appears in a publication entitled:

"A Digest of the Civil Rulings of the Court of the Judicial Commissioner of the Central Provinces for the years 1862-1881,"

which was apparently prepared by the Registrar of this Court. There is nothing to show that it was published under the authority of the Local Government. In addition it merely contains summaries of decisions and cannot be said to contain reports of decided cases. The learned Judge was wrong in holding that he was bound to follow the decision which must be considered to be an unreported ruling. Under S. 3, Law Reports Act, Act 18 of 1875, the Court cannot treat the

finding as an authority binding on it. The Judge of the lower Court should treat with respect an unreported decision of this Court. Even if it is a single and isolated decision he should not differ from it unless he is strongly of opinion that it is erroneous; but it is his duty to consider the point for himself and decide whether or not he should follow the decision.

A summary of *Eidan v. Mazhar Husain* (1) appears underneath the summary of the decision of this Court and it may be inferred that the decision of this Court was influenced by the Allahabad decision. The Allahabad decision has been overruled in *Abdul Kadir v. Salima* (2). The Indian Law Reports contains other decisions which agree with the Allahabad Full Bench ruling in *Kunhi v. Moidin* (3), *Hamidunnessa Bili v. Zohiruddin Sheik* (4) and *Bai Hansa v. Abdulla* (5). The respondent admits that he is unable to cite any case in which a High Court in India in recent years has dissented from this view. I see no sufficient reason for dissenting from the view taken by most of the High Courts in India. I can see no reason why a husband should not be entitled to conjugal rights until he had paid dower. It is not the case that the dower is prompt in all marriages, and when it is prompt the result appears simply to be that the wife can insist on its payment. I therefore hold that non-payment of dower cannot be pleaded as a bar to a suit for restitution of conjugal rights. The order of the lower appellate Court remanding the case is therefore set aside. That Court must decide the other points raised in the appeal and must consider whether the defendant should receive another opportunity to examine herself on commission. Costs in this Court will abide the result of the appeal. Counsel's fee Rs. 40.

P.N./R.K.

Order accordingly.

(1) [1876] 1 All. 483.

(2) [1886] 8 All. 149=(1886) A. W. N. 53 (F. B.).

(3) [1888] 11 Mad. 327.

(4) [1890] 17 Cal. 670.

(5) [1903] 30 Bom. 122.

A. I. R. 1930 Nagpur 271

MOHIUDDIN, A. J. C.

R.S. Seth Goverdhan Das—Applicant.

v.

Collector of Bhandara — Non-Applicant.

Civil Revn. No. 318 of 1929, Decided on 27th January 1930, from order of Land Acquisition Officer, Bhandara, D/- 14th May 1929.

Land Acquisition Act, S. 18 — Collector exercising his functions under S. 18—No revision lies against his order—Civil P. C., S. 115.

The Collector, though he may be acting judicially when exercising his functions under S. 18 and though he may even be called a Court, is certainly not a Court which is subordinate to the High Court for the purposes of S. 115, Civil P. C., and therefore, no revision lies against his decision; *Case law referred: C. R. 230 of 1927, Dist.* [P 271 C 2]

R. N. Padhye—for Applicant.*Vivian Bose*—for Non-Applicant.

Order.—This is a revision application filed by the applicant Rai Sahab Gobardhandas, against the order dated 14th May 1929 passed by the Collector, Bhandara, who upheld the order dated 2nd May 1929 passed by Land Acquisition Officer, who had refused to make a reference to the Court on the ground

“that the points on which the applicant wants reference to be made to civil Court are not covered by S. 18 (1), Land Acquisition Act, nor R. 79 (1) of the rules under the said Act.”

Revisional jurisdiction is exercised by this Court under 115, Civil P. C., and can only be exercised when any Court subordinate to this Court decides a case. The learned pleader for the applicant contended that the Collector when exercising powers under Part 3, Land Acquisition Act, was a Court, and therefore his decision could be revised by this Court. He cited the following cases in support of his contention: *Administrator-General of Bengal v. Land Acquisition Collector* (1), *Krishna Das Roy v. Land Acquisition Collector of Patna* (2), *Saraswati Pattack v. Land Acquisition Deputy Collector of Champaran* (3), *Hari Das Pal v. Municipal Board, Lucknow* (4), *Secretary of State v. Jiwan Bakhsh* (5) and *Ganpat Rao v. Land*

(1) [1908] 12 C. W. N. 241.

(2) [1912] 16 C. W. N. 327 = 13 I. C. 470 = 16 C. L. J. 165.

(3) [1917] 2 Pat. L. J. 204 = 33 I. C. 650 = 3 Pat. L. W. 419.

(4) [1914] 16 O. C. 374 = 22 I. C. 652.

(5) [1916] 67 P. R. 1916 = 36 I. C. 213.

Acquisition Officer, Bhandara C. R. No. 230 of 1927 dated 6th January 1928 decided by Kinkhede, A. J. C.

In *Ganpat Rao v. Land Acquisition Officer, Bhandara, C.R. No. 230 of 1927*, dated 6th January 1928, Kinkhede, A. J. C. entertained a revision application against the order of the Collector and directed the Collector to make a reference to the civil Court, but I find from the record of that case, that the point as to whether this Court has jurisdiction to revise Collector's order or not was not decided in that case. The other cases are contained in unauthorized reports, and were considered by a Full Bench of the Madras High Court in *Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam* (6).

The learned Government Advocate relied on *Balkrishna Daji v. Collector Bombay Suburban* (7), and *Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam* (6), and contended that the Collector exercising his functions under S. 18, Land Acquisition Act, was not acting judicially, that he was not acting as a Court, and that he was not a Court subordinate to the High Court.

Section 3, Civil P. C., runs as follows:

“For the purposes of this Code, the District Court is subordinate to the High Court, and every civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.”

In this section, only District Court, civil Court of a grade inferior to that of a District Court, and Small Cause Court have been mentioned, and these are therefore, only Courts subordinate to the High Court, whose decisions can be revised under S. 115, Civil P. C. The Collector though he may be acting judicially when exercising his functions under S. 18, Land Acquisition Act and though he may even be called a Court, is certainly not a Court which is subordinate to the High Court for the purposes of S. 115, Civil P. C. The civil Courts are enumerated in the Civil P. C., Courts Act, and the Court of the Collector sitting under the Land Acquisition Act is not enumerated therein. I have, therefore, no hesitation in coming to the conclusion that the Collector exercising his functions under S. 18, Land Acquisition Act, is not a

(6) A. I. R. 1921 Mad. 442 = 47 Mad. 357 (F. B.).

(7) A. I. R. 1923 Bom. 290 = 47 Bom. 699.

Court subordinate to the High Court, and, therefore, no revision application lies to this Court. The application is, therefore, dismissed with costs. Pleader's fees Rs. 15.

P.N./R.K.

Revision dismissed.

*** A. I. R. 1930 Nagpur 272.**

JACKSON, A. J. C.

Pandurang—Appellant.

v.

Nand Lal and others—Respondents.

Misc. Judl. Case No. 24-B of 1930, Decided on 5th April 1930, from order of Dist. Judge, Amraoti, D/- 21st November 1929.

*** Provincial Insolvency Act, S. 54—Order under—No second appeal lies.**

Annulment of a transfer or refusal to annul a transfer is not a decision of a question falling under S. 4, and as the distinction between decisions under S. 4 and orders under Ss. 53 and 54 is clearly recognised in Sch. 1, no second appeal lies against an order passed under S. 54: *A.I.R. 1924 Nag. 361* and *S. A. No. 972-B of 1922, not Foll. C. R. No. 246-B of 1929, Foll.* [P 272, C 2]

N. V. Gadgil—for Appellant.

Judgment.—This is a second appeal arising out of the annulment of a transfer under S. 54, Provincial Insolvency Act. The question is whether a second appeal lies. In *Seth Sheo Lal v. Girdhari Lal* (1) Baker, J.C., held that an order passed under S. 53 dealt with a question that falls under S. 4 and that, therefore, a second appeal lay under S. 75 of the Act. He referred to *K. S. Abdul Kadir v. Sayad Lal* (2) as taking the same view. In neither case has there been any discussion of the question. In *Wamanrao v. Mohammad Ali* (3) Macnair, O. J. C., held, on the admission of the learned pleader, who had preferred a second appeal against an order refusing to annul a transfer the order was not one described in proviso 2 to S. 75 (1) and that no appeal lay to this Court. In *Gopisa v. Mr. Chitale, Pleader, Receiver* (4) I have myself held that no second appeal lies in such cases, relying on the fact that Sch. 1 to the Provincial Insolvency Act distinguishes between decisions under

S. 4 and orders under S. 53 and S. 54. In *Dwarkanprasad v. Arjuna* (5) Subhedar, A. J. C., had not to deal with an order of annulment or one refusing annulment and his decision has no bearing upon the point that I am considering. *Anwar Khan v. Muhammad Khan* (6) has been referred to, but in that case the transfer under consideration had been made more than two years prior to the adjudication of the transferer as an insolvent and it did not fall under S. 53, Provincial Insolvency Act. The ruling, therefore, is no ground for holding that a case falling under S. 53 is also covered by S. 4 *Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (7) has also no bearing on the question before me, as there again the transfer under consideration did not fall under S. 53 or S. 54.

As I have shown, only four of the decisions I have referred to deal with the question I have to decide. They are all of this Court and the Judges who gave them are equally divided. With due respect to the learned Judges who decided *Seth Sheolal v. Girdhari Lal* (1) and *K. S. Abdul Kadir v. Sayad Lal* (2) I adhere to the view that I took in *Gopisa v. Mr. Chitale, Pleader, Receiver* (4). It seems to me impossible to hold that annulment of a transfer or refusal to annul a transfer can be a decision of a question falling under S. 4; and, as I said before, the distinction between decisions under S. 4 and orders under S. 53 and S. 54 is clearly recognised in Sch. 1 to the Provincial Insolvency Act. I hold that no second appeal lies and dismiss the appeal under O. 41, R. 11.

I have not been asked to treat the appeal as an application for revision; but if I did treat it as such, it would have to be dismissed as time-barred.

M.N./R.K.

Appeal dismissed.

(1) A. I. R. 1924 Nag. 361=78 I. C. 140.

(2) Second Appeal No. 372-B of 1922, Decided on 29th August 1922.

(3) Misc. Judicial No. 23-B of 1929, Decided on 20th August 1929.

(4) Civil Revn. No. 246-B of 1929, Decided on 20th November 1929.

(5) Second Appeal No. 257-B of 1929, Decided on 10th August 1929.

(6) A. I. R. 1929 All. 105=113 I. C. 819=51 All. 550 (F. B.).

(7) A. I. R. 1921 Mad. 204=62 I. C. 495=44 Mad. 524.

A. I. R. 1930 Nagpur 273**MACNAIR AND SUBHEDAR, A. J. C'S.****Narainrao and others—Defendants—Appellants.**

v.

Seth Hanumantram—Plaintiff—Respondent.

First Appeal No. 76 of 1928, Decided on 6th March 1930, against decree of Addl. Dist. Judge, Raipur, D/- 29th February 1928.

(a) Evidence Act, S. 114—Mortgage-deed—To signature of executant as well as to those of scribe and attesting witnesses clauses appended stating that executant signed in attesting witnesses' presence—No evidence one way or other to show whether attesting witnesses signed in executant's presence—Deed must be considered as validly attested—Transfer of Property Act, Ss. 3 and 59.

In a mortgage-deed there were clear clauses appended to the signature of not only the executant to the effect that he had signed the deed in the presence of the attesting witnesses but also to the signatures of the scribe and the two attesting witnesses stating that the executant had signed the deed in their presence. There was no other reliable evidence one way or the other as to whether the attesting witnesses signed the deed in the presence of the executant :

Held : that when it is proved that the executant put his signature in the presence of the attesting witnesses it was almost certain that the attesting witnesses also put their signatures in the presence of the executant. The circumstances of the case warrant the application of the maxim "*Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*" and the deed must be considered as validly attested : 2 N. L. R. 10, *Rel. on.*

[P 275 C 1]

(b) Hindu Law—Debts—Antecedent debts—Pressure is not pre-requisite of "antecedence."

If the debt was "antecedent" it is immaterial that it was neither pressing nor even due, since pressure is not a pre-requisite of "antecedence," though it is proof of necessity; nor is the fact that the debt might have been otherwise paid even relevant to the question of antecedence : A. I. R. 1924 P. C. 50, *Ref.*

[P 276 C 1]

(c) Contract Act, S. 30—Mere fact that contracts are highly speculative is not in itself sufficient to render them void as wagering contracts.

Whether a contract is a wagering one depends upon the intention of the parties at the time when the contract is entered into and the mere fact that contracts are highly speculative is insufficient in itself to render them void as wagering contracts : A. I. R. 1928 P. C. 30, *Rel. on.*

[P 276 C 1]

(d) Hindu Law—Joint family—Acts of manager cannot be called *avyavaharik*

merely because they involve risk to family property.

While it cannot be considered prudent for the manager of a family to indulge in risky transactions, an act is not *avyavaharik* merely because it involves risk to the family estate : A. I. R. 1926 Pat. 17 and A. I. R. 1926 Lah. 41, *Rel. on.*

[P 277 C 1]

(e) Trusts Act, S. 81—Assignment of mortgage-deed intended to place property beyond reach of assignor's creditors is *benami* transaction, real ownership remaining with assignor.

Assignment of a mortgage-deed, which is merely a colourable transaction intended to place the property conveyed by it beyond the reach of assignor's creditors, falls under S. 81 the legal result of which is that the assignee becomes only the *benamidar* and the assignor remains the real owner. [P 277 C 2, P 278 C 1]

(f) Transfer of Property Act, S. 41—*Benamidar* can by transfer pass good title to transferee.

A *benamidar* or an ostensible owner can by transfer pass a good title to property in the transferee. S. 41, T. P. Act, expressly recognizes such transfers to be valid and not voidable on the ground that the transferor was not authorized to make the transfer "provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

[P 278 C 1, 2]

(g) Practice—Plaintiff failing to prove all his allegations may yet obtain relief if facts pleaded by defendant and found by Court show him entitled thereto.

A plaintiff who fails to prove all the facts alleged by him may yet obtain the whole or any part of the relief claimed by him, if the facts pleaded by the defendant, and found by the Court, show him to be entitled thereto : 4 N. L. R. 86, *Foll.*

[P 278 C 2]

(h) *Benamidar*—Right to sue.

A *benamidar* has a right to maintain a suit in his own name : A. I. R. 1918 P. C. 140; 24 Cal. 34 ; 22 Bom. 672 and 21 All. 380, *Foll.*

[P 278 C 2]

M. R. Bobde—for Appellants.

D. N. Chowdhry and P. N. Rudra—for Respondent.

Judgment.—This is an appeal against the judgment and decree passed by the Additional District Judge, Raipur, in civil suit No. 20 of 1926. The facts alleged in the plaint were briefly as follows : On 14th February 1919 defendant 1, Narainrao, executed a mortgage by conditional sale (Ex. P.1) in favour of one Bhomraj Bhikamchand for a consideration of Rs. 10,000 said to have been taken for payment of prior debts and for improvement of agriculture and other purposes. This mortgage-deed was assigned by Bhomraj Bhikamchand in favour of one Khetmal on 20th January 1921 (Ex. P.2) for a

cash consideration of Rs. 12,371 paid before the registering officer. Khetmal in his turn assigned his rights under the mortgage to the plaintiff on 17th August 1925 for a consideration of Rs. 18,000 out of which Rs. 17,500 were paid before the Sub-Registrar at the time of the registration of the document and Rs. 500 paid previously. The plaintiff, therefore, brought the present suit to recover Rs. 28,242-12-0 due on the mortgage. Defendants 2 and 3 were the minor sons of defendant 1 and were joined in the suit on the ground that they had a right of redemption.

Defendant 1 admitted the mortgage-deed sued on and the receipt of the consideration thereunder, but pleaded that the assignments by Bhomraj Bhikamchand to Khetmal and by the latter to the plaintiff were sham, nominal and fraudulent transactions, which gave no right to the plaintiff to institute the present suit to enforce the mortgage (Ex. P-1). It was also pleaded by him that the whole of the consideration of the mortgage was paid by him to one Ghasiram Baldeodas to cover losses which he had incurred in wagering contracts. The mother of defendants 2 and 3, who was appointed their guardian ad litem, denied the execution, valid attestation and receipt of the consideration of the mortgage-deed as well as the two assignments of the deed. She adopted the pleadings of defendant 1 in regard to the nature of the consideration and pleaded that, since the consideration was utilized by defendant 1 in payment of illegal and immoral debts, the minors' share in the property could not be bound by the mortgage. She also challenged the two assignments as being invalid on the grounds on which they were assailed by defendant 1.

After a protracted trial the learned Additional District Judge held that the mortgage in suit was duly executed and validly attested, that the consideration was utilized by defendant 1 in the discharge of his antecedent debts, and that therefore it fully bound the interests of the minor defendants in the mortgage property. It was also held that the two assignments were for valuable consideration and genuine and passed a good title to the plaintiff so as to entitle him to maintain the present

suit. It was further held that the debts due by defendant 1 to Ghasiram Baldeodas were neither illegal nor immoral and were incurred by him in the course of lac business. The lower Court disallowed the increased compound rate of interest claimed by the plaintiff and passed a decree under O. 34, R. 2, Civil P. C., for Rs. 24,615-10-6 against all the defendants and their interest in the mortgage property. Against this decree all the defendants had filed the present appeal, but defendant 2 having died during the pendency of the appeal his name has been struck off the record. On behalf of the appellants only the following points were pressed in the course of the arguments :

(1) That the mortgage deed (Ex. P-1) is not proved to have been duly attested ;

(2) that the consideration of Rs. 10,000 paid to defendant 1 was not taken by him to discharge any antecedent debt, but that the same was utilized by him for payment of losses incurred by him in connexion with wagering contracts and that therefore the minor's half share in the mortgage property was not liable for such a debt ;

(3) that the assignment by Bhomraj Bhikamchand to Khetmal was sham and nominal and did not convey any rights to the latter and therefore the assignment by Khetmal to the plaintiff did not invest the latter with any right to maintain the present suit ;

(4) that the interest awarded by the lower Court was penal and should be reduced.

The tenth ground of appeal relating to costs was abandoned. We shall deal with these points seriatim.

Although in the pleadings it was not disclosed in what way the attestation of the deed in suit was deficient to render the deed invalid as a mortgage deed, it was argued on the basis of the definition of the word "attested" introduced by Act 27 of 1926 and Act 10 of 1927, that there being no evidence on record to show that each of the two attesting witnesses signed the instrument in the presence of the executant, the mortgage deed was an invalid instrument. Narainrao as D. W. 1 had not the courage to state that the two attesting witnesses did not sign the instrument in his presence, though there is a veiled suggestion to that effect in his statement that

"the writing and the attestation clauses below my signature were not there when I signed the mortgage deed."

It is impossible to accept this suggestion in view of the clear clauses appended to the signature of not only Narainrao himself to the effect that he had signed the deed in the presence of the attesting witnesses but to the signatures of the scribe and the two attesting witnesses in Ex. P.1 stating that the executant had signed the deed in their presence. It is true that no direct question was put on the point to the only attesting witness Dukhitprasad who was examined as P. W. 6, and the scribe Gajadharprasad (P. W. 4). But when it is proved that Narainrao himself put his signature in the presence of the two attesting witnesses, it is almost certain that both the attesting witnesses must have put their signatures in the presence of Narainrao. As laid down in *Mt. Jhama v. Deobux* (1) (at p. 16) the circumstances established in the present case warrant the application of the well-known maxim "*omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*." We have therefore no hesitation in concurring with the first Court's finding that the deed in suit was validly attested.

On the second point the argument was twofold :

(1) That the debt due by Narainrao to Ghasiram Baldeodas, which was discharged by the loan in suit, was not an antecedent debt of the father, and

(2) that the said debt was immoral.

With reference to the first of these points it was argued that the evidence of Dukhitprasad (P. W. 6) shows that as the losses in respect of the lac business of Narainrao were not to be ascertained till the very day when the mortgage deed in suit was executed, it could not be said that the loan covered by the mortgage in suit was taken to discharge an "antecedent debt" within the meaning assigned to this term by their Lordships of the Privy Council in *Brij Narain Rao v. Mangla Prasad* (2) where it was laid down that "antecedent debt" meant antecedent in fact as well as in time, that is to say, that :

"the debt must be truly independent and not part of the transaction impeached."

There is not much substance in this contention. All that Dukhitprasad

(P. W. 6) stated was that "Rs. 10,000 had been received by him in connexion with lac contract" and that "the due date of lac souda was the Magh Sudi Puno 1975 (14th February 1919)." This witness did not state in what manner and at what point of time the account of lac souda was settled and the liability of Narainrao for payment of Rs. 10,000 ascertained. The mortgage deed in suit was actually registered between 2 and 3 p. m. on 14th February 1919 and the consideration of Rs. 10,000 then paid in cash to Narainrao before the Sub-Registrar was immediately transferred by Narainrao to Dukhitprasad. It is, therefore, pretty certain that the liability due on the transactions with Ghasiram Baldeodas must have been settled some time before the transaction of the mortgage in suit.

The following quotations from the evidence of Narainrao (D. W. 1) unmistakably lead to the above conclusion :

"I had told Bhomraj on the 12th two days before the mortgage that I owed Rs. 10,000 to Dukhitprasad. I told him that I was in need of the money and that my property would be seized for its satisfaction."

It was by *andaj* that I calculated the loss at Rs. 10,000.

I had guaranteed the sum beforehand as it was a large amount and the payee had come and I did not deem it safe to keep the money with me."

Narainrao is evidently lying when he made the following statement :

"I paid the loss to him in anticipation. The rate of lac daily rose or fell. Had the rate fallen I would have taken back the whole or part of the money from Dukhitprasad."

This part of Narain's statement, it may be noted, is not supported by Dukhitprasad (P. W. 6).

The lac business with Ghasiram Baldeodas was admittedly carried on by Narainrao for some considerable time before the mortgage loan in suit was even negotiated. Moreover, on his own statement quoted above the loss in this lac business was ascertained and the liability of Rs. 10,000 acknowledged by Narainrao to Ghasiram Baldeodas at least two clear days before the loan upon the mortgage was taken to pay off the said liability. It was never the defendant's case that he gambled with Ghasiram Baldeodas on the rise and

(1) [1906] 2 N. L. R. 10.

(2) A. I. R. 1924 P. C. 50=77 I. C. 689=51 I. A. 129=46 All. 95 (P. C.).

fall of the market in lac on 14th February 1919 and lost Rs. 10,000 that very day and incurred the mortgage loan to pay out that loss.

In para. 1631 of his valuable Hindu Code, Edn. 3, Sir H. S. Gour observes that :

"if the debt was "antecedent" it is immaterial that it was neither pressing nor even due, since pressure is not a pre-requisite of "antecedence," though it is proof of necessity; nor is the fact that the debt might have been otherwise paid even relevant to the question of antecedence."

It is not denied that Rs. 10,000 borrowed from Bhomraj under the mortgage in suit were, as a matter of fact, made over to Dukhitprasad in discharge of the liabilities in connexion with the lac business which Narainrao had done with Ghasiram Baldeodas for a considerable period in the past. Under all the circumstances noted above it is obvious that the two transactions, viz. liability to Ghasiram Baldeodas and the mortgage in suit, were wholly disconnected with one another both in fact and time, and it must, therefore be held that the consideration of the mortgage deed in suit was taken and utilized by the father, Narainrao, to discharge his "antecedent debt" so as to make his son's share in the mortgage property liable for it.

On the question whether the debt due to Ghasiram Baldeodas was immoral or avyavaharik, there is no evidence on the record to prove that the said debt was due for losses on wagering contracts as alleged by Narainrao. Beyond his own word that he carried on this lac business in his own name for one Kanhayalal who was also an agent in the company where he was himself a servant, Narainrao has given no details of the business. Whether a contract is a wagering one depends upon the intention of the parties at the time when the contract is entered into, and as laid down by their Lordships of the Privy Council in *Sukhdevdoss v. Govindoss & Co.* A. I. R. 1928 P. C. 30, the mere fact that contracts are highly speculative is insufficient in itself to render them void as wagering contracts. In the case cited their Lordships observed that

"the authorities cited show that to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not

be demanded, but that differences only should become payable."

Narainrao himself did not regard the business as illegal and unenforceable in law as would appear from the following quotations from his evidence:

"I did not think that I might escape payment of the loss of the phtka transaction by having recourse to Court. I did not know then that I was not legally liable for the loss in such a contract. I do not know even now if such a loss is recoverable in Court from me or from my sons."

There being therefore no good evidence on the record to show that the transaction leading to the payment of Rs. 10,000 to Dukhitprasad's master was in the nature of a wagering contract, we hold that it was not so.

On the authority of *Ram Chandra Singh v. Jang Bahadur Singh* (3) and *Khem Chand v. Narain Das Sethi* (4) it was also argued that since the lac business done by Narainrao with Ghasiram Baldeodas was not an ancestral trade or family business, but was purely a speculative transaction which was immoral or avyavaharik, Narainrao could not therefore legally burden the share of the minor appellant in the ancestral property with a debt which went to discharge the losses in connexion with the said business. In *Ram Chandra Singh v. Jang Bahadur Singh* (3) the question considered was whether a speculative transaction can be considered a transaction for the benefit of a joint family. Clearly the debt may be imprudent but not immoral or avyavaharik. In *Khem Chand v. Narain Das* (4), at 498 (of 6 Lah.) the learned Judges held that speculative transactions cannot be said to be immoral.

We cannot rely upon the uncorroborated testimony of Narainrao, who is found to have made several untrue statements from the witness-box in the frantic effort to save half the mortgage property for himself or his son, when he states that neither he nor his father did even do any business in lac. He himself admits that his father was the local agent of Kilburn and Company which dealt in lac at Dhamtari, and that after the death of his father he succeeded to the post of the agent.

(3) A. I. R. 1926 Pat. 17=90 I. C. 553=5 Pat. 198.

(4) A. I. R. 1926 Lah. 41=89 I. C. 1022=6 Lah. 493.

There is positive evidence of a respectable and disinterested person, Sohanlal (P. W. 12), to the effect that both Narainrao and his father did lac business on their own account at Dhamtari in spite of their being in the service of the company. This witness stated that

"Ganpatrao used to purchase lac for his own sake when in the market more lac was available than that required by the company."

We have already discredited the story of Narainrao that he did the particular business in question for one Kanhayalal and not on his own account. It is impossible to believe that all of a sudden Narainrao should for the first time enter into such large transactions in lac with Ghasiram Baldeodas which involved him in a heavy loss of Rs. 10,000. By his being in the lac trade as agent he must have become fully conversant with all the secrets of this trade. Being the *malguzar* of three villages he had ample resources to enter into business of lac if he so desired. He himself states that on the day the mortgage in suit was executed he might have had Rs. 10,000 or so with him, but that he required this amount for other purposes. All these circumstances lead us to believe the evidence of Sohanlal (P. W. 12) to the effect that both Narainrao and his father, in addition to their other occupation, also did lac business on their own account. In our opinion therefore the transaction with Ghasiram Baldeodas was not a solitary speculative venture; it was effected in the hope of improving the family finances. While it cannot be considered prudent for the manager of a family to indulge in risky transactions, there is no authority for holding that an act is *avyavaharik* merely because it involves risk to the family estate.

On the third point the argument was that the assignment by Bhomraj to Khetmal was in reality a sham transaction and upon the evidence on record there is no doubt that it was so. The following points come out prominently from the evidence of Bhomraj (P. W. 7) and Khetmal (P. W. 13):

(a) That Khetmal is a near relation of Bhomraj being his maternal uncle's son;

(b) that Bhomraj was a partner in the firm of Raghunathdas Bhikamchand

which firm was very much involved and had, in fact, suspended business just before the assignment of the mortgage deed in suit was made by Bhomraj to Khetmal;

(c) that Bhomraj not only assigned the mortgage deed in suit but also transferred by sale three houses belonging to him;

(d) that at the time of assignment the financial position of Khetmal was such that he could not have advanced to Bhomraj the consideration of Rs. 12,371 for the assignment in question, and that there was no apparent reason why Khetmal should invest all the funds he had in obtaining the rights of a mortgage and the house;

(e) that in the litigation which followed these transfers between Ramsewaklal, one of the creditors of Bhomraj, and Khetmal the sale of the houses was declared invalid in a Court of law;

and (f) that apparently no necessity is made out for Bhomraj to have made these transfers to Khetmal at the time when his own position in the business world had become shaky and embarrassed.

The above facts clearly lead to the inference that the assignment in question was merely nominal and was made apparently with the object of placing the property conveyed by it beyond the reach of Bhomraj's creditors. The transfer therefore was merely a colourable paper transaction leaving the real beneficial interest in the mortgage deed with Bhomraj.

That being so the transaction undoubtedly fell within the purview of S. 81, Trusts Act, and was on all fours with the first illustration to that section. In para. 604 of Mulla's Principles of Hindu Law, 6th Edition, a *benami* transaction is thus defined:

"Where a person buys property in his own name but subsequently transfers it into the name of another person, without any intention to benefit such other person, the transaction is called 'benami,' and the person in whose name the transaction is effected is called 'benamidar'."

In para. 1024 of Dr. Gour's Law of Transfer, Vol. I, Edn. 5, the learned author also observes as follows:

"But while it is true that all *benamis* are not necessarily fraudulent, it is equally true that all fraudulent transfers are necessarily *benami*."

The legal result therefore of this assignment was that Khetmal held the mortgage in suit for the benefit of Bhomraj who, despite the ostensible transfer, remained the real owner. In other words the transaction was a benami one and Khetmal's position was merely that of a benamidar and we hold it to be so.

But because the assignment in favour of Khetmal is held to be benami it does not follow, as was contended by the learned advocate for the appellants, that the second assignment by Khetmal in favour of the present plaintiff, was also unreal. The evidence of the plaintiff's agent Durgaprasad (P. W. 10), the plaintiff Hanmantram (P. W. 11) and Mulchand (P. W. 9) one of the attesting witnesses of Ex. P-3 clearly shows that the plaintiff got the assignment in his favour bona fide and had paid the full consideration of Rs. 18,000 of which Rs. 17,500 were paid before the Sub-Registrar.

It would appear that the plaintiff wanted to produce his account books during the course of his evidence but was prevented from doing so by an objection raised by the defendants. But he swore that he paid Rs. 18,000 to Khetmal, that before the purchase of the mortgage he had made inquiries from defendant 1 about it and that the defendant had admitted his liability to pay the debt. He also stated that the defendants raised no objection or dispute about the matter. This statement of the plaintiff has not at all been contradicted by defendant 1 in his evidence. Exs. P-8, P-9 and P-10 show that soon after the assignment in his favour the plaintiff, on 24th August 1925, had sent a formal registered notice to defendant 1 informing him of the purchase by him of the mortgage deed in suit. Under these circumstances we hold that the assignment in plaintiff's favour was a genuine transaction and passed a good title to him to maintain the present suit. That a benamidar or an ostensible owner can by transfer pass a good title to property in the transferee admits of no doubt. S. 41, T. P. Act, expressly recognizes such transfers to be valid and not voidable on the ground that the transferrer was not authorized to make the transfer :

"provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

We have already held above that the plaintiff took the assignment in good faith after reasonable inquiry. Even if both the assignments are treated as benami transactions the plaintiff has still got the right as a benamidar to file the present suit and it is not open to the defendant to contend that he cannot do so : *Gur Narayan v. Sheo Lal Singh* (5); *Bhola Pershad v. Ram Lal* (6); *Raoji v. Mahadev* (7) and *Yad Ram v. Umrao Singh* (8).

It was contended by Mr. Bobde that the plaintiff's suit should be dismissed if it was held that the assignments were unreal or bogus, because the plaintiff did not base his title to sue as a benamidar. But this contention is obviously untenable in view of the dictum laid down by this Court in *Gamu v. Lahario* (9) to the effect that a plaintiff who fails to prove all the facts alleged by him may yet obtain the whole or any part of the relief claimed by him if the facts pleaded by the defendant, and found by the Court, show him to be entitled thereto. If the facts pleaded by the defendants in the present suit and held proved by the Court show that the assignments were bogus or benami transactions, it follows, as a matter of law, that the suit could not fail simply on that account because, as already shown above, the law gives a benamidar the right to maintain a suit in his own name. The third point raised in the argument is therefore untenable.

The fourth point was only feebly touched in the course of the argument and does not deserve any serious consideration. The deed provided for simple interest at As. 12 per cent per mensem and in default of payment of the debt on the due date it provided for interest at Re. 1/4 per cent per mensem at compound rate with yearly rests. The lower Court rightly held the latter provision to be penal and relieved the defendants against it by allowing interest at only As. 12 per cent per mensem

(5) A. I. R. 1918 P. C 140=41 I. C. 1=46 L. A. 1=46 Cal 566 (P.C.).

(6) [1897] 24 Cal. 34.

(7) [1898] 22 Bom. 672.

(8) [1899] 21 All. 380.

(9) [1908] 4 N. L. R. 86.

compound rate. We hold that the rate of interest allowed by the lower Court was perfectly reasonable and just. The result is that this appeal fails and is dismissed with costs. The time for redemption will now be fixed to 1st July 1930.

S.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 279

SUBHEDAR, A. J. C.

(*Khwaja*) *Jalaluddin* and *others*—
Defendants—Appellants.

v.

Mohamad Amir—Plaintiff — Respondent.

Misc. Appeal No. 39-B of 1928, Decided on 4th March 1930, from decision of Dist., Judge, Akola, D/- 30th August 1928, in Civil Appeal No. 58 of 1927.

(a) **Berar Inam Rules (1879), R. 3**—The only way in which it can be decided whether a given grant falls into Cl. 1 or Cl. 3 is by a reference to the orders of the Government of India sanctioning the grant.

There is no real difference between a personal jagir and a personal or subsistence grant and the only way in which it can be decided whether a given grant falls into Cl. 1 or Cl. 3 is by a reference to the orders of the Government of India sanctioning the grant. If it is declared that the grant is governed by R. 3 of the Inam Rules, then the grant is a personal jagir of Cl. 1. If on the other hand it is declared that it is governed by R. 5 then it is a personal or subsistence grant other than a personal jagir. The fact that the grant in the past has been wrongly treated by officers under R. 5 will not alter the nature of the grant, nor will the fact that the rule is not quoted in the certificate prepared by the revenue officers make any difference. In all these cases one must refer to the actual order of the Government of India sanctioning the grant: 12 N. L. R. 150; A. I. R. 1925 P.C. 184 and (1925) C.P. and Berar Revenue Rulings 1, *Rel. on.*

[P 281 C 1]

(b) **Grant -Jagir**—In the case of jagirs of first class future alienation is not prohibited.

The Government in granting jagirs of the first class did not intend to put them on a par with grants of Cl. 3 which are governed by R. 5 of the Inam Rules subject to the four kinds of restrictions enumerated in sub-R. 2 of the said rule. Hence in the case of a jagir of the first class, as the Jagir of Mahan in Akola District is, future alienation of it is not prohibited.

[P 281 C 2]

M. R. Bobda and *Abdul Razak*—for Appellants.

M. B. Niyogi and *G. G. Hatwalne*—for Respondent.

Judgment.—The facts of the case so far as they are necessary for the disposal of this appeal are shortly these: In

the Jagir of Mahan, comprising seven villages in the Akola District, defendant 2's father, Khwaja Gulam Saifuddin, had a one-ninth share. In Civil Suit No. 191 of 1903 on the file of the civil Judge, Akola, a decree, based upon a private award, was passed against Khwaja Gulam Saifuddin in favour of the present plaintiff's grandfather by which the latter was to receive for 999 years in satisfaction of the debts amounting to Rs. 21,032-7-8 one-half of the former's share in the profits of the said jagir either from him or the then certificate holder of the jagir.

Both Khwaja Gulam Saifuddin and the former Dastaki are dead, Defendant 2 now represents the former while defendant 1 represents the latter. On the basis of the aforesaid decree the present suit was filed by the plaintiff to recover his one-eighteenth share of the profits in the Mahan Jagir for six years from 1913—14 to 1918—19 both inclusive. The third original defendant was added to the suit because on account of some private arrangement between him and defendant 1 the profits for the years in suit were recovered by him, but he having died during the pendency of the suit in the first Court his legal representatives have been brought on record in his place.

The principal defence to the claim was that the jagir was granted under R. 5 of the Inam Rules of 1859 as a personal or subsistence grant of Cl. 3 and not having been enfranchised was a limited estate, alienation of which beyond the lifetime of a cosharer was void and therefore the plaintiff was not entitled to claim the profits for the years subsequent to the death of defendant 2's father. The plaintiff, however, asserted that the jagir was granted under Inam R. 3 as a personal jagir of Cl. 1 and was enfranchised, and that in any case it was not amenable to the restrictions imposed by the Inam Rules upon grants which fell under R. 5 of the said rules.

The two preliminary issues, which were settled for trial on this point, were as follows:

1. Whether the grant of the jagir is under R. 3 of the Inam Rules and enfranchised?
2. Whether the jagir is alienable?

Both these issues were decided by Mr. Gharpure by a finding recorded on 6th January 1925. He held that the grant of the jagir was under R. 3 of the Inam Rules 2 but that it was not enfranchised. On issue 2 he held that it was alienable and that the alienation was perfectly valid between the parties. In spite of these findings Mr. Amraotkar, who succeeded Mr. Gharpure, held in his final judgment disposing of the case that the inam was a restricted tenure because the object with which the grant was made was likely to be frustrated by the alienation going beyond the lifetime of defendant 2's father and that therefore the decree in Civil Suit No. 191 of 1903 was not binding upon the present defendants. The plaintiff's suit was accordingly dismissed.

On appeal by the plaintiff the learned District Judge held that the jagir in question fell within R. 3 of the Inam Rules to which the restrictions imposed on grants under R. 5 did not apply and that consequently the decree in Civil Suit No. 191 of 1903 was perfectly valid and binding upon the defendants. He also held that, if it was necessary for this inam to be enfranchised, it was enfranchised because in 1812 five of the 12 villages which comprised the original inam were resumed by His Exalted Highness the Nizam of Hyderabad and the remaining seven villages, which now comprised the jagir, were released in full from all charges. The learned District Judge accordingly set aside the decree of the trial Court and remanded the case for the determination of the other questions which were left undisposed of by that Court. It is against this remand order that the present appeal is filed by the defendants.

The first question to be determined in the appeal is whether the grant of the Mahan Jagir fell under Cl. 1 governed by R. 3, or under Cl. 3 governed by R. 5 of the Inam Rules of 1859. The Inam certificate (Ex. D.1) does not show under which of the two rules the grant was made, but it is clear from the certificate that there is no quit rent reserved in respect of the said inam.

In *Krishnaji v. Nilkanth* (1), it was observed that an Inam estate in Berar is governed by the Inam Rules of 1859

(1) [1916] 12 N. L. R. 150=36 I.C. 518.

and that a jagir or other inam estate may be anything from a mere grant for life in the royal share of the revenue to an absolute estate in the soil, and the only correct method for the judicial decision of claims made upon it is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which, and the rules under which, the sanad was granted. In *Mir Subhan Ali v. Imami Begam* (2), their Lordships of the Privy Council further laid down that the devolution and incidents of an inam estate in Berar are regulated by the inam rules of 1859, but only in matters not expressly mentioned in the sanad or certificate or other document evidencing the special terms of the grant in the particular case.

In *Haji Begum v. Khwaja Kutubuddin* (3) where the question for decision was if the particular grant in the case was a personal jagir of Cl. 1 or a personal or subsistence grant of Cl. 3, the Financial Commissioner of the C.P. and Berar made the following weighty observations:

"The expression 'personal jagir' implies that the grant is a personal and subsistence grant, and it is at first sight difficult to distinguish between grants of Cl. 1 and grants of Cl. 3. On referring, however, to the correspondence with the Government of India, I find that the rules were drafted by Mr. Bullock, Commissioner of Berar, and that in his letter No. 320, dated 1st August 1859, submitting the draft to the Resident, he stated that he had based them on the draft of Inam Rules then under preparation for Madras. The Madras rules as finally sanctioned, and which are printed at pp. 262 to 270 of Vol. 2 of the Standing Orders of the Madras Board of Revenue do not recognize any separate class of personal jagirs, as all grants corresponding to the Berar Class 1 of personal jagirs were in Madras included in the more general class of personal or subsistence grants."

Mr. Bullock in explanation of his Cl. 1 wrote as follows:

"It will be observed that I have drawn, or rather maintained the distinction between the personal jagirs and personal inams. This distinction is recognized in the sanads, and although in fact a jagir is an inam and vice versa, yet a jagirdar as a grade is different from an inamdardar, and I think that it is important that all distinctions of rank in the community should be kept up; for it is one evil tendency of our administration that all ranks are liable to be reduced to one level. I have, therefore, suggested that heirship to a jagir should be

(2) A. I. R. 1925 P. C. 184=21 N. L. R. 117=52 Cal. 971=52 I.A. 294 (P.C.).

(3) [1925] C. P. and Berar Revenue Rulings 1.

secured by a succession fee or legacy duty graduated according to the relationship of the heir."

"It is clear from this statement of intention that there is no real difference between a personal jagir and a personal or subsistence grant, and the only way in which it can be decided whether a given grant falls into First Class or Third Class is by a reference to the orders of the Government of India sanctioning the grant. If it is declared that the grant is governed by R. 3, Inam Rules, then the grant is a personal jagir of First Class. If on the other hand, it is declared that it is governed by R. 5, then it is a personal or subsistence grant, other than a personal jagir. The fact that the grant in the past has been wrongly treated by officers under R. 5 will not alter the nature of the grant, nor will the fact that the rule is not quoted in the certificate prepared by the revenue officers make any difference. In all these cases we must refer to the actual order of the Government of India sanctioning the grant."

These observations have my entire concurrence.

Applying the tests laid down in the above cases to the materials placed upon the record of the present case, it is perfectly clear that the grant of the Mahan jagir falls under First Class governed by R. 3 and not under Third Class governed by R. 5, Inam Rules 1859. Although the sanad itself is silent on the point the correspondence that passed between the Hon'ble the Resident and the Government of India in respect of the continuance of this jagir makes it unmistakably evident that the grant was made under R. 3 of the said Inam Rules. In his letter No. 49-B of 1878, dated 11th February 1878, to the Secretary to Government of India, Foreign Department, the Hon'ble the Resident made a definite recommendation that the grant should be conferred upon the then jagirdar under R. 3, Inam Rules and the Secretary to the Government of India in his reply (letter No. 24-R, dated 14th March 1878) communicated the acceptance of the said proposal in the following definite words :

"I am directed to say that, in accordance with your recommendation, the Governor-General in Council is pleased to confirm the said grant to the claimants with arrears from the date in May last, on which the sanad of 1768 was produced."

Both Mr. Gharpure and the learned District Judge were of opinion that the expression in the sanad that "the jagir was granted for madutmash or maintenance" was rather loosely used and was a mistaken one. It seems to me however that the said expression only

represents the object of the grant and cannot by its mere use in the sanad convert the grant of the First Class, which it was in its origin, into one of the Third Class because, as observed by the Financial Commissioner in the case cited above :

"the expression 'personal jagir' implies that the grant is a personal or subsistence grant."

I therefore agree with the Courts below in holding that the grant of the jagir in the present case was of First Class governed by R. 3 of the Inam Rules of 1859.

The next question that remains for decision is if the grant of such a jagir as the one in question is in any way controlled by the third of the four restrictions of sub-R. 2, R. 5 of the Inam Rules which declares that "future alienation of the inam is prohibited." It is admitted that none of the four aforesaid restrictions is laid down in R. 3 which governs personal jagirs of the First Class. It is thus apparent that the Government in granting jagirs of the First Class did not intend to put them on a par with grants of the Third Class which are governed by R. 5 subject to the four kinds of restrictions enumerated in sub-R. 2 of the said rule. This is further placed beyond any doubt by the clear wording of sub-R. 3, R. 5, whereby an option is reserved to the inamdar to convert "this restricted tenure" into a freehold by consenting to pay annual quit rent according to different scales specified therein. I therefore agree with the learned District Judge in holding that the jagir in question is from its very nature a freehold and unrestricted in matters of alienation and no question of its enfranchisement arises in the case.

It is therefore unnecessary to determine if the view of the learned District Judge that the jagir in question was enfranchised in 1812 is correct or not. But, since the Berar Inam Rules of 1859, which provide for enfranchisement of Inams under R. 5 were not even in existence in 1812, it could not logically be said that the present inam was enfranchised in the year when the said rules were not in force.

It is also significant to note that in the year 1904 when the question, if by the passing of the decree in Civil Suit No. 191 of 1903 any breach of the condition of the grant of this jagir had taken

place, arose for decision, the Deputy Commissioner of Akola, after reviewing all the available documents in possession of the revenue authorities, came to the following conclusion :

"Now looking to the correspondence sanctioning the grant of this jagir it seems clear that the grant falls under R. 3 of the Lnam Rules and as such the Government is not concerned with the alienation of this grant as it does not come within the scope of the order of the Chief Commissioner contained in his letter No. 8361, dated 21st December 1903, a copy of which was received from the Commissioner with his endorsement No. 295, dated 15th January 1906" : see Ex P-9.

The result is that this appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

*** A. I. R. 1930 Nagpur 282**

NIYOGI, A. J. C.

Onkar and another — Defendants — Appellants.

v.

Kisansingh — Plaintiff — Respondent.

First Appeal No. 65-B of 1929, Decided on 22nd August 1930, from decree of Sub-Judge, First Class, Daryapur, D/- 15th July 1929, in Civil Suit No. 139 of 1927.

*** Hindu Law — Alienation — Mortgage debt incurred by father for his fourth marriage is not a family necessity — Debt is not binding on son."**

In order that any purpose should be regarded as a legitimate family purpose it must be felt as such by every member of the family.

The fourth marriage of a father cannot be a legitimate family purpose.

Where a Hindu father, who was between 40 and 41 years of age, and had a minor son nine years old, mortgaged the entire family property for a consideration of Rs. 4,000, borrowed in connexion with his fourth marriage for payment to the bride's mother as bride's price.

Held: that the mortgage debt was not incurred for a legitimate family purpose and that the minor's share of the mortgaged property was not liable for the debt: 31 All. 575, Diss. from; 32 Bom. 81 and 34 Mad. 424 Dist.; 22 Bom. 658; 23 All. 415 and 32 Mad. 185, Ref.

[P 285 C. 1; P 285 C 2]

D. W. Kathale and G. R. Deo — for Appellants.

M. B. Kinkhede — for Respondent.

Judgment.—The suit out of which this appeal arises was instituted to enforce a mortgage dated 3rd June 1924 executed by defendant 1 for Rs. 4,000. The plaintiff claimed a decree to the extent of Rs. 6,161-12-0 against defendant 1, Shriram and his minor son Onkar; and on default the foreclosure of the mortgaged property consisting of

four fields Nos. 14/1, 4/1, 17/2 and 3. The defendants raised various pleas, the important ones being that the interest charged was penal, that all the four fields were self-acquired property of Shriram and that the mortgage debt was not binding on the minor son. The lower Court held that the mortgage debt was justified by legal necessity and that it was binding on the minor defendant and reduced the interest to some extent. It passed a decree against both the defendants in respect of all the four fields. In appeal the main contentions are that the interest was penal and should be reduced, that the mortgage debt having been incurred for the fourth marriage of Shriram, defendant 1, and especially for payment of bride-price, the debt was not binding on the minor son under Hindu law.

The stipulations regarding interest are as follows:

(1) I pay interest thereon at As. 12 per cent per mensem. I agree to make repayments by paying the principal within three years and the compound interest on the entire amount every year. If I fail to pay one year's interest, according to the said agreement I will pay interest on the amount at Re. 1-8-0 per cent per mensem."

It is evident that on default in payment of the first instalment there were two rates provided, viz.: As. 12 per cent per mensem compound interest, and Re. 1-8-0 per cent per mensem simple interest. The lower Court has allowed compound interest at As. 12 per cent up to the date of stipulation for payment of the mortgage debt, viz. 5th January 1927, and thereafter simple interest at the rate of Re. 1-8-0 per cent per mensem. The compound interest at As. 12 per cent per mensem is perfectly legal and the rate of Re. 1-8-0 is by no means excessive. I therefore confirm the finding as to interest.

Some argument was addressed as regards Shriram's age at the time of his fourth marriage. The lower Court has found that his age was 35. The learned Judge himself has noted his age as 50. When he went into the witness-box as D. W. 1 on 30th October 1928 he gave his age as 49 years. The age he had mentioned in the previous proceedings was different. From his statement and other evidence on record and the impression I have formed about his age, while he was present in this Court, I

am led to believe that he was between 40 and 46 at the time he executed the mortgage in 1924.

It is contended forth appellant that according to Hindu religious code a fourth marriage is not a necessity justifying transfer of joint family property; that, even if it were, the loan of Rs. 4000 was far in excess of the actual expense required, and that in any case as it was borrowed for payment of bride-price, the debt does not bind the son. It is argued for the respondent that the marriage is a sacrament enjoined by religion, that the entire amount borrowed was necessary according to the notions prevailing in the caste and that payment of bride-price being customary, the debt is binding on the son. Much learned argument was addressed on both the sides. The respondent in supporting the decree relied on *Sundrabai v. Shivanarayana* (1); *Kameswara v. Veeracharu* (2) and *Bhagirathi v. Jokhu Ram* (3) and in addition, cited the undermentioned authorities from ancient books:

(1) That marriage is a Vyavastha Vikalpa i. e. fixed alternative (Jaiminiya Nyayamala Chap. 12, Pada 4 Adhikarna 7) and not an Aichbacha Vikalpa, i. e. alternative to be chosen according to pleasure (Jaiminiya Nyayamala, Chap. 12, Pada 3, Adhikarana 4).

(2) A twice-born person should not live even for a day without following any order (Anashrami); if he lives without following an order he is required to perform a penitential rite (Daksha Samhita, Dutt's Translation, p. 434).

(3) A man is not fit for karma, Oh king, without a wife whether he is Brahman, Kshatriya, Vaishya or Sudra. The wife is the chief factor in the attainment of Dharma, Artha and Kama (Apararka, Vol. 48, Anandasharam Series, p. 72).

(4) Because men of the three (other) orders are daily supported by the householder with (gifts of) sacred knowledge and food, therefore (the order of) householders is the most excellent order: Manu Sacred Books of the East, Vol. 25, p. 89.

(5) Reference is also made to the opinion expressed by the eminent Sanskritist Govinddas in his book on Hinduism at 6,300 to the effect that everyone is bound to marry and bound to beget children.

That there are clear and unequivocal injunctions of the religious codes as regards the obligation of entering into a householder's life is beyond controversy. But these passages must be read with their context. Marriage is invariably recommended as the step after the termination of the first order,

Brahmacharya (i. e. period of discipline and study). The verse preceding the one relied on by the respondent's learned counsel says:

"Two classes of Brahmacharins have been mentioned by the wise in the Sruti. The first is Upakurvana (i. e. one who wishes to pass on to householder's order) and the second is Naishthika (perpetual celibacy)."

And the verse which follows says:

"The three orders should be followed in succession: Daksha Mimansa, p. 434-8 and 12 Dutt's Translation Vol. 1.

Yajnavalkya enjoins as follows:

Verse LI—Having finished the Veda or the Vratas or both of them and having given presents to the Guru let him bathe with his permission.

Verse LII—Without breaking (the rules) of studentship let him marry woman, etc.: see Yajnavalkya Smriti, Chap. 3, Sacred Books of the Hindus, Vol. 21, pp. 90-91; see also Manu Chap. III-2. 3-4 Sacred Books of the East Vol. 25, p. 75; see also Taittiriya Upanishad-Anuvak 11.

Marriage is held obligatory only after Samavartan, i. e. completion of the studies when the person became known as a Snatak. A Hindu could go through life without a consort but the stringent rules of discipline, celibacy, lifelong study, service of the guru were prescribed. This was the life of a Naishthik Brahmachari which entitled

"destroying the body and subduing the senses: see Yajnavalkya Smriti, Chap. 2, 49-50.

The marriage was prescribed as an alternative to Naishthik Brahmacharya. In Jaiminiya Nyayamala the Vikalpas are not enunciated in connexion with marriage. They are rules of interpretation of the various passages in the Yajurveda dealing with performance of sacrifices. Krishnaswami Aiyar, J., applied the maxim of Vikalpas to the case of first marriage see *Kameswara Sastri v. Veeracharu* (2). The householder's life was extolled to popularize the doctrine of the "Three Debts" (Rina-traya) embodied in the following verse:

A Brahmin becomes free of debt to the gods by sacrifice (Yajna), that due to the Rishis (adepts) by austere learning of the Vedas, that due to the forefathers by begetting a son. (Taittiriya Sanhita 6.3.10.5).

This is amplified in Manu in Ch. 9 137 where he says that through a son a man conquers the world and that son delivers his father from hell called Put and he emphasizes the duty of performance of sacrifices as follows:

"With the sacred fire kindled at the wedding a householder shall perform according to law his domestic ceremonies and five great sacrifices: Manu Chap. III -67, (S. B. E. Vol. 25, R. 87)."

Thus it would appear that the afore-

(1) [1908] 32 Bom. 81=9 Bom. L. R. 1966.

(2) [1911] 34 Mad. 422=8 I. C. 195.

(3) [1910] 32 All. 575=6 I. C. 465.

said texts relied on by the respondent's learned advocate are not authorities to support his argument that the marriage of a widower is enjoined by religion. I have therefore to see whether the sacred Codes insist on marriage of a man who has begot a son. Mitakshara commenting on Yajnavalkya Chap. 3-89 says as follows:

"Having burnt with agnihotra fire . . . his dead wife . . . the husband should take again another wife and another fire according to laws provided that he has not yet begot any son or has not completed his sacrifice or is not entitled to enter another order of life . . . See Sacred Books of the Hindus Vol. 21, p. 178."

The meaning of the last proviso is made clear in Mitakshara. Prayaschithadhaya S. 3-45 (Setlur's Mitakshara p. 1189) where a reference is made to Apastamba's precept that a widower must enter the third order and the aforesaid proviso is explained as applying to those only who are unable to rise superior to the blandishments of material life. Reference may also be made to Balam-bhatta's Glossary and the passage from Aitariya Brahmana as indicating that a householder may worship sacrificial fire without a consort (Sacred Books of the Hindus Vol. 21, p. 179-180). I am fortified by the opinion expressed by Mandalik on Mayukh at p. 399 as follows:

"Again it is taken for granted that when a man becomes a widower, he must marry again as he cannot sacrifice in a single state. This is not correct."

Marriage is recommended to a widower; there is no obligation laid on him to marry. In this case the widower has a son and consequently the necessity of begetting a son could not be assigned as a reason. As to the necessity of maintaining sacrificial fire, the necessity is illusory and theoretical as no fire is now maintained. That this peculiar feature of the Vedic religion has been wiped off long ago is well known. Vedic mode of religious observances was overgrown and superseded by the Smarta and still later by the Pouranic forms. Today an agnihotri is rare even in places like Benares (Gitarahasya p. 288); Mandlik in his Introduction to 2nd Edn., 1915.

Mayukha says:

" . . . All the Grihya ceremonies have been based on the institution of marriage; but the rules have been broken to such an extent that instead of the sacrificial fire lighted at the celebration of marriage being carried along

with the married couple to their future home and rigorously kept till the husband's and wife's bodies are sacrificed therein on funeral pile, it is now considered positively inauspicious."

The necessity of maintaining sacrificial fire does not exist in this case. The only reason that remains is that the father desires marriage because he is unable to give up the material pleasures of life which entering the third order involves. He is therefore prompted by his physical inclinations and such marriage cannot be attributed to religious obligation. Applying the Mimamsa rule of Vikalpa it would appear that the first marriage is covered by the maxim of Vyavasthita Vikalpa whereas the subsequent marriage (of a widower) is covered by Aichhika Vikalpa. Vyavasthita Vikalpa implies a command and Aichhika, counsel. Under the first, there is alternative prescribed only between Naishthika Brahmacharya and householder's order, but under the latter rule the widower has discretion to either enter the third order, take another wife or remain single. The first marriage is ordained (Vyavasthita) and any subsequent marriage is left to the choice (Aichhik) of the agent. The former springs from Shabdi Bhavana (prompting of the Vedic words); the latter from Arthi Bhavana (prompting of desire)*

It should be observed that *Sundrabai v. Sheonarayana* (1) and *Kameswara v. Veeracharlu* (2), dealt with the case of first marriage and have no bearing on the present case. In *Bhagirathi v. Jokhu Ram Upadhia* (3), the point for determination was whether second marriage of a coparcener who had a son alive and was a widower, constituted legal necessity. Tudball, J., held in the affirmative on the ground that a Hindu must have a son and must perform religious ceremonies such as agnihotra. With due deference I do not see my way to agree with his Lordship for reasons already given.

The next question is : Can the alienation be otherwise justified? The text lays down : Even a single individual may conclude a donation, mortgage or sale of immovable property during the season of distress for the sake of the

*Note.—Compare: the first is Dharmapatni; the second is for increasing passion. In the latter originates the fruit that is seen, not what is not seen: *Daksha Samhita*, Chap. 4-15; Dutta's translation Vol. 1, p. 447.

family and especially for pious purposes. (Ghose, Hindu Law, Vol. 1, p. 450). I have already held that it is not a religious obligation. Is it necessary "for the sake of the family"? The word in the original is "Kutumbārtha" and this has been interpreted to mean "for legitimate family purposes": see *Suraj Bansi Koer v. Sheoprasad Singh* (4). The fourth marriage of the father cannot be a legitimate "family" purpose. In order that any purpose should be regarded as a "family purpose" it must be felt as such by every member of the family. Is it necessary or beneficial to the son? Obviously not. He is getting a stepmother at the cost of his own interest in the joint family property. It is urged that there should be somebody to look after the household. It should be noticed that the fourth bride was 10 years of age at the time of marriage and the minor son Onkar was 9 years old. One fails to see how a girl of 10 could have done any service as mother to a boy of 9 years. It is further argued that as the father was joint with his son he could not marry without detriment to "joint property". This argument is sound so far as the expenses are met out of the joint income. If they cannot be so met the question arises whether the father could lawfully alienate the corpus of the joint property. So far as his own share is concerned he, being the owner, could transfer it for his own needs, but could he transfer the son's interest also, for the simple reason that he was joint with his son? One comes back to the same question: Was it family purpose? I have already held it was not a "family" purpose. Let me apply another test, that of propriety: see *Khul Lal Singh v. Ajudhya Misser* (5).

It is neither pleaded nor proved that there was any more property besides the one mortgaged; it follows that this constituted the entire joint family property. The question is whether the marriage of the father, who was between 40 and 45 years old, with a girl of 10 years, at the expense of Rs. 4,000, was fair and proper so as to justify the alienation of the entire property in-

cluding the minor son's interest. On the face of it the transaction is most improper and unfair to the minor son. The Smritis also "censure" the cutting of expenditure of the means of livelihood: see *Chandradeo Singh v. Mata Prasad* (6). A text of Vyas lays down: those (issues) that are born, and those that are yet unbegotten, as well as those that are in the womb (of their mothers), all require means of support; hence the dissipation by sale or gift without the consent of sons, of the means of support (viz., the immovables and slaves) is highly censured: see Sarkar's Hindu Law, 6th Ed. 1927, p. 846). It is obvious that judged from the point of view of the minor son's interest the debt incurred on the mortgage by the father was neither "legitimate" nor "for family purposes."

Conceding for the moment that the marriage was a "necessity" it has to be proved that the expenses incurred were reasonable: *Ravaneshwar v. Chandi* (7), affirmed in *Ravaneshwar Prasad v. Chandi Prasad Singh* (8), and also that the necessity could not be met otherwise than by alienation: see *Mt. Jhama v. Deobux* (8a). It is argued that according to the custom of the caste the expense of Rs. 4,000 was unavoidable. It is also pointed out that Rs. 3,500 were actually spent on the 3rd marriage and that Rs. 4,000 spent were reasonable. The argument in substance amounts to this: that because it was unavoidable it was reasonable. This is not sound. Whether the expense is reasonable or not has to be judged in relation to the competency of the family to bear that expenditure with reference to the value and extent of the estate. From this point of view the expenditure of Rs. 4,000 was indeed unreasonable. There is no evidence that the property could not yield income sufficient to enable the father to defray reasonable expenses of the marriage.

The next question is whether Rs. 4,000 were paid to the bride's mother as bride price. The mortgage deed recites that the debt of Rs. 4,000 was incurred for the expenses of Shriram's marriage. The money was not paid before the

(4) [1880] 5 Cal. 148 = 6 I. A. 88 = 4 Sar. 1 (P.C.).

(5) [1916] 43 Cal. 574 = 22 Cr. L. J. 845 = 31 I. C. 488.

(6) [1909] 31 All. 176 = 1 I. C. 479.

(7) [1911] 38 Cal. 721 = 12 I. C. 931.

(8) A. I. R. 1915 P.C. 57 = 36 I. C. 499 = 43 Cal. 417 (P.C.).

(8a) 2 N. L. R. 10.

Registrar. The defendant's witnesses prove that Rs. 4,000 were paid to the bride's mother by the plaintiff. The plaintiff admits that he with his mukhtyar was present at the marriage. He states that girls are rare among the Marwari community and that occasionally twenty thousand rupees have to be spent. It would be but a reasonable inference to draw that the plaintiff himself paid Rs. 4,000 to the bride's mother. He had thus full knowledge of the purpose for which the loan was incurred at the date of the mortgage.

As the loan was thus taken and utilized for payment of bride-price the question arises whether it binds the son at all. The appellant's learned counsel relies on the following text of Manu:

"Money due by surety, idle promises or lost by play or due for spirituous liquor or what remains unpaid of fine or tax or duty the son is not obliged to pay: Manu, Chap. 8, 157."

The Sanskrit word used is *shulka*, which has been translated in the "Sacred Books of the East" series as fine, tax or duty. Another meaning of this word "*shulka*" translated "toll" is a nuptial present given as the price of the bride and this has been determined not to be repayable by the son on the ground that it constitutes the essence of one of the unlawful forms of marriage: see Mayne's Hindu Law, Edn 9, p. 404. This was so held in *Kesheorao v. Nago* (3) (at p. 215). Ghose translates this word occurring in a text of Gautama as fee due to the parents of the bride: see Ghose on Hindu Law, Vol. 1, p. 532. In *Bhagirathi v. Jokhu Ram Upadhia* (3) it is held to be part of marriage expenses on the ground that such marriages are common and that the marriages are valid. An additional reason assigned is that the injunction is to the father of the girl receiving the money and not an injunction against the husband paying it. With due deference it is difficult to accept this argument. The fact that the custom is common in a particular community cannot make it any the less immoral or contrary to public policy. The observations of Oldfield, J., apply very appropriately to this case:

"The lower Court was not at liberty to rely on the sentiment of one section of the community as decisive with reference to a matter

of ordinary morality. On such matter the law must have regard to sense of community as a whole."

Applying this test, and judging by the conscience of the community as a whole, payment of bride price must be condemned as immoral if not illegal. The marriage is held legal because it is solemnized according to the customary rites. Here we are concerned not with the question whether the marriage is valid or not, but with the nature of the debt incurred by the father. That there is no injunction against the husband from paying the bride-price is immaterial; the question again is whether the son is bound to pay debts incurred by the father for purposes not approved by the Smriti texts. The simple test would be: Could the mother of the bride have sued for recovering the bride-price? The answer is No: see *Dholidas v. Fulchand* (10), *Baldeo Sahai v. Jumna Kunwar* (11), and *Venkata Krishnayya v. Lakshmi Narayana* (12). If so such debt stands on the same footing as any debt which is immoral, illegal or against public policy. The son is thus obviously not bound to pay such debts. For the reasons aforesaid I hold that Onkar (the son) is not bound by the debt and that his interest is not affected by the mortgage.

It is admitted that fields Nos. 4 and 14 were ancestral. field No. 17-2 was purchased by defendant 1 on 24th June 1913 and field No. 3 on 17th November 1922. As the father and son were joint in estate, mess and residence the presumption is that the latter fields were acquired out of joint family funds. There is no evidence that field No. 17-2 was treated as separate property. The plaintiff as P. W. 1 is himself unable to say what other source the defendant got the money from to purchase these fields.

There is thus no evidence to prove that they were self-acquired. Hence I hold that all the four fields comprised in the mortgage were ancestral.

The appellant contends that Shriram had deposited Rs. 4,000 with the plaintiff for payment to the bride's mother and that he did not receive the consideration for the mortgage. It is im-

(10) [1898] 22 Bom. 658.

(11) [1901] 23 All. 495=(1901) A. W. N. 155.

(12) [1903] 32 Mad. 185=3 I. O. 554.

possible to believe the Indore witnesses examined by the appellant on this point as they are all interested. It appears to me clear that Rs. 4,000, which the defendant borrowed from the plaintiff, were kept with him for payment to the bride's mother and that Shriram had no other sum of Rs. 4,000 in deposit with the plaintiff. I see no reason to differ from the lower Court's finding in this respect and hold that plaintiff did not practise fraud on the defendant.

I therefore hold that the mortgage is binding on Shriram's share only and dismiss the suit as against Onkar. The lower Court's decree stands modified to this extent.

The appellant Shriram will bear half costs and pay the costs of this Court as well as the lower Court to the respondent. The respondent will pay the costs incurred by Onkar (as pleader's fees in full and pay the balance of other costs) in this Court and full costs in the lower Court if any.

K.N./R.K. *Order accordingly.*

A. I. R. 1930 Nagpur 287

JACKSON, A. J. C.

Maroti—Appellant.

v.

Maroti and others—Respondents.

First Appeal No 39-B of 1929, Decided on 10th February 1930, from decree of First Class Sub-Judge, Khamgaon, D/- 20th March 1929.

(a) Hindu Law—Alienation—Widow—Reversioner transferee of whole share—Such alienation is on same footing as surrender—When however reversioner is transferee of part of estate alienation is not validated by his consent.

When a reversionary heir is a transferee of the whole estate of the widow, such alienation stands on the same footing as a surrender. But when he is a transferee of part of the estate, the presumption that the consent of the next reversioner shows the transaction to have been a right and proper one is rebutted by the very fact that the next reversioner is one of the transferees and such alienation is not validated by his consent : 40 Cal. 721 (F. B.) and A. I. R. 1918 P. C. 196, Ref. [P 288 C 2]

(b) Hindu Law—Alienation—Widow—Reversioner transferee of part of estate—His consent though not validating transaction estops him, though not his son, from questioning alienation.

Where a reversioner is a transferee of only part of the widow's estate, his consent, though not validating the alienation, nevertheless estops him, though not his son from questioning the alienation : A. I. R. 1921 P. C. 227, Dist.; A. I. R. 1926 All. 715 and A. I. R. 1927 Bom. 260 (F. B.), Foll. [P 288 C 2]

(c) Hindu Law—Widow—Alienation not void but voidable—Reversioner accepting it as valid—Such consent binds him, though subsequent to transfer.

An alienation by a widow is not void but voidable, the reversioner may accept it as valid and if he does so, his acceptance will bind him. In such a case there is no election within the strict meaning of the term. Even given subsequently such assent has the effect of satisfaction of the transfer : 20 All. 1 (P. C.) and A. I. R. 1918 P. C. 196, Foll.; A. I. R. 1923 All. 387 (F. B.) and A. I. R. 1929 Mad. 502 (F. B.), Ref. [P 289 C 2]

(d) Hindu Law—Alienation—Widow—Ratification or election by reversioner for whom succession not opened—Such ratification is good.

Where a reversioner for whom the succession has not yet opened ratifies an alienation by a widow, such ratification is good : A. I. R. 1929 Mad. 502 (F. B.) and 30 All. 1 (P. C.), Foll. A. I. R. 1923 All. 387, Ref. [P 289 C 2]

(e) Hindu Law—Widow—Alienation—Consent of only one of reversioners—No presumption that transaction is right and proper—Assent binds reversioner personally.

When only one of the body of reversioners consents to an alienation by a Hindu widow it does not afford a presumptive proof that the transaction is a right and proper one and so give it validity, but the assent binds him personally : A. I. R. 1927 P. C. 227, Foll. [P 290 C 2]

V. Bose—for Appellant.

M. B. Niyogi and S. V. Bhide—for Respondents.

Judgment.—The plaintiff Maroti is claiming possession of certain properties as the reversionary heir of one Yedu who died on 9th February 1894, Yedu left two widows, of whom one, Mt. Laxmi, died in 1899 and the other, Mt. Ambi, in 1923. The estate of Yedu was divided equally between the widows on 30th April 1894 and they executed documents in which each undertook not to question any alienation made by the other. On 4th August 1894 Laxmi sold her half share in the estate of her husband to Vithoba, the father of the plaintiff and the next reversionary heir, and Mahadu, a relative of her own. On 5th March 1900 Mahadu sold his undivided half-share in this property to Mt. Ambi and on 20th March 1900 Vithoba and Ambi partitioned the property. On 3rd June 1901 Ambi sold the property that she had purchased from Mahadu to defendants 1 and 2. On 4th December 1894 she had sold her own half-share in Yedu's estate to one Bhagu Kadu and on the same day Bhagu sold it to defendants 1 and 2. On 3rd June 1901 therefore defendants 1

and 2 became the owners of three-fourths of the estate left by Yedu. It is the validity of the transactions by which they came to be the owners of that share that has to be considered in this appeal.

The sale by Laxmi to Vithoba and Mahadu, according to the recitals in the sale deed, was for the purpose of satisfying debts due by the deceased Yedu to the extent of Rs. 3,000; Rs. 1,200 is said to have been due to the shop of Bhagwandas Vithaldas of Jalgaon and Rs. 1,800 to unspecified creditors. As regards the debt of Rs. 1,200, the lower Court has found that there was no debt due to the shop mentioned except one incurred by Laxmi herself. As regards the sum of Rs. 1,800 the lower Court remarks that there is no evidence, apart from the recitals in the sale deed to show that Yedu owed any such debt; but, taking into consideration the facts that Mt. Ambi had in anticipation consented to any alienation that might be made by Mt. Laxmi of the property that fell to her share and that Vithoba, one of the vendees, was the only next reversioner after the widows and, as a vendee, had obviously consented to the sale, the lower Court has held that the consent of Mt. Ambi and Vithoba shows that the transaction was the right and proper one and that the sum of Rs. 1,800 must be treated as borrowed for necessary purposes. As to the sale by Mt. Ambi, the lower Court has held that there was neither legal necessity nor the contemporaneous assent of the next reversioner, but that the sale has been validated by the subsequent assent of Vithoba and the plaintiff. I propose to deal with the appeal on the basis of these findings and the first question to be considered is whether the sale by Mt. Laxmi is validated by the fact that one of her transferees was the next reversioner.

The power of a Hindu widow to alienate the property of her deceased husband to or with the consent of the next reversioners has been considered by the Calcutta High Court in *Debi Prosad Chowdhury v. Golap Bhagat* (1), and by the Privy Council in *Rangasami Gounden v. Nachiappa Gounden* (2), and

(1) [1913] 40 Cal. 721=19 I. C. 273 (F.B.).

(2) A. I. R. 1918 P. C. 196=50 I. C. 498=46 I. A. 72=42 Mad. 523 (P.C.).

they have come to substantially the same conclusion which is thus stated at page 536 of 42 *Mad.* of the report of the Privy Council decision :

"The result of the consideration of the decided cases may be summarized thus : (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

In the present case however it seems to me that it must be held that the presumption, that the consent of the next reversioner shows the transaction to have been a right and proper one, is rebutted by the very fact that the next reversioner is one of the transferees. It is to be noted that Vithoba was not the transferee of the whole of Yedu's estate or even of the whole of Laxmi's half-share in that estate. When the reversioner is transferee of the whole estate then, as their Lordships of the Privy Council have remarked, at page 533 (of 42 *Mad.*) the alienation would stand on the same footing as a surrender. But different considerations apply when the reversionary heir is the transferee of only a part of the estate. As their Lordships remark at page 534 (of 42 *Mad.*) :

"For first if mere consent as such of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule."

I do not therefore accept the lower Court's view that the consent of Vithoba to the sale by Laxmi validates that transaction.

As regards the reversioner himself, it is clear that his consent to an alienation, though it may be given in circumstances, as in the present case, which do not allow it to operate as a complete validation of the alienation, will, nevertheless, estop him from questioning the alienation. That has been held

in *Moti Shah v. Gandharp Singh* (3) and *Akkaua v. Sayadk an Mithekran* (4). Vithoba therefore would be estopped from impugning the sale by Laxmi to himself and Mahadu and claiming the whole of the property sold. The plaintiff however stands on a different footing. In *Ramgowda Annagowda v. Bhausahab* (5) the Privy Council held the son and grandsons of the next reversioner bound by the consent of that reversioner to alienations made by the widow of the last male holder; but in that case the widow had predeceased the next reversioner and his son and grandsons claimed through him. In the present case Vithoba predeceased the second widow, Ambi, and when she died the plaintiff did not claim Yedu's property through his father Vithoba. I am of opinion then that Vithoba's assent to the sale by Mt Laxmi, although it would estop him from questioning the validity of the sale does not estop the plaintiff.

At the time of the partition between Vithoba and Mt. Ambi on 23rd June 1900 Vithoba executed a farkatnama, in which he recognized the validity of the sale by Laxmi to himself and Mahadu and also the sale by Ambi to Bhagu and purported to bind himself and his heirs not to question them. Apart from this farkatnama, Vithoba was in any case, as I have already held, estopped from questioning the sale by Laxmi; and as against the plaintiff, Vithoba's subsequent acknowledgment of the validity of the sale could have no more effect than his original consent to it. The plaintiff however attested the farkatnama as also the partition deed; and the lower Court has held that he did so in circumstances which show that although attestation does not ordinarily involve the attesting witness in any knowledge of the contents of the deed or affect him with notice of its provisions, in the present case the plaintiff attested with knowledge of the contents of the documents and as indicating his consent to them. This finding is based on the evidence of Kadtu (1 D. W. 7), who wrote the partition deed and the kararnama.

(3) A. I. R. 1926 All 715=96 I. C. 595=48 All. 687

(4) A. I. R. 1927 Bom. 260=102 I. C. 282=51 Bom. 475 (F.B.).

(5) A. I. R. 1927 P. C. 227=105 I. C. 708=54 I. A. 896=52 Bom. 1 (P.C.).

He says that he cannot say whether the plaintiff Maroti attested the documents with knowledge of their contents or not; but he adds that the plaintiff had come with Vithoba and one Ganpat and that they were all sitting together when Vithoba gave him instruction and when he wrote the document and read them out to Vithoba. I see no necessity to discuss the lower Court's view that the plaintiff's attestations make him a consenting party to the farkatnama executed by Vithoba, as there is another farkatnama, executed by the plaintiff himself on 14th June 1901, in which he recognizes the validity of the sales by Laxmi and Ambi. The question is whether this recognition precludes the plaintiff from now questioning the validity of those sales.

It has been argued that subsequent assent to a transfer has no effect. It may be that it has no effect as estoppel, but it is clear from the following passage from the judgment of the Privy Council in *Ran-asani Gounden v. Nachiappa Gounden* (2), (at 202) that it can have effect as ratification or, in more precise language, election to hold the transfer good:

"No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract; it is only voidable; *Bijor Gopal Mukerji v. Krishna Mahishi Devi* (6). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If therefore a reversioner, after he became in titulo to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good: *Modhu Sudhan Singh v. Rooke* (7).

But it is well settled that though he who may be termed as presumptive reversionary heir had a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character, which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

(6) [1907] 34 Cal. 329=84 I. A. 87=5 C. L. J. 334 (P.C.).

(7) [1897] 25 Cal. 1=22 I. A. 164=7 Sar. 222 (P.C.).

"Of course something might be done even before that time which amounted to an actual election to hold the deed good."

In an earlier judgment in *Bajrang Singh v. Monakarnika Baksh Singh* (8) their Lordships of the Privy Council have declared that it is immaterial whether the concurrence of the reversioners is given at the time the alienation is made or whether the transaction is subsequently ratified: and the view expressed in *Rangasami Gounden v. Nachiappa Gounden* (2) and quoted above has been applied by the Allahabad and Madras High Courts in *Fateh Singh v. Thakur Rukmini Rawanji Maharaj* (9) and *Ramakotayya v. Viraraghavayya* (10). As has been pointed out in the passage quoted above an alienation by a widow is not void but voidable: the reversioner may accept it as valid and if he does so, his acceptance will bind him. It is suggested that in such a case there is no election within the strict meaning of the term, and that is so; but in *Ramakotayya v. Viraraghavayya* (10), it has been held that, although no one has been damnified so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election, nevertheless, if he has positively and definitely chosen to announce his intention and in fact agreed to abide by the act of the widow, he is personally debarred from resiling from it afterwards.

It has further been argued that there can be no ratification or election by a person for whom the succession has not opened. An argument to this effect, based on the passage quoted in the last preceding paragraph from *Rangasami Gounden v. Nachiappa Gounden* (2), has been considered in *Ramakotayya v. Viraraghavayya* (10), and rejected in the following words:

"It has been argued that their Lordships meant to confine the class of persons who could validate the voidable contract to a reversioner who had not merely a spes successionis but had become in titulo to reduce the estate into possession. Giving the best consideration we can to this leading authority we think that that passage is by way of illus-

tration and should not be treated as exhaustive of the possibilities of a reversioner validating a prima facie voidable contract. There are two cases in which a reversioner may lose his rights. The first is when he does something definite and positive to indicate his election to abide by it; the other is where he is merely guilty of laches and sleeps on his rights. It is clear that what their Lordships call a presumptive reversioner like the present plaintiff cannot be deemed to have affirmed the widow's alienation by mere inactivity. He is entitled to bring a declaratory suit, but he is not bound to do so; he may wait until the succession opens by the death of the widow and the termination of any other intervening interest. The question is whether the same holds good in the case not merely of passivity but of a positively manifested intention to abide by the act of the widow. That seems to be left open by the concluding words of the passage that I have quoted, in which it is said that something may be done even before that time (that is, when the succession opens) which amounted to an actual election to hold the deed good."

The concluding words of the passage quoted from *Rangasami Gounden v. Nachiappa Gounden* (2) have also been considered by a Full Bench of the Allahabad High Court in *Fateh Singh v. Thakur Rukmini Rawanji Maharaj* (9), and the view taken is the same as that of the Madras High Court. I find, further, that in *Bajrang Singh v. Monakarnika Baksh Singh* (8) the ratification took place before the succession opened; and I have no doubt that such ratification is good.

It has been suggested that the farkatnama executed by the plaintiff has no binding effect, because after his father's death he was only one of a body of next reversioners. It is true that the consent of only one of the reversioners to an alienation cannot afford presumptive proof that the transaction was a right and proper one and so give it validity, but the assent of only one of such reversioners or his election to hold the alienation good may bind him personally. As their Lordships of the Privy Council have said in *Ramgowda Annagowda v. Bhausahab* (5):

"It is settled law that an alienation by a widow in excess of her powers is not altogether void, but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding."

As I agree with the lower Court in holding that the sales by Mt. Laxmi and Mt. Ambi are binding on the plaintiff, as he has debarred himself from ques-

(8) [1907] 30 All. 1=11 O. C. 78=35 I. A. 1 (P.C.).

(9) A. I. R. 1923 All. 387=72 I. C. 8=45 All. 339 (F.B.).

(10) A. I. R. 1923 Mad. 502=119 I. C. 155=52 Mad. 556 (F.B.).

tioning their validity, his appeal necessarily fails and is dismissed with costs.

B.V./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 291

JACKSON, A. J. C.

Diwan Singh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 197 of 1930, Decided on 7th August 1930, from order of Addl. Sess. Judge, Hoshangabad, D/- 5th June 1930, in Criminal Revn. No. 10/6 of 1930.

Criminal P. C., (1898), S. 201—Magistrate having two jurisdictions, taking cognizance of complaint under one jurisdiction but later on under another jurisdiction may be deemed to have returned the complaint for presentation to proper Court and to have accepted it as re-presented—States (Protection Against Disaffection) Act, (1922) S. 3.

Inspector-General of Police, Bhopal, with the sanction of the Governor General in Council lodged a complaint in the Court of a Magistrate having two jurisdictions, that of a Headquarters Magistrate and that of a Magistrate exercising jurisdiction over railway lands in Bhopal State. The complaint was against the editor, printer and publisher of an Urdu Weekly "Riyasat" for publishing an article tending to excite disaffection towards the Chief of Bhopal State or his government or administration in Bhopal. The Magistrate was subordinate to different High Courts in two different jurisdictions. The complainant applied for amplification of his complaint by the inclusion of Itarsi as one of the places of publication of the above offending article. The Magistrate passed the following order: "The result of this petition for amplification will be that the case will henceforward cease to be a railway case for State-administered areas if it was one and be transferred to my ordinary file of criminal cases of this Court. This be done." After this order the accused objected that the Magistrate had no jurisdiction to hear the case as he had transferred a case from a Court subordinate to one High Court to another Court subordinate to the other High Court, which the Governor-General in Council could alone do by a notification in the Gazette of India.

Held: that the trying Magistrate in his capacity as the Railway Magistrate for Bhopal was incompetent to deal with the complaint of an offence committed at Itarsi but in his capacity as Headquarters Magistrate was competent to do so. [P 293 C 1]

Held further: that as the original papers filed by the complainant contained material clearly amounting to an allegation of publication at Itarsi, the Railway Magistrate for Bhopal was no longer bound to dismiss the complaint in its entirety: he was entitled to return the complaint for presentation to the Court that could try the offence committed at Itarsi and this was in effect what he did. [P 293 C 1,2]

B. B. Tawakley, Bhagwan Singh and M. B. Kinkhede—for Applicant.

V. Bose—for the Crown.

Abdur Rahman, S.C. Dube and J. Sen—for Non-Applicant.

Order.—The applicant in the present case is alleged to have committed an offence punishable under S. 3, States (Protection Against Disaffection) Act, 1922. The complaint, with the sanction of the Governor-General in Council, was laid by the Inspector-General of Police of the Bhopal State in the Court of the Railway Magistrate, Hoshangabad. In it it was alleged that the accused was the editor, printer and publisher of the Urdu Weekly called *Riyasat*, that an article in that paper headed "Pandit Moti Lal Nehru and Bhopal" published in the issue of 17th August 1929 brought or was intended to bring His Highness the Nawab of Bhopal or the government or administration established in Bhopal into hatred or contempt, or excited or intended to excite disaffection towards the Chief of the Bhopal State or his government or administration in Bhopal.

The complaint was made on 4th December 1929. The complainant when examined made the following statement:

"The publication of the offending article having taken place at the Bhopal Railway Station, the offence under S. 3, States (Protection Against Disaffection) Act, 1922, has been committed by the accused within the jurisdiction of this Court."

Some time thereafter the accused applied to the Government of India for an order of transfer, apparently on the ground that on conviction the appeal would lie to the Political Agent, Bhopal and an application for revision to the Agent to the Governor-General in Central India. Before orders were received on this application the complainant made an application to amplify the complaint, with the purpose of making it clear as to the jurisdiction of the Court, and for that purpose it was alleged that the offending article in the said issue of the *Riyasat* was published at the Itarsi Railway Station in Hoshangabad and other places within the jurisdiction of the Court and that the said article was also published at the Bhopal Railway Station.

It must here be explained that Mr. Royzada, in whose Court the complaint

has been laid, exercises two jurisdictions : he is the Headquarters Magistrate of Hoshangabad and he is also the Magistrate exercising jurisdiction over railway lands in the Bhopal State. In his latter capacity the Political Agent, Bhopal, is the Sessions Judge to hear appeals from his decisions and the Agent to the Governor-General is the High Court. The application for transfer was thus on the assumption that Mr. Royzada had entertained the complaint as the Magistrate exercising jurisdiction in the railway lands in Bhopal. The amplification of the complaint by the inclusion of Itarsi as one of the places where the offending article is alleged to have been published gave Mr. Royzada jurisdiction in his other capacity as the Headquarters Magistrate and on 8th March 1930 he passed an order containing the following :

"The result of this petition for amplification will be that the case will henceforward cease to be a railway case for State-administered areas if it was one and be transferred to my ordinary file of criminal cases of this Court. This be done."

After this order the accused objected that the Headquarters Magistrate, Mr. Royzada, had no jurisdiction to hear the case ; but the objection was overruled on 15th April 1930, and an application for revision was rejected by the Additional Sessions Judge, Hoshangabad, on 5th June 1930, against whose order further application for revision has now been made to this Court. The objection taken is that Mr. Royzada, as a Railway Magistrate, has by his order dated 8th March 1930, transferred the case from a criminal Court subordinate to one High Court to a criminal Court subordinate to another High Court, as such a transfer can only be made by the Governor-General in Council by notification in the Gazette of India.

It would appear from the paragraph I have cited from the order passed on 8th March 1930 that Mr. Royzada expressed a doubt as to whether the case had ever been a railway case for State-administered areas; it seems quite clear from that order that he thought he had taken cognizance of it as such a case, though that is immaterial, if the complaint was of an offence within his other jurisdiction. Whether it was one in reality will depend on the allega-

tion, as to the place where the offence is alleged to have been committed on which the Magistrate took cognizance. The complaint itself does not mention a specific place of publication: it mentions in para. 2 that the Riyasat has a fairly wide circulation in India generally and the Indian States particularly, and is also received in Bhopal. In para. 6 it merely says that the Riyasat issue of the 17th August 1929 was published within the jurisdiction of this Court. The terms of the complaint thus do not show whether the Magistrate took cognizance of an offence committed at Bhopal or at Itarsi.

It is the examination of the complainant, from which I have quoted a passage in para. 2 foregoing, that shows that the Railway Magistrate was asked to take cognizance of an offence committed at the Bhopal railway station. It is urged that Bhopal railway station is not in British India: the States (Protection Against Disaffection) Act applies only to British India and so no offence under it can be committed at that station. From this it is argued that the complaint can only be directed against an offence committed in British India; but it does not follow: the view seems to have been taken that the offence could be committed at that station though it was a mistaken view. It is urged that the intention was not to complain of an offence committed there because there is no certificate from the Political Agent, as S. 188, Criminal P. C., requires. I doubt however if such a certificate is necessary when the trial is to be held by a Magistrate exercising jurisdiction within the Bhopal State. I am satisfied that the complaint made to the Railway Magistrate was *prima facie* of an offence alleged to have been committed at Bhopal railway station, and it was of that offence he took cognizance.

It was not however a complaint of that offence that was transferred to the Headquarters Magistrate for trial but an offence alleged to have been committed at Itarsi railway station, which the Magistrate for Bhopal could not try. S. 527, Criminal P. C., contemplates transfer from a competent Court ; and the only objection, I think, that the accused can raise is that the procedure adopted has resulted in the Headquarters

Magistrate assuming illegal jurisdiction in a case in which no valid complaint has been made to him.

It is suggested on behalf of the prosecution that what has taken place is a return, under S. 201, Criminal P. C., of a complaint for presentation to the proper Court by a Magistrate not competent to take cognizance of the case. It would be unfair to rule out this contention because Mr. Royzada transferred the case from one of his Courts to the other without handing back the complaint to be formally re-presented. It is also immaterial that the Magistrate probably did not realize that S. 201 applied. The question however is whether the Railway Magistrate for Bhopal was incompetent. He certainly was incompetent to deal with the complaint of an offence committed at Itarsi. The complaint itself is in very general terms and does not exclude an allegation of publication at Itarsi or any other place. It was only the examination of the complainant that made it clear that complaint of an offence committed at Bhopal railway station was primarily intended. Such a complaint the Railway Magistrate for Bhopal was not incompetent to deal with. He could have dismissed it as disclosing no offence; but he did not do so and when the application for amplification was made other points arose for consideration. If that amplification introduced matter extraneous to the complaint, then I think it would have had no justification; but it did not. The application, after stating that publication had taken place at Itarsi railway station as well as at Bhopal, went on to point out that a list of witnesses to prove publication at these places had been given with the complaint. That list of witnesses shows that the agent of the bookstall at Itarsi Station was to be called with his newspaper register showing the account of newspapers for the months of August, September and October 1929, and the only intention could be to prove sale of the Riyasat at Itarsi and consequently publication at that place. When thus it was apparent that the papers originally filed by the complainant contained material clearly amounting to an allegation of publication at Itarsi, the Railway Magistrate for Bhopal was no longer bound to dismiss the complaint in its

entirety; he was entitled to return the complaint for presentation to the Court that could try the offence committed at Itarsi and this is in effect what he did.

In this view of the case I must hold that the Headquarters Magistrate has jurisdiction to try the case, and I dismiss the application for revision.

K.N./R.K. *Application dismissed.*

A. I. R. 1930 Nagpur 293

JACKSON, A. J. C.

Fatechand—Appellant.

v.

Mahant Ganeshgir—Respondent.

Misc. Appeal No. 40 of 1929, Decided on 28th August 1930.

Civil P. C., O 21, R. 58—Objection by judgment debtor to attachment on ground that he is trustee for third person is under O. 21, R. 58.

There is a very real distinction between the case of a judgment-debtor's legal representative asserting that the property is his own and has not come to him from the deceased judgment-debtor and that of a judgment-debtor or legal representative of a judgment-debtor opposing execution on the ground that the property is vested in him as trustee or executor of someone else. In the latter case the objection would be under O. 21, R. 58, Civil P. C.

The plaintiff took objection to the attachment of certain property in execution of a decree against him as the legal representative of another person on the ground that the property was not his but belonged to a muth and was held by him as manager and trustee of the muth. The objection was disallowed and the plaintiff brought his suit under O. 21, R. 63, whereupon it was contended that no suit lay as the order disallowing the objection was passed under S. 47, Civil P. C.

Held: that the objection was under O. 21, R. 58, because the plaintiff was not raising it as a judgment-debtor or as the judgment-debtor's legal representative but in a totally different legal character, viz., that of a trustee for a third person: *A. I. R. 1928 All. 392, Foll. A. I. R. 1927 Oudh 120, Diss. from. A. I. R. 1928 Rang. 29; 23 Mad. 195; 31 Cal. 293; 42 Cal. 440; A. I. R. 1922 Pat. 196 and A. I. R. 1927 Mad. 1043 (F.B.) Ref.*

[P 294 C 2]

W. R. Puranik—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—The defendant in the suit out of which this appeal arises had attached certain property in execution of a decree obtained against the plaintiff as the legal representative of one Krishna Nand. The plaintiff preferred an objection to the attachment on the ground that the property was not his but belonged to a muth and was held by him as manager and trustee of the muth. The objection was

disallowed and the plaintiff has brought his suit under O. 21, R. 63. It has been pleaded by the defendant that no suit lies as the order disallowing the objection was passed under S. 47, Civil P. C. The trial Court accepted the plea but the lower appellate Court has held that the objection was one under O. 21, R. 58 and has remanded the suit for a second decision.

The only question that I have to decide is whether the objection was made under S. 47, O. 21, R. 58. The defendant relies on *Shah Naim Ata v. Girdhari Lal* (1) and that case is directly in point. The decision in that case turns upon the interpretation of of the Privy Council decision in *Prosunno Kumar Sanjal v. Kali Das Sanjal* (2) in which their Lordships approved of *Kuriyali v. Mayan* (3). This Madras decision is held to support the view taken by the Chief Court: if it does it is opposed to the later decisions of the same High Court in *Ramanathan Chettiar v. Levvai Marakayar* (4) and *Narayanan Nambudri v. Theva Amma* (5) and the Privy Council's approval is not in my opinion expressed in such terms as make it a guide to the decision of the point I am now considering which was not in fact before their Lordships.

Shah Naim Ata v. Lala Girdhari Lal (1) has been expressly dissented from in *Somwar Gir v. Mayanand Gir* (6) in which it has been pointed out that there is a great mass of authority against the view taken by the Chief Court of Lucknow. In the Allahabad case the objection of a judgment-debtor to the attachment of certain property in execution of the decree against him was that though the property sought to be attached was vested in him it was vested in him not in his private capacity but of mutwalli of a muth and therefore could not be taken in execution by the decree-holder: it was held that the objection was under O.

21, R. 58, because the judgment-debtor was not raising it as judgment-debtor but in a totally different legal character namely that of a trustee for a third person. This view has also been taken in *Ramanathan Chettiar v. Levvai Marakayar* (4); *Kartick Chandra Ghose v. Ashutosh Dhara* (7); *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (8); *Nazir Hussain v. Muhammad Ewaz Hussain* (9); and *Narayanan Nambudri v. Theva Ammal* (5).

In *Somwar Gir v. Mayanand Gir* (6) a distinction was drawn between the case of a judgment-debtor's legal representative asserting that the property is his own and has not come to him from the deceased judgment debtor and that of a judgment-debtor or legal representative of a judgment-debtor opposing execution on the ground that the property is vested in him as trustee or executor of someone else. That distinction has also been drawn in *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (8) where also it has been held that in the former case the objection would be one under S. 47 and in the latter one under O. 21, R. 58. In view of that distinction decisions such as that in *Ma Shwe Mra Pru v. Maung Ba On* (10) in which it has been held that an objection by a person sued as the legal representative of the deceased person to the attachment of certain property in execution of the decree on the ground that it is his own property is one under S. 47, do not help the defendant. It is argued however that the distinction is a false one. It is however based on good authority and there is none against it. Apart from authority, it seems to me that there is a very real distinction: in cases of one class the objector is claiming the property as his own though not through the deceased judgment-debtor and he is before the Court only in his personal capacity while in cases of the other class he is setting up the right of a third person, thus, as *Somwar Gir v. Mayanand Gir* (6) points out making his objection in a totally different legal character from that of the judgment-debtor or the judgment-debtor's legal

(1) A. I. R. 1927 Oudh 120=100 I. C. 434=2 Luck. 145.

(2) [1892] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P.C.).

(3) [1884] 7 Mad. 255.

(4) [1900] 23 Mad. 195=10 M. L. J. 64 (F.B.).

(5) A. I. R. 1927 Mad. 1043=106 I. C. 230=51 Mad. 46 (F.B.).

(6) A. I. R. 1928 All. 392=113 I. C. 171=50 All. 801.

(7) [1912] 39 Cal. 218=17 I. C. 163.

(8) 1915 42 Cal. 440=27 I. C. 328.

(9) A. I. R. 1922 Pat. 196=67 I. C. 438=1 Pat. 637.

(10) A. I. R. 1928 Rang. 29=107 I. C. 856=5 Rang. 659.

representative. The appeal fails and is dismissed with costs.

K.N./R.K.

Appeal dismissed.

A. I. R. 1930 Nagpur 295

NIYOGI, A. J. C.

Gobind—Appellant.

v.

Baliram—Respondent.

Misc. Appeal No. 2-B of 1930, Decided on 22nd August 1930, from decision of First Additional District Judge, Akola, D/- 4th October 1929, in Civil Appeal No. 75 of 1929.

(a) Civil P. C., O. 43, R. 1 (u)—Appeal against order of remand—Lower appellate Court determining case on preliminary point—Appeal lies

The plaintiff sued on a promissory note dated 23rd December 1925 executed by the defendant in favour of his stepmother S, alleging that he was her only heir. On the defendant's objection that S had a daughter, he found that he had no case on the plaint and sought by application dated 13th February 1929 to amend the plaint by alleging that his stepmother managed his estate and advanced the money to get the promissory note executed in her name for his benefit. The trial Court rejected the application and dismissed the suit. On appeal the lower appellate Court held that plaintiff's application ought to have been allowed and remanded the suit under O. 41, R. 23, Civil P. C. Against this order defendant appealed. Plaintiff took a preliminary objection that no appeal lay as the remand order could not be treated as one made under O. 41, R. 23 when there was no preliminary point before the lower appellate Court which could attract the application of that rule.

Held: overruling the objection, that the appeal was maintainable as the point on which the lower appellate Court determined the case was a preliminary point. [P 296 C 1]

(b) Civil P. C., O. 41, R. 23—Meaning of "preliminary point."

Preliminary point is one which, when determined in favour of the plaintiff, permits the progress of the suit, but when determined against him concludes it: *A.I.R. 1922 Mad. 505 and 9 All. 26, Ref.* [P 296 C 1]

(c) Civil P. C., O. 6, R. 17—Discretionary powers of Court—When and how exercised.

Under O. 6, R. 17, Civil P. C., Courts have wide powers of discretion in allowing amendment. Such discretion must be a judicial discretion to be exercised on legal principles and not capriciously: *A.I.R. 1927 Nag. 310, Foll.; 58 I.C. 421, Ref.* [P 296 C 1]

Where there was absence of good faith on plaintiff's part in applying for amendment, and the application was made after the period of limitation had expired and the effect of allowing the amendment would be to convert the suit into one of a totally different character:

Held: that the lower appellate Court was wrong in allowing the plaintiff to amend the plaint: 33 Bom. 35; 5 All 456, *Ref.* [P 296 C 2]

G. G. Hatvalne—for Appellant.

M. R. Bobde—for Respondent.

Order.—This appeal has been filed from an order of remand made in Civil Appeal No. 75 of 1929 under O. 41, R. 23, Civil P. C.

The plaintiff-respondent instituted a suit, No. 614 of 1928, on the basis of a promissory note dated 23rd December 1925, executed by the defendant in favour of one Sarjabai, who was the stepmother of the plaintiff. He alleged to be the only heir to Mt. Sarjabai. The defendant admitted execution of the promissory note and receipt of consideration, but pleaded that Mt. Sarjabai had a daughter and that the plaintiff had no right to sue. Thereon the plaintiff discovered that he had no case on the plaint. He made an application on 13th February 1929 for amendment of his plaint. He alleged that Sarjabai was managing his estate and that she advanced the money to get the promissory note executed in her own name for the benefit of the plaintiff. As a result of the objection by the defendant the trial Court rejected the application for amendment and proceeded to deliver judgment of the case as originally framed. Holding that the plaintiff was not the heir in preference to Mt. Sarjabai's daughter, it dismissed the suit. In appeal the only point argued was that the application for amendment ought to have been allowed. The lower appellate Court acceded to this contention and remanded the case under O. 41, R. 23, for further trial. The defendant has preferred this appeal against that order.

It is contended by the respondent that no appeal lies against that order. The reason for this contention is stated to be that the lower appellate Court could not remand the case under O. 41, R. 23. It is contended that there was no preliminary point before the lower appellate Court which could attract the application, under O. 41, R. 23. The respondent on the other hand contended that in order to give him the right to appeal under O. 43, R. 1 (u) it was sufficient that the Court purported to remand under O. 41, R. 23. Both the parties relied on many cases. It appears to me that the real question in controversy is whether the point which was to be determined by the lower appellate Court was a preliminary point or not. The preliminary point has been defined as any point, whether of fact or law, deci-

sion of which avoids the necessity for the full hearing of the suit: see *Raman Narar v. Krishnan Nambudripad* (1). This case refers to *Sohanan v. Babu Nant* (2) note at pp. 30 and 32, where Mahmood, J., observed that "preliminary point" is not confined to such legal points only as may be pleaded in bar of suit, but comprehends all such points as may have prevented the Court from disposing of the case on merits whether such points are pure questions of law or pure questions of facts. It appears to me that the preliminary point can be broadly described as one which, when determined in favour of the plaintiff, permits the progress of the suit, but when determined against him, concludes it. Supposing the trial Court rejects the plaint on the ground that it does not disclose the cause of action and on appeal the appellate Court sends back the case for trial on merits holding that the plaint disclosed the cause of action. In this case the order would rightly be made under O. 41, R. 23. In my opinion the present case stands exactly on the same footing. The plaintiff desired that his plaint should be taken as the basis of the suit after amendment on the lines prayed for by him. The trial Court having rejected that application there could be no trial on the merits of the claim which the plaintiff desired a trial on. The order of the lower Court now opens the way for the trial on merits. I therefore think that the lower appellate Court was right in acting under O. 41, R. 23.

The appeal has been also argued on merits. I am disposed to think that the amendment ought not to be allowed. No doubt the Courts have under O. 6, R. 17, wide powers of discretion. Such discretion must of course be

"a judicial discretion to be exercised in legal principles, not by chance, medley, nor by caprice nor in temper: see *Justain Hull v. Arthur Francis Paull* (3)."

The rules governing discretion of the Courts in such cases having been lucidly stated in *Bhuwanlal v. Sumranlal* (4): first, there must be good faith on the part of the plaintiff; and secondly the

amendment must be possible without prejudice to the defendant; and thirdly the amendment must not turn the suit into one of a different character. There is obviously absence of good faith as is clear from the fact that this plea was not raised until the plaintiff discovered that his suit was going to be dismissed. Nobody knew better than himself that he was a beneficiary under the promissory note. As a matter of fact this ought to have been his primary ground of title. In reply to the defence pleadings the plaintiff made a vacillating statement through his pleader on 12th February 1929. He first said that Mt. Sarjabai only got the promissory note executed as he was minor then, and he changed his statement immediately and said that she got it executed in her name as manager of the plaintiff's family. Absence of good faith is also evident from the fact that in spite of his knowledge that Mt. Sarjabai had left a daughter he pretended to be the heir. Moreover this amendment cannot be allowed without prejudice to the defendant. The suit was filed a few days before the expiry of the period of limitation, and allowing the plaint to be amended now would obviously result in depriving the defendant of his plea that the suit is barred by limitation.

I think that the suit now would be of a totally different character. The object of the amendment is ordinarily to help the Court in determining the real questions in controversy between the parties. Originally the plaintiff claimed under the obligee of the promissory note and by the amendment he claims against the obligee. This is an attempt to set up a new case altogether. It therefore fundamentally alters the nature of the controversy in the suit. A defeated litigant like him should not be allowed at a late stage to amend his case: see *Nathu Piraji v. Umedmal Gadumal* (5), at p. 38. In *Hamilton v. The Land Mortgage Bank of India* (6) at p. 459 their Lordships under very similar circumstances observed as follows:

"We cannot countenance the notion, that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegations."

(1) A.I.R. 1922 Mad. 505=69 I.C. 828=45 Mad. 900 (F.B.).

(2) [1887] 9 All. 26.

(3) [1920] 58 I.C. 421.

(4) A.I.R. 1927 Nag. 310=103 I.C. 455=23 N.L.R. 81.

(5) [1909] 33 Bom. 35=1 I.C. 456.

(6) [1883] 5 All. 456=(1883) A.W.N. 99.

This according to their Lordships is "a complete change of front." Here the lower appellate Court was itself of opinion that the amendment was inconsistent with the original pleadings. In my opinion the cause of action is undoubtedly different. In the one case the plaintiff's title would arise on the death of Mt. Sarjabai whereas on the amended case it would arise on the very day the promissory note was executed. Again, the lower appellate Court felt that the suit as based on the amended plea would be time barred; but curiously enough it allowed the amendment simply on the ground that there was no separate suit, but only an alternative claim in the same suit.

The lower appellate Court did not exercise its discretion according to the well-established judicial principles. For the reasons aforesaid I allow the appeal. The respondent will pay the costs of the appellant in this Court as well as the Courts below.

K.N./R.K.

Appeal allowed.

A. I. R. 1930 Nagpur 297

MACNAIR, A. J. C.

Mohanlal—Plaintiff—Appellant.

v.

Muka and others—Respondents.

Second Appeal No. 504 of 1927, Decided on 8th February 1930.

C P. Land Revenue Act, S. 2 — Escheated malik-makbuza fields leased to malguzar for term of settlement cannot be considered to be 'survey-number' — Malguzar cannot mortgage his right in fields as he is merely permitted to cultivate for certain period—If it is mortgaged such mortgage cannot form basis of civil suit.

Escheated malik-makbuza fields, which are subsequently leased out to malguzar for a term of settlement under the provisions of Revenue Book Circular S. 1, Serial No. 3, cannot be considered to be 'survey number' within the definition in S. 2. Such a malguzar is a mere licensee as unless he continued to cultivate the fields he will have no right when the settlement expires. The permission to cultivate the land cannot be mortgaged. If it is mortgaged, the mortgage cannot form the basis of a civil suit. [P 297 C 2; P 295 C 1]

T. J. Kedar—for Appellant.

M. R. Bobde—for Respondents.

Judgment. — The defendants purported to mortgage two fields described as raiyat-sarkar. The lower appellate Court has held that these fields were survey-numbers in which the defendants held the rights of a raiyat: S. 212, Land Revenue Act, states that such

rights are not transferable, and a foreclosure decree could not be passed with regard to these fields. In appeal it is urged that the mortgage was valid and a foreclosure decree should have been passed. The fields were originally malik-makbuza fields which escheated to the Government and were subsequently leased out under the provisions of Revenue Book Circular, S. 1, serial No. 3. The land belonged to Government and the malguzar was a lessee. He was therefore termed a cultivator holding from the Government or "raiyaat-sarkar." Now the definition of "survey number" is given in S. 2, Central Provinces Land Revenue Act of 1917:

"'Survey number' means any area held by, or intended to be settled with, a raiyat under a separate assessment of land revenue in a village or land which is the property of Government."

The fields in dispute are pieces of land which are the property of Government, but cannot be considered to be areas in land which is the property of Government. The rules in the Revenue Book Circular to which reference is made show clearly that there was no intention to consider escheated malik-makbuza plots, when made over to the malguzar for the term of a settlement, as survey numbers. At a subsequent settlement the malguzar will be given an opportunity to obtain *sir* rights in the land by payment, but only if he is cultivating the land for himself; if he does not cultivate it for himself, the plots will be auctioned. By rules made under S. 212, Land Revenue Act, a raiyat may lease his survey number if the lease complies with certain conditions, and at the subsequent settlement the assessment of the survey number will be offered to the raiyat: S. 206 of the Act. This is sufficient to make it clear that the rules regarding survey numbers do not apply to the fields in suit.

The fields in suit, however, have been made over to the malguzar for the term of settlement. Unless the malguzar continues to cultivate the land he will have no rights when the settlement expires: the malguzar is a mere licensee. There is nothing in the Revenue Book Circular which suggests that he can give any right to any other person in the fields. A permission to cultivate land for a period cannot be mortgaged. The

mortgagee obtains no right to cultivate the land and cannot be given a decree for possession. In my opinion it is not material whether the Land Revenue Act and the rules thereunder state that a certain right is not transferable or show clearly that no transferable right is given : in either case the transfer of the right cannot form the basis of a civil suit. The finding of the lower appellate Court is correct. In appeal this finding only is attacked. The appeal therefore fails and is dismissed. Costs on the appellant. Counsel's fee Rs. 40.

P.N./R.K.

Appeal dismissed.

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NIYOGI, A. J. C.

Chhedilal—Defendant—Appellant.

v.

Manoharlal—Plaintiff—Respondent.

Second Appeal No. 406 of 1928, Decided on 8th July 1930.

* Evidence Act (1 of 1872), S. 92—Acknowledgment is not document within S. 92—Suit brought alleging that money was paid on pro-note and that liability was acknowledged—But suit based on oral promise made at the time of execution of acknowledgment—Such oral agreement can be proved.

Acknowledgment is not a document contemplated in S. 92. Where a suit is brought alleging that money was advanced on a promissory note and liability was acknowledged, but where the plaintiff rests his claim not on the acknowledgment or on the pro-note but on oral promise made at the time of the execution of the acknowledgment, S. 92 does not preclude the proof of such oral agreement, for a contract of loan is not a matter which is required by law to be in writing. An agreement to pay the amount found due on a particular day which is acknowledged in writing need not be in writing : 16 N. L. R. 68 ; A. I. R. 1921 Bom. 449 and A. I. R. 1925 Lah. 576, Dist. (Case Law Referred). [P 299 C 1,2]

K. V. Deskar—for Appellant.

K. K. Tiwari, A. V. Khare and W. B. Pendharkar—for Respondent.

Judgment.—The respondent Manoharlal sued the appellant for the recovery of Rs. 338-8-9 on the allegation that on two occasions amounts were advanced on promissory notes and once on oral promise to pay the money in the year 1918 and that the liability was acknowledged by defendant-appellant on 13th May 1921 which was in turn renewed by another acknowledgment on 10th April 1924. The respondent rested his claim not on the acknowledgment or on the promissory notes, but on oral promise made by the

appellant at the time of the execution of the acknowledgment dated 10th April 1924. The Court of first instance held the oral promise to be disproved and dismissed the plaintiff's suit. The learned District Judge on appeal came to a different conclusion and decreed the suit in full.

In second appeal it is contended that the oral agreement pleaded could not be proved in view of S. 92, Evidence Act. The learned pleader for the appellant contended that in view of the acknowledgment no oral evidence was admissible to vary the terms thereof, and the respondent relied on Proviso. (2) and Illus. (f) and (g) to S. 92, Evidence Act and contended that the evidence to prove an independent oral agreement was admissible. He relied on *Ibrahim v. Lali Mohan* (1).

In my opinion S. 92, Evidence Act, has no application. That section deals with matters which the law requires to be reduced to the form of a document and which are contracts, grants or other dispositions of property. This is indicated by the words "as between the parties to any such instrument or their representatives in interest," which are only applicable in the case of a document of a dispositive character: see Law of Evidence by Woodroffe and Ameer Ali, 8th Edition, p. 611. The prohibition against the admission of oral evidence or statement contained in S. 92 applies only where the matter required by law to be in writing constitutes an instrument *ejusdem generis* with a contract, grant or other disposition of property ; vide *Ranglal v. Chunnilal* (2).

What is the character of an acknowledgment ? Obviously it is neither contract, grant nor disposition of property, nor analogous to any of them. The acknowledgment need not be addressed to the creditor : *Maniram v. Seth Rupchand* (3). It may be contained in a disposition : *Periavenkan Udaya Tevar v. Subramaniam Chetti* (4). It may indeed be made in a formal way with a stamp affixed, but the formality is meant for supplying evidence

(1) A. I. R. 1924 Cal. 388 = 79 I. O. 489 = 50 Cal. 974.

(2) [1920] 16 N. L. R. 204 = 60 I. O. 316.

(3) [1906] 33 Cal. 1017 = 33 I. A. 165 = 2 N. L. R. 130 (P.C.).

(4) [1896] 20 Mad. 239.

of debt : Stamp Act, Sch. 1 Art. 1. It does not by itself operate by any means as a contract. I am aware that in *Chunnilal v. Laxman Govind* (5), and *Sitaram v. Nandram*, A. I. R. 1925 Nag. 9, the acknowledgment was treated as an implied contract on the strength of certain observations of their Lordships of the Privy Council made in *Maniram v. Seth Rupchand* (3). Although acknowledgment may imply promise for extending limitation, it is, without a promise, insufficient to create a contract and cannot be enforced as such: see *Maganlal v. Amichand* (6), *Sashikanta v. Sonaula Munshi* (7), and *Raj Narain Rao v. Ram Sarup* (8); see also *Govind Singh v. Bijoy Bahadur Singh* (9). I am therefore of opinion that an acknowledgment is not a document contemplated in S. 92, Evidence Act.

The appellant further contends that the liability enforceable on the date of the acknowledgment arose from promissory notes which at any rate belong to the class of documents referred to in S. 92, Evidence Act, and that consequently no oral evidence was admissible to vary the terms thereof. I am aware of cases like *Pentaya v. Kesheorao* (10), *Vishnu Ramchandra Joshi v. Ganesh Krishna Sathe* (11), and *Hira Lal v. Benarsi Das* (12). These cases are distinguishable as the suits were based on the promissory notes and the oral evidence was sought to be given to vary the terms thereof. In the present case the claim does not rest on the promissory notes but on the verbal agreement only. The question is whether this oral agreement cannot be proved as an independent contract. I find that S. 62, Contract Act, recognizes novation of contracts. If the parties agree to give up their prior contract and substitute it by a new one, there is nothing in law to prevent the subsequent contract being enforced. The appellant's objec-

tion however is one with reference to S. 92, Evidence Act, and he has therefore to show that the contract of debt evidenced by the promissory notes is "a matter required by law to be reduced to the form of a document"

Proviso (4) runs as follows:

"The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing."

The pro-notes indeed represent the contract, but is a contract of simple money debt, one which is required by law to be reduced to the form of a document? If A lends money to B, he might do so relying on his verbal promise to pay as well as take a writing from him. There is no law to prevent oral contracts for payment of loans. A document may offer better evidence, but it is not absolutely necessary for the validity of the contract. It is on this principle that when the promissory notes or other negotiable instruments are found unenforceable for defective stamp and other reasons, the creditor is permitted to fall back on his contract of loan, and oral evidence is admitted to prove the contract independently of the promissory notes; vide *Gokuldas v. Parmanand* (13). In *Dhaneshwar Sahu v. Ramrup Gir* (14) their Lordships observed:

"Apart from the instrument, viz., the promissory note, there is always a contract to repay a loan, and such contract can be proved independently of the instrument."

It is therefore evident that although a contract of loan may be evidenced by a promissory note, it is not a matter which is required by law to be in writing, as for example, in the transactions relating to sale, mortgage, lease and gift. On this view again, S. 92, Evidence Act, will not preclude the proof of oral agreement as is done in this case.

Now the question may arise as to whether an agreement to pay the amount found due on a particular day which was acknowledged in writing, should be in writing. I think it need not be in writing; the contract is for consideration and the contract being with reference to a debt not time barred, S. 25, Contract Act, will not come into operation. It may be con-

(5) A. I. R. 1922 Bom. 183 = 63 I. C. 923 = 46 Bom. 24.

(6) A. I. R. 1928 Bom. 319 = 112 I. C. 24 = 52 Bom. 521.

(7) A. I. R. 1929 Cal. 441 = 121 I. C. 412 = 57 Cal. 394.

(8) A. I. R. 1930 All. 467 = 123 I. C. 820.

(9) A. I. R. 1929 All. 980 = 121 I. C. 103.

(10) [1920] 16 N. L. R. 68 = 56 I. C. 219.

(11) A. I. R. 1921 Bom. 449 = 63 I. C. 673 = 45 Bom. 1155.

(12) A. I. R. 1925 Lab. 576 = 90 I. C. 982 = 6 Lab. 411.

(13) [1901] 6 N. L. R. 125 = 8 I. C. 231.

(14) A. I. R. 1923 Pat. 426 = 111 I. C. 482 = 7 Pat. 845.

tended that when this oral promise was made there was no fresh consideration advanced and therefore the contract was required to be in writing. I think this is not a correct statement of the position. Although the acknowledgment was executed, the creditor could file a suit, if he chose, the next day. The creditor may say to the debtor:

"I intended to file a suit, but I shall abstain if you promise to pay the amount on a particular day."

Here the debtor receives consideration: see S. 2 (d), Contract Act. Such oral agreements have been held to be valid and enforceable as fresh contracts: see *Motabhoj v. Mulji Haridas* (15), *Ibrahim v. Lalit Mohan* (1), *Annamalai v. Velayuda* (16), *Textile Manufacturing Co. v. Solomon Brothers* (17), and *Govind Singh v. Bijoy Bahadur* (9).

For the reasons aforesaid I hold that the plaintiff could prove the oral agreement pleaded by him. The appellate Court's finding that this agreement was proved has not been challenged. I therefore dismiss the appeal. The appellant will pay the respondent's costs in this Court and costs in the lower Courts as already ordered by the lower appellate Court.

P.N./R.K. *Appeal dismissed.*

(15) A. I. R. 1915 P. C. 2=29 I. C. 223=42 I. A. 103=39 Bom. 319 (P. C.).

(16) [1915] 33 Mad. 129=32 I. C. 863. (F. B.).

(17) [1915] 40 Bom. 570=33 I. C. 353.

A. I. R. 1930 Nagpur 300

NIYOGI, OFFG. A. J. C.

Jairam and another—Appellants.

v.

Bhilaji—Respondent.

Misc. Appeal No. 39 of 1929, Decided on 20th July 1930.

(a) Deed—Construction.

Where disputes relating to a mortgage are referred to a Board which delivered an award modifying some terms of the mortgage deed with a note that "regarding these things the original document should be considered to have been corrected" and making one co-mortgagor solely responsible for redemption, the award does not extinguish the original mortgage: *A. I. R. 1921 P. C. 13, Rel. on.*

[P 301 C 1]

(b) Limitation Act (1908), Arts. 144 and 148—Transfer of Property Act (1882), Ss. 95 and 100.

Where one of the co-mortgagors pays off the mortgage debt in full a suit by another co-mortgagor for redemption of his share is governed by Art. 148 and not by Art. 144, and limitation begins to run from the date when the co-mortgagor redeems the mortgage: 26

Bom. 507 and 46 Cal. 111, not Foll. ; 14, All. 1 (F.B.), Rel. on. [P 304 C 1]

(c) Transfer of Property Act (Amendment Act 20 of 1929), S. 92—Intention of legislature.

The legislature has by the amendment not created a right which did not exist before but has simply classified the position of the co-mortgagor holding a charge within S. 95 read with S. 100. [P 304 C 1]

N. G. Bose and Sitacharan Dube—for Appellants.

Shridhar Rao Gokhale—for Respondent.

Judgment.—Mouza Dhondikhera in the Bhainsdehi Tahsil originally belonged to five brothers, Jangoba, Gunda, Gangaji, Sambhia and Bhilia. Jangoba was the father of defendants 1 and 2, Jairam and Gana, and Bhilia is now the plaintiff. The five brothers jointly executed a mortgage in respect of the aforesaid property on 25th June 1892 for Rs. 1,000 in favour of one Dhanrao. The dispute relating to the mortgage was referred to the Debt Conciliation Board which delivered an award on 3rd June 1904, Ex. D. 7. The award modified the terms of the mortgage deed by reducing the debt to Rs. 1800 directing repayment thereof by instalments and making Jangoba solely responsible for redemption. The award bears the signatures of all parties in token of acceptance. The co-mortgagors put Jangoba in exclusive possession of the entire village in 1904.

Jangoba paid off the mortgage debt in full by the year 1909. Bhilia has filed this suit for redemption of his own share in this village. The defendants raised various pleas, including that of adverse possession, and 25 issues were framed. The Court of first instance however decided the question of limitation as it thought that the case would be concluded by a finding on that issue. It held that the article applicable to the suit was Art. 144 and not 148, and that Jangoba and his sons had been in adverse possession since the time Jangoba paid off the entire mortgage debt in 1909. On this finding the suit was dismissed. The Court of first appeal agreed with the trial Court that Art. 144 applied to the case, but it held that the mere redemption of the entire mortgage by Jangoba was not sufficient to convert his possession into an adverse possession; and on review of some evidence in the case it concluded

that there was no adverse possession on the part of Jangoba or his successors. The suit was remanded for the purpose of determining the amount which the appellant would have to pay for recovering possession of his share.

This appeal is preferred against the order of remand. The learned counsel for the appellants contends that the award per se extinguished the mortgage of 1892 and altogether destroyed plaintiff's equity of redemption and vested it exclusively in Jangoba on whom the obligation of paying off the entire debt was laid, that Jangoba's adverse possession commenced in 1904, that in any case Jangoba's adverse possession began in 1909 when he redeemed the mortgage in full, and that the suit having been filed more than 12 years since 1904 or 1909 is time barred. The respondent's counsel, on the other hand, argues that the question of Jangoba's adverse possession cannot be considered in second appeal as the determination of that question depends upon facts which have yet to be ascertained. He also contends that the proper article to be applied is Art. 148 and not Art. 144.

As the case has not been tried on issues of fact, I assume for the purpose of this appeal that Bhilia, the plaintiff, continued to be cosharer in spite of the award or any other circumstances, up to the date of the suit. As an abstract proposition, the appellant's learned counsel is right in his contention that an award extinguishes the mortgage, but I find that the award, which was accepted by the parties and thus became a new agreement between them, did not purport to extinguish the mortgage. Some terms of the mortgage deed were modified and there is a note in Ex. P. 3 that

"regarding these things the original document should be considered to have been corrected."

In such a case it could not be said that the original mortgage of 1892 was extinguished. The facts in *Gulabsing v. Ballabhdas* (1) were similar to the present case. It was held by this Court that the decree passed on consent of the parties was to be read with the mortgage which should be treated as a schedule to it. Their Lordships of the Privy Council expressed their approval at

(1) A. I. R., 1921 P.C. 13=61 I.C. 769=43 I.A. 220=48 Cal. 591 (P.C.).

p. 83. It is thus evident that the award read with the mortgage kept the rights under the mortgage deed alive; even on the assumption that the award was tantamount to a decree of the Court, Jangoba would be only one of the co-judgment-debtors and, if he paid off the mortgage debt, he would acquire a right similar to that of a co-mortgagor paying off the mortgage debt: see *Rajah of Vizianagram v. Rajah Setrucherla Soma-sekhara* (2); *Amman Pariyayi v. Pak-ran Haji* (3); *Shri Maharaja Prabhu Narayan Singh v. Babu Beni Singh* (4).

The contention that Jangoba's possession became adverse since 1904 cannot obviously be agitated here for the first time. The trial Court reserved investigation into the controversy pertaining to facts and has given its finding only on the question of limitation. The learned Judge of the lower appellate Court, in my opinion, has gone beyond the purview of the appeal by pronouncing his opinion on the question of adverse possession in a summary way. In any case, neither of the two Courts below has so far had opportunity to consider the case as presented here; the appellants cannot therefore be allowed to raise the point here. It is quite open to them to press this contention in the trial Court when this case is sent back.

Now as to the next question, I am of opinion that Art. 148, Sch. 1, Lim. Act, applies to the present case. The Courts below have followed the view enunciated in *Vasudeo v. Balaji* (5); *Jai Kishan Joshi v. Budhanand Joshi* (6); *Purnu Chandra Pal v. Barada Prasanna Bhattacharje* (7); *Munia Goundan v. Ramasami Chetty* (8) and *Wazir v. Girdhari* (9) and have rejected the view taken in *Ashjaq Ahmad v. Wazir Ali* (10). I shall briefly examine the grounds assigned for the decisions in the various reported cases followed by the Courts below. In *Vasudeo v. Balaji* (5), Jenkins, C.J., no doubt took the view that the article applicable was Art. 144 and not Art. 148. The learned Judge framed the

(2) [1903] 26 Mad. 686.

(3) [1913] 36 Mad. 493=15 I. C. 262.

(4) [1903] 5 I. C. 779.

(5) [1902] 26 Bom. 500=4 Bom. L. R. 178.

(6) [1916] 33 All. 138=34 I. C. 244.

(7) [1919] 46 Cal. 111=45 I. C. 783.

(8) [1918] 41 Mad. 650=45 I. C. 867.

(9) A. I. R., 1923 Lah. 311=71 I. C. 847.

(10) [1891] 14 All. 1=(1891) A. W. N. 211 (F.B.).

point for determination in these words:

"It is to be noticed that it is a condition of Art. 148 that it should be one against a mortgagee, so that we have to see whether a co-mortgagor who has redeemed answers that description."

Then the learned Judge referred to S. 95 and the first part of S. 100, T.P. Act, and stated his opinion in these words:

"We see therefore from this that in the Transfer of Property Act, a distinction is drawn between a charge and a mortgage, and that what redeeming co-mortgagor has is a charge and not a mortgage. From this it would follow that he would not be a mortgagee within the meaning of Art. 148."

In *Vasudeo v. Balaji* (5) and *Jai Kishan Joshi v. Budhanand Joshi* (6), the suit was held barred for the reason that the charge holder had set up adverse title in himself and held under that title to the knowledge of his adversary for more than 12 years: see *Jai Kishan Joshi v. Budhanand Joshi* (6). This decision cannot be accepted as authority for the proposition that by the simple fact of a co-mortgagor redeeming the mortgage, his possession would be adverse. In *Purna Chandra v. Barada Prosanna* (7) their Lordships observe that:

"The view taken in the Bombay case is more consistent with the language of Ss. 95 and 100, T. P. Act, and the language of Art. 148 of the schedule of the Limitation Act. The Transfer of Property Act draws a clear distinction between a charge and a mortgage, and it is difficult to interpret the word "mortgage" in Art. 148 as including a charge."

In *Munia Goundan v. Ramasami Chetty* (8) the article applied was 126 and not 144. It was held in that case that a suit by the assignee from a member of a joint family, against the mortgagee (in whose favour the manager of the joint family mortgaged the entire property without justifying necessity) was one substantially for setting aside the mortgage and for possession, and not for redemption. In *Wazir v. Giridhari* (9), the ground of decision is given in these words:

"The rule that ordinarily one cosharer cannot hold adversely against another cosharer proceeds upon a rebuttable presumption that the cosharer in exclusive possession is holding on behalf of the other cosharer. This presumption is rebutted when it is shown that the cosharer in possession denies the right of the other cosharers to enter into possession until they have paid to him their share of a charge upon the property which he has defrayed."

Examining the reasons given in *Vasudeo v. Balaji* (5) and *Purna Chandra Pal v. Barada Prosanna Bhattacharje* (7), it would appear that the position of

a person having a charge is regarded as distinct from that of mortgagee on account of the distinction between a charge and a mortgage made in S. 100, T. P. Act. With due respect, I am unable to accept the reasons, as they rest on the acceptance of one part and rejection of the other part of provisions of S. 100, T. P. Act, which runs as follows:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall so far as may be apply to the owner of such property, and the provisions of Ss. 81 and 82 shall so far as may be apply to the person having such charge."

The last portion of this section conveys that the position of a person having a charge is that of a mortgagee so far as the enforcement of the right of (contribution) is concerned. The owner of the property subject to the charge is also entitled to claim redemption under the provisions of S. 60. The Transfer of Property regards the person having a charge as a mortgagee for the purpose of working out his rights. The Limitation Act itself does not define the term "mortgagee or mortgagor."

As these terms are defined in the T. P. Act, the words used in the Lim. Act must be interpreted in the light of the T. P. Act. When the rights in respect of a charge are worked out, the Transfer of Property Act does not make any distinction between the two. Again, if Art. 132 which only mentions a charge, is interpreted in a narrow sense to mean "a mortgagee" because the money of the mortgagee is charged on the property, why should not the term "mortgagee" used in Art. 148, be interpreted as one "whose money is charged on the property?" It may be objected that the charge being a wider term than "mortgage." "mortgagor" cannot include a person having a charge. The answer is that when the person "whose money is charged on the party" becomes a mortgagee in the terms of the Transfer of Property Act, he cannot cease to be a mortgagee for the purpose of Art. 148, Lim. Act. Even apart from the provisions of S. 100, the mortgagor who pays off the mortgage is, under the doctrine of subrogation clothed with all the rights of the mortgagee. A mortgagor

redeeming the whole mortgage stands in the shoes of the original mortgagee and is entitled to all the rights and incidents connected with his estate: see *Ashfaq Ahmad v. Wazir Ali* (10). If so, how can he cease to be regarded as a mortgagee when the correlative right of redemption is being enforced against him. It is evident that the owner of the property subject to a charge cannot be excluded from the benefit of Art. 148, Lim. Act. I have now to examine whether Art. 144 applies to a suit for redemption of a charge, arising in favour of a co-mortgagor who redeems the whole mortgage: *Vasudeo v. Balaji* (5) and *Purna Chandra Pal v. Barada Prosanna Bhattacharya*: Art. 144 was applied as no other article was thought to be relevant. In *Wazir v. Girdhari* (9) however Art. 144 is taken to be the only appropriate article. According to this view, as soon as the co-mortgagor redeems the mortgage and obtains a charge on the mortgaged property, he is deemed to deny the title of his co-mortgagors. It is difficult to understand how a redeeming co-mortgagor could be assumed to deny the title of the co-sharer for the simple reason that the law gives him a charge. His very right to redeem the entire mortgage arises by reason of common liability of co-owner, and, if the reasoning is correct, it would mean that, as soon as such co-owner, discharges the common debt he ceases to be a co-owner. If this were the position it will be contrary to the plain provisions of S. 95, T. P. Act. The mortgagor does not become an exclusive owner by redemption but only acquires from the other cosharers a right to recover by contribution the portion of the debt paid by him on their behalf and to that extent he has a charge on the property. The redemption places the redeeming co-mortgagor (by operation of law) on the footing of a mortgagee in relation to his co-mortgagors and if he were to convert his possession into one that is hostile to the co-mortgagors, then could not every mortgagee in possession be regarded as being in adverse possession? The reasoning thus leads to somewhat startling results, since it ignores the principle that a person having a charge, or a mortgagee in possession, is deemed to be in such possession with the permis-

sion of the cosharers or the mortgagors. The view that mere payment of the mortgage debt and the consequent acquisition of a charge, render the possession of a co-mortgagor adverse does not stand to reason. It would however appear that it is contrary to the ordinary presumption that possession which is held under a lawful title cannot be adverse. The person having a charge may hold possession either under an arrangement with the cosharers or by transfer from the mortgagee. In any case, the possession is under a lawful title; unless there is some overt act on his part in denial of his co-mortgagor's title, such as setting up his own exclusive and absolute title as owner to the knowledge of the cosharers, his possession would be deemed to continue as being under a lawful title of a co-owner. It is only when he abandons his position as a co-owner, and openly asserts the title of a full owner, that his possession may become adverse. Their Lordships of the Privy Council observe:

"Entering into possession, and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all: *Corea v. Appuhamy* (11)."

They further observe:

"It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result. *Corea v. Appuhamy* (11)."

"It is obvious that something more than mere redemption and consequent acquisition of charge is necessary to convert the possession held as a co-owner into one which would operate to the prejudice of the co-mortgagors."

Article 144 is a residuary article. This suit is one for redemption and not for possession. In such a case the article which is more relevant to the suit for redemption will apply. Article 148 deals with suits for redemption, whereas Art. 144 is intended for suits for possession when no other article applies. As between Arts. 148 and 144, the latter being more general will not apply: 1 *Nagoba v. Madolala Kasar* (12). Even if there is doubt as to which of the two articles would apply I am inclined to think that Art. 148 would be the appropriate article on the principle given below:

"In giving effect to a statute of limitation if two articles limiting the period for bringing

(11) [1912] A. C. 230.

(12) [1908] 4 N. L. R. 47.

the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, apart from other equitable considerations be preferred: *Tafa Lal Das v. Syed Moinuddin* (13)."

Article 148 was applied in *Ashfaq Ahmad v. Wazir Ali* (10) on the view that a co-mortgagor redeeming the whole mortgage stood in the shoes of the mortgagee and that he was entitled to all the rights and incidents connected with his estate. This was only an application of the doctrine of subrogation. The Transfer of Property Act is not exhaustive and does not contain the whole law on the subject of transfer of property: *Chotesha v. Mt. Maktum Bi* (14). It was therefore quite open to resort to the doctrine of equity. It has now been definitely recognized in S. 92, T. P. Act, as amended by Act 20 of 1929 which runs as follows :

"Any of the persons referred to in S. 91 (other than the mortgagor) and any co-mortgagor shall on redeeming property subject to mortgage, have as far as regards redemption, foreclosure or sale of such property the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this section is called the right of subrogation and the person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems."

The fact that the legislature has promulgated the aforementioned interpretation put upon the rights of the co-mortgagor redeeming the mortgage debt as law, leaves no alternative but to accept that view as sound. The legislature has by the amendment not created a right which did not exist before but has simply classified the position of the co-mortgagor holding a charge within the meaning of S. 95, T. P. Act, read with S. 100, T. P. Act. Now the position of the co-mortgagor is assimilated to that of the subsequent mortgagees and other persons specified in S. 92, T. P. Act. It is evident therefore that the construction of the rights of the redeeming co-mortgagor as made in *Ashfaq Ahmad v. Wazir Ali* (10), correctly represented the intention of the legislature. It is a well settled principle of construction that the legislature is presumed to know not only the gene-

ral principles of law but the construction of the particular statutes. Where a section of an act which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of the construction: see *Nogendra Mohan Roy v. Peary, Mohansaha* (15) also *Isan Chandra Bakshi v. Saftulla Sikdar* (16) and *Bipulbihari Chakravarti v. Nikhilchandra Chakravarti* (17). Applying this principle, it is clear that S. 92, T. P. Act as amended by Act 20 of 1929 simply gives legislative expression to what was already the law apart from it. The Transfer of Property Act purports to "define" the law relating to the transfer of property and the result of the enactment of the aforesaid S. 92, T. P. Act, is that while construing the transfer of property Act of 1882, "the earlier Act must be read as having the meaning declared by the later Act": *Attorney General v. Hartford* (18). I may observe that this view does not conflict with S. 63, Act 20 of 1929 (Amending Act) or S. 2, T. P. Act (as amended) since the law as amended is not being applied.

For the reasons aforesaid I hold that Art. 148, Lim. Act, is applicable to this suit. The suit is therefore within time. If Art. 148 applies the question arises as to when the time begins to run. I am of opinion that in accordance with the law laid down in *Suryabhan v. Renuka* (19) the limitation begins to run from the date when the co-mortgagor redeems the mortgage. I have already held that the lower appellate Court's finding as regards adverse possession is of a summary nature, consequently the suit is remanded for trial with reference to the issues of fact that were left over by the trial Court. I make no order as to costs of this Court. The costs of the Courts below will abide the result of the suit.

P.N./R.K.

Case remanded.

(15) [1916] 43 Cal. 103=30 I. C. 420.

(16) A. I. R. 1922 Cal. 331=68 I. C. 219.

(17) A. I. R. 1929 Cal. 536=124 I. C. 65=57 Cal. 381.

(18) [1890] 24 Q. B. D. 557.

(19) A. I. R. 1926 Nag. 84=92 I. C. 118=24 N. L. R. 92.

(13) A. I. R. 1925 Pat. 765=4 Pat. 448.

(14) A. I. R. 1928 Nag. 223=100 I. C. 195.

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1930

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1930

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TO
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IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

ODDH CHIEF COURT

1930

Chief Justice :

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Puisne Judges:

The Hon'ble Khan Bahadur Syed Mohammad Raza, B. A., LL. B.

" Mr. Bisheshwar Nath Srivastava, B. A., LL. B., O. B. E.

" „ A. G. P. Pullan, M. A., I. C. S., J. P.

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Jammu & Kashmir
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Table No. III—This Table is the converse of the **First and Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1930 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

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N. B.—Column No. 1 denotes pages of I. L. R. 5 LUCKNOW.

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N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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| 9 | 1930 " 142 | 46 | " A 1 | 99 | " " 105 | 137 | " " 202 | 173 | " O 319 |
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| 28 | 1930 A 305 | 73 | " " 265 | 113 | " " 413 | 163 | " " 375 | 190 | " " 300 |
| 33 | 1929 " 592 | 94 | " " 144 | 115 | " " 254 | 164 | " " 313 | 193 | " " 218 |
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| RD) A. I. R. | | | | RD) A. I. R. | | | | RD) A. I. R. | | | | RD) A. I. R. | | | | RD) A. I. R. | | | |
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| 229 | " | " | 219 | 309 | " | " | 419 | 400 | " | " | 441 | 517 | " | A | 795 | 651 | 1931 | A | 57 |
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| 264 | " | " | 304 | 355 | " | " | 353 | 423 | " | " | 517 | 566 | " | " | 265 | 672 | " | " | 40 |
| 266 | " | A | 304 | 357 | " | " | 365 | 425 | " | " | 630 | 583 | " | Notes 16c | 681 | 1930 | A | 762 | |
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| 276 | " | O | 374 | 365 | " | " | 398 | 460 | " | " | 521 | 597 | " | Notes 14e | 705 | 1930 | " | 784 | |
| 281 | " | Notes 22e | 337 | 367 | " | " | 410 | 464 | " | O | 422 | 601 | " | A | 637 | 705 | 1930 | " | 784 |
| 287 | " | A | 427 | 371 | " | " | 422 | 482 | " | A | 553 | 604 | " | O | 485 | 705 | 1931 | O | 62 |
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13 & 14 All India Criminal Reports=All India Reporter
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1930 Allahabad.

31 Cr. L. J. & 121 to 128 I C.=All India Reporter
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1930 Lahore.

1930 Criminal Cases=All India Reporter
Please refer to COMPARATIVE TABLE No. II in A. I. R. 1930 Nagpur.

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1930, Oudh Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1930 Oudh.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

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| A.I.R.) Other Journals | | | | A.I.R.) Other Journals | | | | A.I.R.) Other Journals | | | | A.I.R.) Other Journals | | | |
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| 1 | 6 | OWN | 1014 | 29 | 5 | OWN | 624 | 49 (2) | 6 | OWN | 1042 | 57 | 31 | Cr L J | 599 |
| | 122 | IC | 328 | | 119 | IC | 456 | | 124 | IC | 362 | 58 | 6 | OWN | 953 |
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| 2 | 118 | IC | 807 | 32 | 6 | OWN | 891 | | 124 | IC | 448 | | 124 | IC | 364 |
| | 4 | Luck | 667 | | 120 | IC | 828 | 51 (2) | 119 | IC | 366 | | 31 | Cr L J | 679 |
| | 7 | OWN | 573 | 36 | 6 | OWN | 977 | 53 (1) | 6 | OWN | 1093 | | 5 | Luck | 435 |
| 8 | 6 | OWN | 1002 | | 123 | IC | 61 | | 5 | Luck | 479 | 60 | 6 | OWN | 1056 |
| | 123 | IC | 855 | | 5 | Luck | 248 | | 124 | IC | 368 | | 1930 | Cr C | 156 |
| | 5 | Luck | 241 | 39 | 6 | OWN | 963 | 53 (2) | 119 | IC | 365 | | 4 | Luck | 726 |
| 6 | 6 | OWN | 1073 | | 123 | IC | 849 | 54 | 6 | OWN | 1109 | | 31 | Cr L J | 689 |
| | 120 | IC | 817 | | 5 | Luck | 400 | | 5 | Luck | 489 | 62 | 124 | IC | 444 |
| 9 | 118 | IC | 805 | 41 | 6 | OWN | 960 | | 124 | IC | 419 | | 123 | IC | 854 |
| 10 | 6 | OWN | 969 | | 5 | Luck | 431 | 55 | 6 | OWN | 1134 | | 7 | OWN | 9 |
| | 123 | IC | 215 | | 127 | IC | 246 | | 5 | Luck | 471 | | 1930 | Cr C | 158 |
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| 13 | 6 | OWN | 644 | 43 | 123 | IC | 894 | 56 | 6 | OWN | 1068 | | 6 | OWN | 932 |
| | 119 | IC | 462 | | 6 | OWN | 1036 | | 5 | Luck | 444 | | 13 | RD | 785 |
| | 5 | Luck | 359 | 46 | 6 | OWN | 908 | | 124 | IC | 435 | | 125 | IC | 393 |
| 16 | 118 | IC | 804 | | 121 | IC | 84 | 57 | 6 | OWN | 1007 | 65 | 5 | Luck | 418 |
| 17 | 118 | IC | 808 | | 5 | Luck | 410 | | 1930 | Cr C | 153 | | 6 | OWN | 1064 |
| 20 | 6 | OWN | 982 | 49 (1) | 11 | LRARev | 18 | | 4 | Luck | 721 | | 5 | Luck | 458 |
| | 121 | IC | 908 | | 124 | IC | 447 | | 123 | IC | 851 | 67 | 124 | IC | 445 |
| | | | | | | | | | | | | | 6 | OWN | 943 |

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| 67 | 5 | Luck | 446 | 124 | 122 | I C | 610 | 200 | 114 | I C | 497 | | 122 | I C | 769 |
| | 124 | I C | 425 | 129 | 6 | O W N | 1099 | 202 | 7 | O W N | 330 | | 5 | Luck | 684 |
| 69 | 6 | O W N | 1094 | | 124 | I C | 417 | | 123 | I C | 49 | 272 | 7 | O W N | 373 |
| | 13 | R D | 865 | 131 | 6 | O W N | 1112 | | 14 | R D | 137 | | 123 | I C | 220 |
| | 11 | LRARev | 24 | | 124 | I C | 431 | 203 | 7 | O W N | 468 | 274FB | 5 | Luck | 12 |
| | 124 | I C | 366 | 140 | 7 | O W N | 147 | | 127 | I C | 46 | | 7 | O W N | 622 |
| 71 | 7 | O W N | 88 | | 125 | I C | 172 | 204 | 7 | O W N | 396 | | 125 | I C | 841 |
| | 123 | I C | 857 | | 5 | Luck | 621 | | 123 | I C | 55 | 281FB | 7 | O W N | 551 |
| | 5 | Luck | 597 | 142 | 7 | O W N | 36 | 206 | 121 | I C | 275 | | 14 | R D | 300 |
| 75 | 7 | O W N | 40 | | 14 | R D | 9 | 208 | 7 | O W N | 338 | | 126 | I C | 669 |
| | 14 | R D | 13 | | 124 | I C | 665 | | 123 | I C | 58 | 284FB | 7 | O W N | 608 |
| | 124 | I C | 360 | | 5 | Luck | 667 | 210 | 7 | O W N | 222 | | 127 | I C | 38 |
| 77 | 7 | O W N | 1 | 144 | 7 | O W N | 34 | | 122 | I C | 321 | 287 | 7 | O W N | 420 |
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| 82 | 7 | O W N | 150 | | 5 | Luck | 712 | | 127 | I C | 41 | 291 | 7 | O W N | 485 |
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| 83 | 7 | O W N | 17 | | 124 | I C | 641 | | 122 | I C | 622 | 292 | 7 | O W N | 217 |
| | 5 | Luck | 484 | | 5 | Luck | 552 | | 14 | R D | 193 | | 123 | I C | 56 |
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| | 125 | I C | 411 | | 31 | Cr L J | 688 | | 124 | I C | 668 | | 123 | I C | 211 |
| | 5 | Luck | 637 | | 124 | I C | 441 | 221 | 126 | I C | 393 | | 5 | Luck | 691 |
| 88 | 7 | O W N | 12 | | 5 | Luck | 462 | 223 | 7 | O W N | 392 | 299 | 7 | O W N | 481 |
| | 125 | I C | 174 | 166 | 7 | O W N | 44 | | 121 | I C | 898 | | 126 | I C | 509 |
| | 5 | Luck | 547 | | 14 | R D | 17 | | 5 | Luck | 707 | 300 | 7 | O W N | 438 |
| 89 | 7 | O W N | 97 | | 124 | I C | 667 | 225 | 7 | O W N | 173 | | 14 | R D | 190 |
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| | 5 | Luck | 678 | | 125 | I C | 170 | 234 | 126 | I C | 399 | | 5 | Luck | 721 |
| 90 | 7 | O W N | 99 | | 5 | Luck | 595 | 235 | 7 | O W N | 271 | 301 | 7 | O W N | 483 |
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| | 5 | Luck | 539 | | 14 | R D | 37 | | 14 | R D | 119 | 302 | 7 | O W N | 390 |
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| | 121 | I C | 277 | | 6 | O W N | 1329 | | 31 | Cr L J | 1025 | 310 | 7 | O W N | 504 |
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| 101 | 4 | Luck | 396 | 176 | 4 | Luck | 665 | 250 | 7 | O W N | 461 | | 126 | I C | 703 |
| | 6 | O W N | 1334 | | 6 | O W N | 206 | | 126 | I C | 497 | 312 | 7 | O W N | 426 |
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| 104 | 6 | O W N | 1105 | 177 | 4 | Luck | 339 | | 1930Cr C | 570 | 314 | | 7 | O W N | 377 |
| | 5 | Luck | 474 | | 7 | O W N | 61 | 251 | 7 | O W N | 464 | | 123 | I C | 217 |
| | 124 | I C | 420 | | 121 | I C | 892 | | 126 | I C | 657 | | 5 | Luck | 742 |
| 105 | 6 | O W N | 1088 | 178 | 6 | O W N | 393 | | 31 | Cr L J | 1084 | 317 | 7 | O W N | 473 |
| | 5 | Luck | 465 | | 118 | I C | 835 | | 5 | Luck | 725 | | 127 | I C | 243 |
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| 110 | 6 | O W N | 1060 | 184 (2) | 119 | I C | 872 | | 1930Cr C | 572 | | | 14 | R D | 186 |
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| | 124 | I C | 442 | | 121 | I C | 896 | 256 | 7 | O W N | 140 | | 11 | LRARev | 146 |
| 112 | 7 | O W N | 153 | | 14 | R D | 69 | | 125 | I C | 165 | | 14 | R D | 173 |
| | 125 | I C | 171 | 194 | 6 | O W N | 1012 | 260 | 7 | O W N | 401 | 321 | 7 | O W N | 556 |
| 113 | 6 | O W N | 1017 | | 123 | I C | 853 | | 125 | I C | 402 | | 126 | I C | 679 |
| | 123 | I C | 886 | | 5 | Luck | 218 | | 5 | Luck | 727 | | 31 | Cr L J | 1078 |
| | 31 | Cr L J | 575 | 195 (1) | 6 | O W N | 1011 | 265 | 7 | O W N | 213 | | 1930Cr C | 725 | |
| | 5 | Luck | 255 | | 123 | I C | 853 | | 14 | R D | 73 | 324 | 7 | O W N | 564 |
| | 1930Cr C | 249 | | | 5 | Luck | 164 | | 121 | I C | 902 | | 126 | I C | 684 |
| 121 | 6 | O W N | 1080 | 195 (2) | 6 | O W N | 49 | | 5 | Luck | 680 | | 31 | Cr L J | 1081 |
| | 124 | I C | 659 | | 114 | I C | 809 | | 7 | O W N | 475 | | 1930Cr C | 728 | |
| | 5 | Luck | 615 | 196 | 4 | Luck | 669 | 266 | 127 | I C | 244 | 328 | 7 | O W N | 398 |
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| 329 | 127 I C | 82 | 366 | 127 I C | 33 | 408 | 127 I C | 875 | 463 | 129 I C | 171 |
| 330 | 7 O W N | 333 | 368 | 7 O W N | 571 | | 32 Cr L J | 44 | 465 | 7 O W N | 902 |
| | 123 I C | 51 | | 126 I C | 688 | 412 | 1930Cr C | 952 | | 11 LRARev | 286 |
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| 334 (1) | 7 O W N | 208 | | 14 R D | 317 | | 7 O W N | 756 | | 14 R D | 55 |
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| | 1930Cr C | 524 | 377 | 7 O W N | 744 | 417 | 7 O W N | 668 | | 11 LRARev | 309 |
| | 124 I C | 661 | FB | 126 I C | 700 | | 128 I C | 67 | | 14 R D | 628 |
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| | 5 Luck | 720 | FB | 126 I C | 689 | | 128 I C | 66 | 474 | 7 O W N | 941 |
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| | 14 R D | 262 | | 127 I C | 254 | | 14 R D | 464 | 475 | 7 O W N | 642 |
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| | 126 I C | 672 | 394 | 7 O W N | 621 | | 127 I C | 24 | 496 | 7 O W N | 894 |
| 337 | 7 O W N | 488 | | 126 I C | 702 | 426 | 7 O W N | 753 | | 14 R D | 531 |
| | 126 I C | 397 | | 31 Cr L J | 1118 | | 128 I C | 71 | | 11 LRARev | 308 |
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| | 14 R D | 258 | | 7 O W N | 736 | | 32 Cr L J | 94 | 509 | 128 I C | 284 |
| | 126 I C | 703 | | 127 I C | 878 | | 128 I C | 211 | | 7 O W N | 986 |
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ODDH CHIEF COURT

* A. I. R. 1930 Oudh 1

STUART, C. J.

Narain—Plaintiff—Applicant.

v.

Pudan—Defendant—Opposite Party.

Civil Revn. Appln. No. 46 of 1929,
Decided on 29th August 1929, against
order of Munsif, North Unao, D/- 8th
July 1929.

*** Provincial Small Cause Courts Act, S. 17—Provisions are mandatory—But deposit may be made subsequently within period of limitation.**

The provisions of S. 17 are mandatory. But if an application under S. 17 is filed without security and is subsequently completed within the time prescribed by the law of limitation for making the application by the deposit of the decretal amount or filing of security the applicant has a right to have his application heard merits : 32 Cal. 339 and 43 Mad. 579, Rel. on. ; A. I. R. 1926 Oudh 544 and 23 All. 470, Ref.

[P 2 C 1]

D. K. Seth and Narayan Lal—for Applicant

R. D. Sinha—for Opposite Party.

Judgment.—The question raised in this application is of importance. The application is under S. 25, Provincial Small Cause Courts Act of 1887. The facts are these: Narain obtained a decree against Pudan on 4th February 1929. This was an ex parte decree passed by a Court of Small Causes. It has been found as a fact that Pudan did not receive any information as to the passing of this decree against him until 12th April 1929. On 19th April Pudan presented an application to the Small Cause Court passing the decree for the setting aside of the ex parte decree. The application was dated 17th April 1929, but presented two days later. The Small

Cause Court Judge in view of the provisions of S. 17, Provincial Small Cause Courts Act, refused to entertain the application, as neither the amount due under the decree had been deposited in the Court nor had security been tendered and the application remained without orders. On 25th April 1929 Pudan deposited the decretal amount and the application was then registered for the first time. The period of limitation for the setting aside of the ex parte decree on these facts did not expire till 12th May 1929. The Small Cause Court Judge has set the decree aside and the present application requests that his order be reversed, on the ground that inasmuch as the decretal amount was not deposited on 19th April 1929, the application for setting aside the ex parte decree failed automatically on that date. The view that the provisions of S. 17, Provincial Small Cause Courts Act, allow the Court discretion to admit an application in which neither the decretal amount is deposited nor security is tendered was taken at one time by the Judicial Commissioner's Court of Oudh and by the High Court of Madras. But in the decision in *Dunia Din v. Farzand Husain* (1), I accepted as against that view, the view taken in *Jagannath v. Chet Ram* (2), in which it was laid down that the deposit of the decretal amount or the furnishing of security is a condition precedent to the entertaining of an application to set aside an ex parte decree passed by a Small Cause Court under the Provincial Small Cause Courts Act and that

(1) A. I. R. 1926 Oudh 544.

(2) [1906] 28 All. 470=3 A. L. J. 318=(1906) A. W. N. 93.

the provisions of S. 17 are mandatory. It is to be noted that the Madras High Court no longer accepts the former view. A Full Bench of the Madras High Court decided in *Assan Mohammad Sahib v. M. E. Rahim Sahib* (3), that the provisions of S. 17 as to the deposit of the decretal amount are mandatory. I again find that the provisions are mandatory. But this does not determine the matter. It is to be noted that in the decision in *Jagannath v. Chet Ram* (2), the deposit was not made until the application was beyond time, and the Bench of the Allahabad High Court which decided that application cannot be taken as going further than saying that when a decretal amount is deposited after the time for filing an application for setting aside the decree has expired the application must fall. It is to be noted that in my decision in *Dunia Din v. Farzand Husain* (1), the money was also not deposited until the period for making the application had expired. In *Jeun Muchi v. Budhiram Muchi* (4), a Bench of the Calcutta High Court while holding the view that the provisions of S. 17 were mandatory laid down that if an application under S. 17 was filed without security and was subsequently completed within the time prescribed by the law of limitation for making the application by the deposit of the decretal amount or filing of security, the applicant had a right to have his application heard on the merits. That view was followed by the Full Bench of the Madras High Court in the decision in *Hasan Mahomed Sahib v. M. E. Rahim Sahib* (3), to which I have already referred. They laid down:

"But the deposit of the decretal amount may be made or the security given within the period prescribed by the law of limitation."

Now here not only was the amount deposited within the period prescribed by the law of limitation but it appears to me further that no actual application was made until 25th April 1929, the date on which amount was deposited for the Court had refused to register the previous application as it was not accompanied by a deposit. I am in agreement with the Madras and Calcutta decisions to which I have referred. Apart from that in this individual case I take it that no actual application can be considered

(3) [1920] 43 Mad. 579=38 M. L. J. 539=55 I. C. 977=(1920) M. W. N. 376.

(4) [1906] 32 Cal. 339=1 C. L. J. 43.

to have come into existence until 25th April 1929. I, therefore, consider that the learned Judge of the Small Cause Court arrived at a correct conclusion on this point. I do not propose to interfere with his order on any of the points raised before him. I, therefore, dismiss this application with costs. The order of stay is discharged.

R.M./R.K. *Application dismissed.*

A. I. R. 1930 Oudh 2

RAZA AND PULLAN, JJ.

Lachhman Prasad—Applicant.

v.

Raghubar Dayal and others — Opposite Parties.

Application No. 50 of 1928, Decided on 7th February 1929, against order of Sub-Judge, Malihabad, Lucknow, D/- 3rd September 1928.

(a) **Jurisdiction—Civil and revenue Court—Suits for profits by cosharer must be instituted in revenue Court when plaintiff is recorded as cosharer at time of suit.**

A suit for profits by a cosharer must be instituted in a revenue Court if the plaintiff is at the time of the suit recorded as a cosharer. The plaintiff need not be recorded as a cosharer during the whole of the period to which the suit relates. It is sufficient that the name was recorded at the time when the suit was brought. Such a suit does not fall within the jurisdiction of a civil Court simply because the plaintiff has not been a cosharer for the whole of the period for which he claimed profits: 12 O. C. 13, *Rel. on.* [P 3 C 1]

(b) **Civil P. C., O. 7, R. 10 — Appellate Court dismissing appeal cannot be said to have failed to exercise its jurisdiction when it is the only course open to it—Civil P. C. S. 115.**

Where the Munsif rightly returns a plaint to be presented to a revenue Court and the plaintiff appeals, the only course open for the appellate Court, if it holds that the Munsif is right, is to dismiss the appeal. It cannot be said in such case that the appellate Court fails to exercise its jurisdiction rightly when it dismisses the appeal: *A.I.R. 1926 All. 58 Rel. on.* [P 3 C 1]

Naziruddin and Hakimuddin — for Applicant.

R. B. Lal—for Opposite Party 1.

Judgment.—This is an application in revision of an order of the Additional Subordinate Judge of Lucknow upholding the order of the Munsif, South Unao, returning the plaint for presentation to the proper Court, that is, the revenue Court. This suit was one for profits, but the plaintiffs alleged that it fell within the jurisdiction of the civil Court because they had not been cosharers

during the whole period for which they claimed profits. They sued as the heirs of their father, who was a cosharer until the year 1332 Fasli. This question was decided long ago in *Balgovind v. Gajadhar* (1) and it was decided against the plaintiff. The plaintiff need not be recorded as a cosharer during the whole period to which the suit relates. It is sufficient that the name was recorded at the time when the suit was brought. The plaintiffs were recorded as cosharers when the suit was brought and they were therefore bound to sue for profits in a revenue Court. The Subordinate Judge, who heard the case in appeal, agreed with the Munsif and dismissed the appeal. In our opinion he could do no more. There was no decision of the case and no finding on the facts.

Consequently it was impossible for him to dispose of the appeal himself on its merits as though the suit had been instituted in the right Court, under S. 124 (c), Oudh Rent Act. If he held that the Munsif was right and the case could not be heard by the Munsif but only by the revenue Court, the only course open to the Subordinate Judge was to dismiss the appeal. It certainly cannot be said that the Subordinate Judge to whom the appeal had been transferred by the District Judge failed to exercise his jurisdiction rightly when he passed the order dismissing the appeal. This was the view taken by the Allahabad High Court in a similar matter in the case of *Bisheshar Prasad v. Raghunir* (2). In our opinion the order of the Court below was correct and the order of the Munsif was also correct. The case was clearly cognizable in the revenue Court and could not be tried by the Munsif. We reject this application with costs.

R.M./R.K. *Application rejected.*

(1) [1909] 12 O.C. 13=1 I.C. 11.

(2) A.I.R. 1926 All. 58=48 All. 168.

* A. I. R. 1930 Oudh 3

STUART, C. J., AND RAZA, J.

Radhey Shiam—Plaintiff—Appellant.
v.

Mohammad Nasir Khan and another
—Defendants—Respondents.

Second Appeal No. 462 of 1928, Decided on 12th August 1929, against decree of Third Addl. Dist. Judge, Lucknow, D/- 19th October 1928.

(a) Civil P. C., O. 22, R. 3 — Plaintiff dying in course of suit—Portion of claim admitted—Order should be passed under O. 22, R. 3 and not under Civil P. C., O. 9, R. 9.

Where the plaintiff dies while the suit is still pending and the Court is ignorant of his death, it should not proceed to dismiss the suit under provisions of O. 9, R. 9, when a portion of the claim is admitted by the defendant such an order is on the face of it wrong. The correct order in such a case is one under O. 22, R. 3. After allowing time for the representative of the plaintiff to make an application, the suit should be directed to abate. [P 5 C 1]

* (b) Civil P. C., O. 22, R. 9 — Suit abates not in respect of claim admitted but only in respect of remaining claim.

Where the defendant admits a portion of the claim the cause of action as to that portion disappears. The suit abates in respect of the remaining cause of action only. It does not abate in respect of the portion of claim admitted and fresh suit in respect of that portion and on other cause of action is not barred. The fact that the suit was wrongly dismissed under O. 9, R. 8 which had no application does not affect the merits of the case: 35 All. 331 (P. C.), *Rel. on.* [P 5 C 1, 2]

Ali Zaheer, Radha Krishna and Sailen Roy—for Appellant.

M. Wasim, Naziruddin and Habib Ali Khan—for Respondents.

Judgment. — In order to appreciate the points in dispute in this second appeal it is necessary to go back several years. A certain Mohammad Bakhsh who was a Darogha in the Lucknow Cantonment died on 6th October 1908. In 1913 Fazilatunnissa, who claimed to be the widow of Mohammad Bakhsh, sued a woman called Sitala and her four sons Mohammad Wazir Khan alias Nawab, Mohammad Amir Khan alias Nannhey, Mohammad Munir Khan alias Munney and Mohammad Nasir Khan alias, Chunney for a one-eighth share in the property of the deceased Mohammad Bakhsh. She stated that she as widow and her daughter Wazirunnissa were the sole heirs in the property of the deceased, she being entitled under the law to a one-eighth share and her daughter being entitled to seven-eighths. As her daughter refused to join her in the claim she made her a defendant. The claim was directly against Sitala and the four other male defendants.

It was alleged by the plaintiff that Sitala was the mistress of Mohammad Bakhsh and that the four male defendants were his illegitimate sons by her and that they had obtained possession of the property of Mohammad Bakhsh after his death. The property consisted of

certain houses and shops. The Munsif who decided the case found that Fazilatunnissa was the wedded wife of Mohammad Bakhsh and Wazirunnissa was his legitimate daughter, that Sitala who was Tambolin and a Hindu by caste was the mistress of Mohammad Bakhsh and that Wazir Khan, Amir Khan, Munir Khan and Nazir Khan were his illegitimate sons by her. He decreed Fazilatunnissa a one-eighth share in all property except five shops 1037/1, 1037/2, 1037/3, 1037/4 and 1037/5 which he found had been built by the defendant Wazir Khan and which were the property of the said Wazir Khan. An appeal was filed to the District Judge who upheld the decision of the Munsif and an appeal was filed to the Court of the Judicial Commissioner. The appeal was dismissed and the decree was maintained. The date of the decision of the appeal in the Judicial Commissioner's Court was 29th May 1916. It was thus found on that date that Wazir Khan, Amir Khan, Munir Khan and Nazir Khan were the illegitimate sons of Mohammad Bakhsh and as such were not entitled to any share in the property of Mohammad Bakhsh but that the shops already mentioned were not the property of Mohammad Bakhsh and were the property of Wazir Khan.

After the decision of this suit the parties appear to have entered into friendly negotiations for we find that Sitala and her sons first bought out Fazilatunnissa and then bought out Wazirunnissa. These negotiations did not affect the five shops in question. Wazir Khan was apparently afterwards absent from Lucknow possibly being on service during the War. He was in the Army. It is not, however, clear whether he was on active service or not. The next material incidents are these: In 1922 Wazir Khan who had then returned to Lucknow filed two suits in the Small Cause Court. One was for rent against two persons, who he alleged were the tenants of 1037/4 which he had sold in November 1921, from November 1920, to the date of sale and subsequently of shop 1037/3 from the date of sale to April 1922. The other was against another tenant for the rent of shop 1037/1 from April 1920 to February 1922, and for the rent of 1037/3 from February 1922 to April 1922. There appears to be a clash of dates but the fact is not material. These suits were

filed in the Small Cause Court. The alleged tenants replied that they had already paid the rents to Mohammad Nasir Khan, Mohammad Wazir Khan's brother. Mohammad Nasir Khan was joined as co-defendant and the names of the original defendants were struck out.

An addition was made to the plaints under which the plaintiff asked for a declaration in the first suit that Mohammad Nazir Khan had nothing to do with No. 1037/3 and in the second suit for a declaration that he had nothing to do with No. 1037. The addition of this relief removed the suits from the jurisdiction of the Small Cause Court and the hearing was transferred to the Court of the Munsif, Haveli, Lucknow. Mohammad Nasir Khan filed a written statement. In this it was asserted that the shops 1037/1 to 1037/5 were the property not of Wazir Khan but of Mohammad Bakhsh. If this were the case neither Wazir Khan nor Nasir Khan would have had any interest in the shops, for on the finding in the previous case they were the illegitimate sons of Mohammad Bakhsh. On this allegation Nasir Khan claimed one-fourth of the shops 1037/1 to 1037/5. The woman Sitala his mother, (whom he called her Nurjahan) according to his allegation died in 1919 and thus the four sons had succeeded to a quarter each. But with regard to shop 1037/C which as far as we can gather does not appear in the previous litigation he asserted that he and Wazir Khan had constructed this shop from their joint funds. The Munsif framed five issues:

1. Were the shops in question built by the plaintiff as alleged and do they belong exclusively to him?
2. (a) Are the shops in question the property of Darogha Mohammad Bakhsh as alleged?
(b) If so what is the plaintiff's share in them?
3. What amount is due to the plaintiff from the defendant?
4. To what relief if any is the plaintiff entitled?
5. Is this suit for declaration not maintainable as alleged in para. 16 of the written statement?

The written statement mentioned in the fifth issue is not before us. There was no decision on the merits in these two suits. On 17th April 1923, Wazir Khan executed a deed of sale of shops 1037/1, 1037/2, 1037/3 and 1037/C in favour of a certain Mohammad Mehdi. Under this transfer Mohammad Mehdi obtained no right to collect arrears of

rent. He could not under this deed have obtained any decrees for rent in respect of the two suits already filed. Wazir Khan died on 30th July 1923, while the suits were still pending. Nasir Khan was present in Court on a later date. He did not bring the fact of his brother's death to the notice of the Court. The Court being in ignorance of Wazir Khan's death proceeded to dismiss the suits on 13th August 1923, under the provisions of O. 9, R. 9, Civil P. C. This order was on the face of it wrong, as Nasir Khan had admitted a portion of the claim. The correct order should have been an order under O. 22, R. 3. After allowing time for the representatives of Wazir Khan to make an application, the suit should have been directed to abate. Mohammad Mehdi transferred his rights under the sale deed to the present plaintiff Radhey Shiam on 13th August 1925. Radhey Shiam instituted the suit out of which this present appeal arises against Nasir Khan and others for possession of shops 1037/1, 1037/2, 1037/3, 1037/C and mesne profits and fourth share in certain other property which he had acquired. The learned Subordinate Judge of Mohanlalganj decreed his claim to one-fourth of the whole property.

Radhey Shiam appealed to the District Judge only against that portion of the decree dismissing his suit in respect of three-fourths of the shares in 1037/1, 1037/2, 1037/3 and a half share of 1037/C. Nasir Khan filed a cross objection asserting that the whole suit in respect to shops 1037/1, 1037/2, 1037/3 and 1037/C was barred under the provisions of O. 22, R. 9. The learned Additional District Judge, who decided the appeal, allowed the cross objections and as a result dismissed Radhey Shiam's appeal. He appeals here. The first point to be considered is how far was the order of dismissal justified.

We have to look again at the two suits filed in the Munsif's Court by Wazir Khan. These suits must be taken to have abated under the provisions of O. 22, R. 9 and Wazir Khan's representatives are under that rule precluded from bringing a fresh suit on the same cause of action. But does this defeat the plaintiff altogether? It does not altogether defeat him. In those suits Wazir Khan had applied for two reliefs. He applied for a relief for rent. The cause of action

in respect of rent in those suits is not the cause of action in these suits. He further applied for a declaration against his brother Nasir Khan that his brother had no right or title in shops Nos. 1037. Nasir Khan in reply said that he had title to a quarter share in 1037/1, 1037/2, 1037/3 and a half share in 1037/C. After these pleadings all cause of action in respect to a quarter share in 1037/1, 1037/2, 1037/3 and a half share in 1037/C disappeared. The circumstance that the previous suits were wrongly declared to have been dismissed under O. 9, R. 8, which had no application does not affect the merits. The provisions of O. 9, have no application. This is clear from the decision of their Lordships of the Judicial Committee in *Debi Bakhsh Singh v. Habib Shah* (1). After the pleadings all that was left for the Court to decide was whether Wazir Khan had an extra three-fourth share in shops Nos. 1037/1, 1037/2, 1037/3 and an extra one-half share in 1037/C. That was the sole cause of action remaining. His title to a quarter share in 1037/1, 1037/2 and 1037/3 and to a half share in 1037/C was admitted. As his suit in respect of the remaining cause of action abated no fresh suit can be brought on that cause of action. The omission to grant a proper decree in the previous suits does not conclude the matter. In these circumstances it is unnecessary to remit the appeal back for further hearing. The decision of the learned Subordinate Judge granted the right relief and all that is necessary is to restore it. We restore that decision accordingly and grant Radhey Shiam as against Mohammad Nasir Khan and the other defendant-respondent the relief which was given by the learned Subordinate Judge. On the question of costs we allow Radhey Shiam the costs of this appeal. As his appeal in the lower Court was unjustified he will pay his own costs of appeal and the costs of Mohammad Nasir Khan in the lower appellate Court. As the cross objections of Mohammad Nasir Khan in the lower appellate Court were unjustified Mohammad Nasir Khan will pay the costs of his cross objections and the costs of Radhey Shiam in the lower appellate Court.

R.M./R.K.

Order accordingly.

(1) [1913] 35 All. 331=40 I.A. 151=19 I.C. 526=16 O.C. 194 (P.C.).

A. I. R. 1930 Oudh 6

WAZIR HASAN AND RAZA, JJ.

Mirza Mohammad Zaki Beg—Plaintiff
—Appellant.

v.

Mirza Abdul Ghani Beg and others—
Defendants—Respondents.

Second Appeal No. 399 of 1928, Decided on 7th August 1929, against order of Addl. Sub-Judge, Lucknow, D/- 24th August 1928.

Transfer of Property Act, S. 58 (c)—Sale or Mortgage—Deed held to be sale with power to repurchase.

Prima facie an absolute conveyance in which there is nothing to show that the relation of debtor and creditor should exist between the parties does not cease to be a conveyance so as to be converted into a mortgage merely because there is a right to repurchase the property. The Court ought not to cut down the rights of the purchaser unless it can see its way clearly to his having the right of a creditor.

A mortgagor executed a sale deed in favour of his mortgagee in respect of a portion of the mortgaged property. The deed contained a provision to the effect that should mortgagor pay back the purchase money together with an additional sum within a fixed period, the mortgagee would be bound to return the sale deed. In case of failure to pay the sum the sale would become final.

Held : that the deed in question evidenced a transaction of an out and out sale with a right to repurchase and it did not evidence a mortgage by conditional sale : 12 *All.* 387 (*P.C.*); *A. I. R.* 1916 *P. C.* 49 and *A. I. R.* 1924 *P. C.* 226, *Rel. on.* [P 7 C 2; P 8 C 2]

Ghulam Hasan—for Appellant.

Hyder Husain and A. C. Mukerji—for Respondent 1.

Judgment.—This is a plaintiff's appeal from a decree of the Additional Subordinate Judge, Lucknow, dated 24th August 1928, setting aside a decree of Munsif, Haveli, Lucknow, dated 12th December 1927.

The facts relevant to this appeal are as follows : One Hamid Beg mortgaged with possession six bighas land in village Dularmau, Pargana Malihabad, together with a nankar of Rs. 2 to Abdullah Beg for Rs. 350 in the year 1887. The mortgage was to be redeemed in any year in the month of Jeth. Hamid Beg died and then his son Abid Beg, and Asghar Beg and Ghaffar Beg, executed a sale deed, in respect of five bighas, one biswas land out of the property comprised in the mortgage of 1887, in favour of the mortgagee, Abdulla Beg, for Rs. 450 on 7th May 1894. Rs. 350 out of Rs. 450 were credited in the account of the

mortgage of 1887 and thus the mortgage was satisfied. Rs. 100 were left with the vendee to be paid to a certain person who held a decree against the executants (vendors). The first portion of the deed shows clearly that the property was absolutely transferred to the vendee and it was an out and out sale ; but there was provision in the second portion to the effect that should the vendors pay back to the vendee the purchase money together with the additional sum of Rs. 48 within four years in the month of Jeth, the latter would be bound to return the sale deed to the former without any excuse and that in case the purchase money together with Rs. 48 was not paid within the period fixed, the sale would become final (or complete). On the same date (i.e., 7th May 1894) Abid Beg, Asghar Beg, and Ghaffar Beg, executed a mortgage with possession in respect of the remaining one bigha land and the nankar, in favour of Abdul Ghani Beg son of Abdullah Beg for Rs. 57 only. This mortgage was redeemable in any year in the month of Jeth. Abdullah Beg vendee was duly recorded owner of the land comprised in the sale deed. He died a few years after the execution of the sale deed mentioned above and was succeeded by his son Abdul Ghani Beg. The vendee and his successor planted a grove on three bighas, one biswa land out of the land comprised in the sale deed, some years ago. Asghar Beg and Ghaffar Beg died some years ago leaving them surviving their brother Abid Beg as their only heir. Abid Beg transferred his right in the property in suit (i.e. the property comprised in the sale deed dated 7th May 1894) to Mohammad Zaki Beg by a registered deed dated 30th March 1927.

Mohammad Zaki Beg brought the present suit to redeem the said property alleging that the deed of 7th May 1894 was simply a deed of mortgage by conditional sale.

The claim was resisted by Abdul Ghani Beg on the ground that the transaction evidenced by the deed dated 7th May 1894 was an out and out sale with a right of repurchase and not a mortgage by conditional sale as alleged by the plaintiff. It was alleged further that improvements have been made in the property at the cost of Rs. 1,500 within the knowledge of the vendors.

The learned Munsif decreed the plaintiff's claim, holding that the deed dated 7th May 1894 was deed of mortgage by conditional sale and that the plaintiff was entitled to redeem the mortgage on payment of Rs. 498 only. The value of the grove planted by Abdul Ghani Beg and his father Abdullah Beg was fixed at Rs. 765-10-0 but the learned Munsif was of opinion that Abdul Ghani Beg could get nothing as compensation for any improvements made by him or his father during the continuance of the mortgage.

Abdul Ghani Beg appealed and his appeal was allowed by the learned Additional Sub-Judge. The learned Subordinate Judge held that the deed dated 7th May 1894 was a deed of an out and out sale and not a deed of mortgage by conditional sale. He therefore rejected the plaintiff's claim without going into the question of improvements.

The plaintiff Mohammad Zaki Beg, has now come to this Court in second appeal.

The question of the interpretation of the deed dated 7th May 1894 is the only question to be decided in this appeal.

We have heard the learned counsel on both sides at some length. We are not prepared to disagree with the finding of the learned Additional Subordinate Judge on the point under consideration. We think the learned Additional Subordinate Judge was perfectly right, in the circumstances of the case, in interpreting the deed in question as a deed of an out and out sale with a right to repurchase the property.

The following rulings of their Lordships of the Privy Council, to which reference was made in the course of arguments, are of great help in deciding the point under consideration :

Bhagwan Sahai v. Bhagwan Din (1), *Jhanda Singh v. Wahid Uddin* (2), *Narsingerji v. Partha Saradhi Rayanim Garu* (3). It was held in *Bhagwan Sahai's* case (1) that a document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold on repaying the purchase money within a certain time, is not on

(1) [1890] 12 All. 387=17 I. A. 98=5 Sar. 551 (P.C.).

(2) A. I. R. 1916 P. C. 49=38 All. 570=43 I. A. 284 (P.C.).

(3) A. I. R. 1924 P. C. 226=47 Mad. 729=51 I. A. 305 (P.C.).

that account to be construed as if it were a mortgage.

It was held in *Jhanda Singh's* case (2) that in the case of dispute as to whether a document is a mortgage by conditional sale or a sale with a covenant for repurchase the test is the intention of the parties to be gathered from the language of the documents themselves, in the light of the surrounding circumstances. It is a rule of law dictated by common sense that prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. It was held in *Narsingerji's* case (3) that where there was ostensibly an absolute sale of property for an extremely inadequate price accompanied by a deed providing for the exercise of a right of repurchase within a certain time the Court can well conclude from such inadequacy of price coupled with the evidence as to surrounding circumstances showing in what manner the language of the document was related to existing facts, that the transaction was in reality a mortgage by conditional sale and that the transferrer had a right to redeem.

The first two cases mentioned above are authorities for the proposition that prima facie an absolute conveyance in which there is nothing to show that the relation of debtor and creditor should exist between the parties, does not cease to be a conveyance so as to be converted into a mortgage, merely because there is a right to repurchase the property. The Court ought not to cut down the rights of the purchaser, unless it can see its way clearly to his having the rights of a creditor.

"It is true that the right of the mortgagor may not be defeated under colour of a redeemable sale, but care must be taken to distinguish a mortgage from a bona fide sale with a clause for repurchase. The two things may resemble one another closely in form, but they differ widely in their incidents. If there is a bona fide sale with a condition for repurchase the power must be exercised strictly in compliance with the terms of the condition; while in the case of a mortgage, a failure to fulfil the strict terms of the agreement is not immediately followed by a forfeiture of the property. The reason for this distinction is said to be that in the case of bona fide sale with an option to the vendor to repurchase within a given time, there is no equity whatso-

ever to relieve against the sale, so as to deprive the purchaser of his property; but in the case of a mortgage, the transaction is regarded only as a security and the mortgagee is therefore sufficiently compensated, if he is allowed interest in default of payment at the appointed time: see Ghose's Law of Mortgage, Vol. 1, pp. 87 88 (5th Edn.)."

It has been found in the present case that the market value of the property in suit is almost equal to the consideration of the deed in question. It has also been found that the name of Abdullah Beg was duly entered in the khewat as owner of the land and this entry was never questioned by the sons of Hamid Beg. It has also been found that Abdullah Beg and his successor planted a grove on 3 bighas 1 biswa land out of 5 bighas 1 biswa, comprised in the deed in question, at the cost of Rs. 765 at least, and the executants of the deed had full knowledge of the fact, but they never raised any objection and allowed the transferee to deal with property as if it were his own property. These findings are findings of fact based upon admissible evidence and cannot be impugned in second appeal. They were not challenged in the course of arguments before us. Abdullah Beg was already holding the whole property under possessory mortgage of 4th June 1887, executed by Hamid Beg. The sons of Hamid Beg sold 5 bighas odd out of that property to Abdullah Beg for Rs. 450 by the deed in question, on 7th May 1894. On that very day they mortgaged the remaining property to Abdul Ghani Beg the son of Abdullah Beg for Rs. 57. They were fully aware of the distinction between a sale and a mortgage. However, they thought it proper to sell the property in suit to Abdullah Beg and stated clearly in the deed that having sold the property to him they and their heirs and successors had no right or interest left in the same. There is nothing in the deed in question to show that by that deed they mean to transfer the property for the purpose of securing the payment of the debt due from them on the mortgage of 1887. They might have executed a fresh mortgage deed for Rs. 450 or a deed of further charge for Rs. (450-350) = 100 in favour of the mortgagee Abdullah Beg, but no such deed was executed by them. What they did was that they executed two deeds on one and the same

date (i. e., 7th May 1894). By one deed, that is to say, the deed in question, they sold 5 bighas odd to Abdullah Beg and by the other deed, they mortgaged the remaining 1 bigha to his son Abdul Ghani Beg. The property was already held by Abdullah Beg under a possessory mortgage and there was no sufficient reason for entering into a different form of mortgage. They sold the property to Abdullah Beg for a sum which was almost equal to the market value of the property at the date of sale. The vendee got possession of the property as such and his name was duly entered in the khewat. He and his successor planted a grove on the major portion of the land in suit and spent Rs. 765 at least in doing so. The sons of Hamid Beg never raised any objection and allowed the transferee to exercise all rights of ownership over the property. They might have taken proper steps to get back or repurchase the property within the time fixed by the deed, but they never thought of doing so. It was left for the plaintiff to bring the present suit about 30 years after the vendors had lost the property.

Having examined the deed in question carefully and having regard to all the surrounding circumstances, we are of opinion that the deed evidences a transaction of an out and out sale with a right to repurchase the property sold on repaying the purchase money together with the additional sum of Rs. 48 within a certain time, and that it does not evidence a mortgage by conditional sale.

It appears that the additional sum of Rs. 48 was a consideration for the return of the property. It surely did not represent the interest on the sum of Rs. 450 or Rs. 100. The deed contains no stipulation for the payment of any interest at any time.

We think no case has been made out to disturb the judgment of the learned Additional Subordinate Judge. The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs in this Court. The parties will bear their own costs in the lower Courts as already ordered by the lower appellate Court. There is no force in the cross-objections as regards the costs of the suit. We dismiss the cross-objections. Costs on parties.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 9

RAZA, J.

Durga Prasad — Judgment-debtor — Appellant.

v.

Chandika Prasad and others—Decree-holders—Respondents.

Application No. 67 of 1928, Decided on 21st December 1928, against order of Dist. Judge, Rae Bareli, D/- 13th July 1928.

(a) Civil P. C., O. 21, R. 92—No second appeal lies from order setting aside sale under O. 21, R. 92.

Where an order is passed setting aside a sale under O. 21, R. 92 from which one appeal is specially provided for by O. 43, R. 1 (j) no second appeal is permitted by S. 104 (2) of the Code. But the case may be brought within the provisions of S. 115 : A. I. R. 1925 Oudh 622, *Bel. on.* [P 9 C 2]

(b) Civil P. C., S. 115—Contravention of express provisions of law is an illegality.

The contravention of an express provision of law is not merely an erroneous decision but it is an illegality within the meaning of S. 115.

[P 9 C 2 ; P 10 C 1]

(c) Civil P. C., O. 21, R. 89 (3)—It is not necessary for judgment-debtor to deposit costs and interest.

The provision laid down in R. 89 (3), O. 21, that "nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale" does not mean that the judgment-debtor should deposit also any costs and interest not covered by the proclamation of sale within 30 days from the date of the sale. [P 10 C 1]

Ram Bharose Lal and Harish Chandra—for Appellant.

P. N. Chaudhri—for Respondents.

Judgment.—This is an appeal from an order of the District Judge, Rae Bareli, dated 13th July 1928, affirming an order of an Assistant Collector in that district, dated 28th October 1927.

Chandrika Prasad and others obtained a decree against the appellant Durga Prasad under S. 108, Cl. 15, Oudh Rent Act. A residential house in Sahgaon Pachhimgaon in the District of Rae Bareli belonging to the appellant (judgment-debtor) was sold on 27th September 1927, to realize Rs. 250-0-3 the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The house was sold for Rs. 750 and was purchased by the decree-holders themselves. 26th and 27th October 1927, were holidays. Consequently the judgment-debtor (appel-

lant) made an application to the executing Court, on 28th October 1927, for setting aside the sale under O. 21, R. 89, Civil P. C. He deposited on the same date a sum of Rs. 293-14-3. It should be noted that he should have deposited (Rs. 250-0-3 plus Rs. 37-8)=Rs. 287-8-3 only, under O. 21, R. 89, but he actually deposited Rs. 293-14-3. It appears that under some misapprehension he deposited Rs. 37-8-0 more on 31st October 1927, 1st November 1927. Though the judgment-debtor had deposited the full amount under O. 21, R. 89, Civil P. C., within time, the executing Court refused to set aside the sale and passed the following order on the judgment-debtor's application :

"The sale is confirmed. The decree-holder will file a receipt for his dues and shall deposit the rest along with sale fee in the treasury."

It is difficult to understand what did the learned Assistant Collector mean by passing the order in question on the judgment-debtor's application. The said order was clearly wrong and so the judgment-debtor filed an appeal in the Court of the District Judge, Rae Bareli. The learned District Judge dismissed the appeal on the ground that the whole amount which the judgment-debtor should have deposited under O. 21, R. 89 was not deposited by him within time. It appears that the learned District Judge was of opinion that the judgment-debtor should have deposited also one anna in the rupee on the purchase money as costs of sale within one month of the sale.

The judgment-debtor has come to this Court in second appeal or in revision (in the alternative.)

I think no second appeal is permitted by S. 104 (2), Civil P. C. As pointed out in the case of *Iftikhar Haidar v. Ikram Fatima* (1), where an order is passed setting aside a sale under O. 21, R. 92, Civil P. C., from which one appeal is specially provided for by O. 43, R. 1 (j) in such a case no second appeal is permitted by S. 104 (2) of the Code. No second appeal lies in this case also. Though no second appeal lies, but I think the facts are such as to bring the case within the provisions of S. 115, Civil P. C. In my opinion contravention of an express provision of law is not merely an erroneous decision, but it is

(1) A. I. R. 1925 Oudh 622=29 O. C. 86.

an illegality within the meaning of S. 115, Civil P. C. I think the lower Courts have acted in the exercise of their jurisdiction illegally or with material irregularity in this case and the order in question must be set aside.

There is no doubt that the learned Assistant Collector was wrong in passing the order in question on the judgment-debtor's application under O. 21, R. 89, when the judgment-debtor had duly complied with the provisions of O. 21, R. 89, Civil P. C. Under O. 21, R. 89, the judgment-debtor is required to deposit in Court (a) for payment to the purchaser, a sum equal to five per cent. of the purchase money, and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such proclamation of sale have been received by the decree-holder. If the deposit is made within 30 days of the date of sale, the Court

"shall make an order setting aside the sale : see O. 21, R. 89 (1) and R. 92 (2), Civil P. C."

In this case the judgment-debtor had deposited Rs. 250-0-3 the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered and also five per cent. of the purchase money for payment to the purchaser. This is all that he had to deposit and he deposited the same within 30 days of the date of sale. 25th October to 27th October 1927, being holidays must be excluded. If the learned District Judge means that the judgment-debtor ought to have deposited also an additional sum of one anna in the rupee on the purchase money within 30 days from the date of sale then I am not prepared to agree with him. Order 21, R. 89 (3) provides that

"nothing in this rule shall relieve the judgment debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

This surely does not mean that the judgment-debtor should deposit also any costs and interest not covered by the proclamation of sale within 30 days from the date of sale.

I think this application which has been treated as one in revision must be allowed. The order in question is clearly wrong and cannot be upheld.

Hence I allow this application and setting aside the orders of the lower

Courts make an order setting aside the sale. The applicant will get his costs from the opposite party in all the three Courts.

R.M./R.K.

Application allowed.

A. I. R. 1930 Oudh 10

STUART, C. J. AND RAZA, J.

Lala—Appellant.

v.

Amir Haider Khan—Respondent.

First Appeal No. 141 of 1928, Decided on 22nd August 1929, against decree of Sub-Judge, Rae Bareli, D/- 17th September 1928.

(a) Civil P. C., O. 34, R. 6—R. 6 also applies to sale on charge.

Rule 6, O. 34 does not only apply to a sale on a mortgage but can also be applied to a sale on a charge. [P 11 C 2]

(b) Civil P. C., O. 34, R. 6—R. 6 is given effect to in decree form No. 4 in Appx. D.

Order 34, R. 6 reproduces the effective portion of the old S. 90, T. P. Act, and the words used in decree form No. 4 in Appx. D are intended to give effect to O. 34, R. 6: A.I.R. 1918 P. C. 159, *Rel. on.* [P 12 C 2]

(c) Civil P. C., S. 97—Person aggrieved by provision in preliminary decree about personal decree must appeal against it within period of limitation—Civil P. C., O. 34, R. 6.

The provision that if the net proceeds of the sale are insufficient to pay the amount decreed with interest and costs, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance gives the mortgagee an actual right the existence of which is detrimental to the mortgagor. A mortgagor is aggrieved by a preliminary decree containing such a provision and if he wants to take exception to it he must appeal against the preliminary decree within the period of limitation. If he does not do so he is precluded from disputing the correctness of the preliminary decree upon that point. [P 12 C 2]

H. Hussain and P. N. Choudhri—for Appellant.

K. P. Misra—for Respondent.

Judgment.—This is an appeal against the order of the learned Subordinate Judge of Rae Bareli, dated 17th September 1928, by which a personal decree was awarded in favour of Thakur Amir Haidar Khan, plaintiff-respondent against Lala Kalwar, appellant for a balance of Rs. 7,152-11-0 and costs. The facts are as follows: The plaintiff Thakur Amir Haidar Khan had sold to Lala Kalwar on 12th April 1923 a 20 biswas share in the village of Ramapur, with the exception of some plots. A portion of the consideration was left

with him for the satisfaction of claims against the plaintiff. He did not satisfy those claims and the plaintiff sued in 1925 for relief against him, at the same time asking for a charge upon the property in the defendant's hands for the amount due to him with interest. The right to this charge was based on the provisions of S. 55 (4) (b), Act 4 of 1882. In para. 11 of the plaint the plaintiff asked that if the amount due to him could not be obtained from the sale proceeds of the property, the balance should be recoverable personally from the defendant. The learned Subordinate Judge passed a decree on 22nd April 1926 granting the plaintiff certain relief declaring the existence of a charge upon property, and further declaring that if the net proceeds of the sale were insufficient to pay such amount, and such subsequent interest and costs in full, the plaintiff should be at liberty to apply for a personal decree for the amount of the balance. The decree in question was passed exactly in the form laid down in decree form No. 4, Appx. D, Act 5 of 1908. The defendant's counsel signed the decree to indicate that no objection at that time was taken to its form. The defendant, who is the appellant here, preferred no appeal against that decree, and on the expiration of the period of limitation within which an appeal could be filed, that decree became final against him.

Subsequently the plaintiff-respondent, in pursuance of the charge, brought the property to sale. The sale proceeds were not sufficient to satisfy the decretal amount. He then applied for a personal decree for the balance against the defendant-appellant. Notice was served on the defendant-appellant. He did not appear and was not represented. The order granting the personal decree was then passed (as we have already stated) on 17th September 1928. On 19th December 1928 the defendant-appellant preferred the following appeal here. These are the grounds:

1. That no personal decree for the balance could be passed under O. 34, R. 6, because the decree in the original suit was not a mortgage decree.

2. Because there being no prayer for a personal decree in the previous suit for a relief granted against the appellant personally, a personal decree cannot be passed against the appellant.

3. Because the judgment of the Court below is against law and merits of the case. It is to be noted that there is no force in the plea stated in the second ground, as we have found from the plaint in the previous suit that there was prayer for a personal decree.

The case as argued by the appellant here is as follows: His learned counsel agrees that under the provisions of S. 55 (4) (b), Act 4 of 1882, the plaintiff was entitled to enforce a charge against the property sold in satisfaction of the amount due to him. He also agrees that under the provisions of S. 100, Act 4 of 1882, all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Ss. 81 and 82 shall, so far as may be, apply to the person having such charge. There is now no provision in Act 4 of 1882 corresponding to old S. 90, which was as follows:

"When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

This provision has been deleted from Act 4 of 1882 and its place has been supplied by the provisions of O. 34, R. 6, Civil P. C. which read as follows:

"Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

In order to give effect to the provisions of this rule the legislature have inserted in form No. 4, to which we have referred, the words:

"that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance."

The learned counsel for the appellant has argued that O. 34, R. 6, can only apply to a sale on a mortgage and not to a sale on a charge. We should not accept this view in any circumstances. But we find that apart from the merits of this appeal the appellant is not competent to appeal on the point at all in accordance with the provisions of S. 97, Civil P. C. (Act 5 of 1908). As we have already shown he did not appeal against the preliminary decree and is now ap-

pealing for the first time against the final decree. S. 97 says:

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

The learned counsel for the appellant suggests that he is not appealing against the preliminary decree. His argument is that the preliminary decree did not award plaintiff a personal decree in event of the proceeds of the sale being insufficient but merely left it open to him to apply for a personal decree in such event which the Court was in a position either to award or to refuse. He bases considerable argument upon the interpretation which he puts upon the words "shall be at liberty to apply." We cannot, however, accept his argument. The position has not been materially changed by the amendment in the law. The provisions of old S. 90, Act 4 of 1882, have been reproduced in O. 34, R. 6, with no alteration of the principle. Their Lordships of the Judicial Committee in *Jeuna Bahu v. Parmeshwar Narayan* (1) were dealing with a decree under old S. 90, Act 4 of 1882. At p. 297 (of 46 I. A.) they say:

"The ground upon which the sale is disputed is that by virtue of S. 90, T. P. Act, 1882; the decree of 17th April 1890, was inoperative so far as it ordered payment of the balance of the moneys and formed a foundation for the sale of property outside the mortgage. This argument turns on the language of the section, which is in these terms: "When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

"The appellants contended that the opening words establish as a condition precedent to the power of decreeing payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt. It is admittedly a strict and technical construction of the statute and one for which no reason can be assigned, and from which no advantage can possibly be derived by any mortgagor. It would be unfortunate if the statute by its terms rendered necessary the adoption of this contention; but in their Lordships' opinion it is not necessary so to construe the Act. The words of the section are, in their opinion, satisfied in cases where the Court passes a decree that, on the happening of the event when the net proceeds of the sale are found to be insufficient, the balance should be paid. The order though made at the time of the decree for the sale of

the mortgaged estate, operates at a future date, and is made in such terms that it can only operate when the sale has failed to satisfy the debt, and this is the event specified and defined in the section as the event when the decree can be made."

The decision of their Lordships appears to us to afford authority for the view which we take. This is that O. 34 R. 6 reproduces the effective portion of old S. 90 and that the words used in decree form No. 4 are intended to give effect to O. 34, R. 6. What we understand the preliminary decree to mean is this: If the sale proceeds are insufficient the plaintiff then can take out a personal decree against the defendant-appellant for the balance. He obviously cannot obtain such a decree if the sale-proceeds are sufficient. He may lose his right to the decree by not applying within limitation. There may be other circumstances in which he will be unable to avail himself of the decree passed in his favour. But the provision that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance gave the plaintiff an actual right the existence of which was detrimental to the defendant. There was thus something in the preliminary decree which was against the defendant's interests. In other words the defendant was aggrieved by that portion of the preliminary decree. If he took exception to that portion of the decree under the provisions of S. 97, he had to appeal against the preliminary decree within the period of limitation. As he did not do so, under the provisions of S. 97 he is now precluded from disputing the correctness of the preliminary decree upon that point. In these circumstances the appeal fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 12

PULLAN, J.

Ram Narain and another — Defendants—Appellants.

v.

Gaya Deen and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 387 of 1929, Decided on 23rd January 1929, against decree of Sub-Judge, Rae-Bareilly, D/- 30th July 1928.

(1) A. I. R. 1918 P. C. 159=47 Cal. 370=46 I. A. 291 (P.C.).

Jurisdiction—Civil and revenue Court—Suit by reversioner for declaration that deed of relinquishment executed by mother of deceased occupancy tenant is not valid is not cognizable by civil Court.

A suit by reversioners for possession of occupancy holding or in the alternative for declaration that a deed of relinquishment executed by the mother of the deceased occupancy tenant is invalid is not cognizable by a civil Court. The question whether the plaintiffs are the next persons of the widow cannot be decided by a civil Court. It is a question really cognizable a revenue Court. Primarily all suits brought by a person claiming to be a tenant against a landlord in respect of an occupancy tenure are suits entertainable by a revenue Court.

[P 13 C 1, 2]

Radha Krishna—for Appellants.

Khaliquzzaman—for Respondents.

Judgment.—This is an appeal from a decree of the Subordinate Judge of Rae-Bareilly varying the decision of the Munsif of Partabgarh, who dismissed the suit brought by certain persons, who, claiming to be the reversioners of a deceased occupancy tenant, asked the Court in the first place to grant them possession of the occupancy holding, and, in the alternative, to give them a declaration that a deed of relinquishment executed by one Mt. Buta, who was the mother of the deceased occupancy tenant and obtained possession of the holding on his death, was invalid as against them. The lower appellate Court held that in so far as this was a suit for possession the civil Courts had no jurisdiction, but that in so far as it was a suit for a declaration the civil Courts had jurisdiction, and finding that the plaintiffs were the reversioners in law of the deceased occupancy tenant decreed the suit for a declaration only. In appeal it has again been pleaded that the decision of the Court below is without jurisdiction. Primarily all suits brought by a person claiming to be a tenant against a landlord in respect of an occupancy tenure are suits entertainable by the revenue Courts, and the defendants in this suit are the landlords in whose favour Mt. Buta has relinquished the holding. The decision of the lower appellate Court rests probably on the fact that it is not clear under which section of the Oudh Rent Act the plaintiffs could have brought their suit. They were not entitled to immediate possession because it must be held that the widow was competent to transfer her rights during her lifetime, and a declara-

tory suit of this nature is not specifically mentioned in S. 108, Oudh Rent Act. But the civil Courts before undertaking a suit of this kind must be careful not to encroach on the sphere of the revenue Courts. I have to consider, therefore, what is the effect of the decision passed by the lower appellate Court. In my opinion it is this. He has decided that these plaintiffs are the next persons entitled to this occupancy holding on the death of Mt. Buta. This is a question which the civil Courts cannot decide, and although the case has been concealed as it were under the guise of Hindu law it is really a question only cognizable by the revenue Courts. Whether the plaintiff could or could not have succeeded in their suit in the revenue Courts or whether, as appears possible, such a suit might have been held premature, is a matter of little importance, and does not justify the civil Courts in stepping in and determining a claim between the landlord and tenant merely because the revenue Courts might not at that time have had the material handy on which to give the decision. I hold, therefore, that this appeal must succeed. I allow the appeal with costs, set aside the decree of the Court below and restore that of the Court of first instance.

R.M./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 13

MISRA AND RAZA, JJ.

Abid Ali Khan—Plaintiff—Appellant.
v.

Har Pershad and another — Defendants—Respondents.

First Appeal No. 101 of 1928, Decided on 8th May 1929, from order of Sub-Judge, Unao, D/- 31st July 1928.

(a) Pre-emption—Suit for—Claim decreed and amount ordered to be paid in Court—Amount paid with prayer not to be allowed to be withdrawn till result of appeal—Deposit is not conditional or invalid.

When a pre-emption decree requires certain amount to be paid in Court by the pre-emptor for payment to the vendees, and the pre-emptor pays the amount as directed into the Court, the mere fact that he made an application praying that the amount might not be given to the vendees till the disposal of the appeal preferred by pre-emptor against the pre-emption decree does not make the deposit a conditional or invalid deposit so as to justify dismissal of the pre-emption suit.

[P 15 C 1]

(b) Pre-emption — Suit for—Preliminary decree is not always necessary.

It is wrong to suppose that there must be a preliminary decree in all cases in which pre-

emption decree is passed embodying the condition that if the pre-emption money be not paid within the time fixed by the Court the suit shall stand dismissed. [P 15 C 2]

(c) Civil P. C., O. 41, Rr. 32 and 33—**Powers of appellate Court.**

Once an appeal is preferred from a decree the appellate Court becomes seized of the entire proceedings and becomes vested with the jurisdiction of confirming, varying and reversing the decree from which the appeal is preferred. [P 15 C 2]

K. P. Misra and Bihari Lal Nigam—for Appellant.

A. P. Sen—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a pre-emption suit.

This Appeal (No. 101 of 1928) is connected with Appeal No. 87 of 1928.* Both the appeals arise out of one and the same suit. We are going to dispose of Appeal No. 87 of 1928 by a separate judgment.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:

Abid Ali Khan brought a suit against Har Prasad, Ganga Sewak (defendants 1 and 2) and Akhtar Ali (defendant 3) to enforce his right of pre-emption in respect of a certain zamindari share which was sold by Akhtar Ali to Har Prasad and Ganga Sewak by a deed dated 14th August 1926. The price entered in the sale-deed was Rs. 12,500; but the plaintiff alleged that the price was not fixed in good faith, that the property was really sold to defendants 1 and 2 for Rs. 8,063-12-0 and that the market value of the property was also the same.

The claim was resisted by defendants 1 and 2 on various grounds.

The learned Subordinate Judge gave the plaintiff a decree on 15th May 1928, for possession of the property in suit by right of pre-emption, on payment of Rs. 9,153 plus costs. The plaintiff was ordered to pay the amount into the Court within two months from the date of the decree (i. e., up to 15th July 1928). The decree was to become void in default of payment of the amount as ordered by the Court.

The plaintiff deposited the amount in the lower Court on 13th July 1928. He did so by making an application to that Court. It was stated in the application that the plaintiff was ready and willing

[* *Abid Ali Khan v. Har Prasad*, A. I. R. 1929 Oudh 486.]

to deposit the amount in Court for payment to defendants 1 and 2 as ordered by the Court. The plaintiff, however, prayed that the amount might not be given to defendants 1 and 2 till the disposal of the appeal which the plaintiff was going to file against the decree of the Court. The learned Subordinate Judge passed the following order on the plaintiff's application on 13th July 1928:

"According to the decree, the plaintiff should deposit Rs. 9,286-12-0 due to defendants 1 and 2 up to 15th July 1928. He wants to deposit it and prays that it should not be given to defendants 1 and 2 till the disposal of the appeal which he is about to file. Ordered, that he should deposit the money and that the money be not paid to opposite party till the appeal is disposed of."

Defendants 1 and 2 put in an application on 16th July 1928 stating that they would suffer loss of interest if they would not get money till the disposal of the plaintiff's appeal. They prayed that, if for any reason they were not allowed to get the money deposited by the plaintiff, the latter might be ordered to pay interest till the appeal, which he was going to file was disposed of. The learned Subordinate Judge passed the following order on the defendants' application on 17th July 1928:

"Let the decretal amount be deposited in Court but it shall not be paid to the vendees until disposal of appeal, as desired by the plaintiff pre-emptor in his application dated 13th July 1928, but the pre-emptor shall be liable to pay interest, at 6 per cent per annum, on the decretal amount from the due date until disposal of appeal."

It should be noted that the plaintiff had already deposited the money in Court. It should also be noted that the plaintiff filed his appeal in this Court against the decree dated 15th May 1928, on 31st July 1928.

Defendants 1 and 2 filed another application in the lower Court on 23rd July 1928, contending that the deposit which was made by the plaintiff on 13th July 1928 was not in accordance with the conditions of the decree dated 15th May 1928 and that it was not a valid deposit and should not be treated as such. They asked the Court to dismiss the suit, as the plaintiff had failed to comply with the terms of the decree.

The plaintiff also filed an application in the lower Court on 31st July 1928, informing the Court that he had filed his appeal in the Chief Court and questioning the correctness of the order of the

lower Court as to payment of interest on the money deposited in Court.

The learned Subordinate Judge disposed of these applications on 31st July 1928. He rejected the plaintiff's application holding that he had no jurisdiction to set aside his order regarding interest. He, however, granted the defendants' application and passed the following order:

"Now I take up the question of conditional deposit taken on behalf of the defendants vendees. The pre-emption decree required unconditional payment of Rs. 9,286 by the pre-emptor to the vendees within two months time and the plaintiff obviously made a conditional deposit as stated above; hence this deposit should be treated as no deposit at all in terms of the decree. I, therefore, dismiss plaintiff's suit for pre-emption with costs if any, to defendants 1 and 2 including costs, if any, of the present proceedings because I uphold the objections raised by defendants 1 and 2."

The plaintiff has filed this Appeal (No. 101 of 1928) against the order quoted above. We think this appeal should be allowed.

We have considered the plaintiff's application dated 13th July 1928, carefully. In our opinion the plaintiff never meant to make a conditional deposit and the deposit made by him was in compliance with the decree of the Court. Under the decree he had to pay the amount into Court on or before 15th July 1928. He paid the amount into Court on 13th July and thus complied with the decree dated 15th May 1928. The mere fact that his application contained this prayer also that the amount might not be given to defendants 1 and 2 till the disposal of the appeal, which he was going to file against that decree, does not make the deposit a conditional or invalid deposit. He had made a prayer and it was for the Court to refuse or grant it. The money was deposited under the order of the learned Subordinate Judge and he took it to be a valid deposit. The contesting defendants also raised no objection to the validity or legality of the deposit and asked the Court to allow them to draw the money or to require the plaintiff to pay interest on the amount deposited. Thus neither the Court nor the contesting defendants thought before 23rd July 1928, that the deposit in question was a conditional or invalid deposit.

The respondents' learned counsel has referred to some old rulings in mortgage

suits dealing with the question of the validity or legality of the tender of mortgage money. We do not think it necessary to discuss those cases. They differ materially from the present case in their facts and do not help the defendants in this case. The respondents' learned counsel has referred to these cases in support of his argument that the tender must be unconditional. We agree with him on that point; but the question is: Was the deposit made by the plaintiff in this case conditional? We hold that it was not conditional and was never meant to be conditional. The plaintiff deposited the money in compliance with the decree which was passed in his favour on 15th May 1928 and the lower Court was wrong in dismissing his suit on 31st July 1928 under the circumstances mentioned above. It appears that the learned Subordinate Judge was under the wrong impression that he had to pass or that he could pass a final decree or order in the pre-emption suit after he had disposed of the suit on 15th May 1928. He was under the wrong impression that there must be a preliminary decree and then a final decree in all cases in which pre-emption decrees are passed embodying the condition that if the pre-emption money be not paid within the time fixed by the Court, the suit shall stand dismissed. He was clearly wrong in passing the order in question when the plaintiff had filed his appeal against the decree dated 15th May 1928 in this Court. Once an appeal is preferred from a decree, the appellate Court becomes seized of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred: see O. 41, Rr. 32 and 33, Civil P. C.

Hence we allow this appeal and set aside the order of the lower Court dated 31st July 1928. The appellant will get his costs from the contesting respondents (i. e., respondents 1 and 2) in this Court, and also in the lower Court (so far as the proceeding in which the order in question was passed is concerned).

V.B./R.K.

Appeal allowed,

A. I. R. 1930 Oudh 16

SRIVASTAVA, J.

Munnoolal—Plaintiff—Appellant.

v.

Danbahadur Singh—Defendant—Respondent.

Second Rent Appeal No. 14 of 1928, Decided on 3rd September 1928, against decree of Dist. Judge, Fyzabad, D/- 20th December 1927.

Cosharers—Suit for profit by cosharer on ground that defendant realized in excess of his share does not lie where plea is not substantiated.

In a suit for profits by a cosharer where the cosharer alleges that the defendant has realized profits in excess of his share the cosharer is not entitled to the profits if he fails to give any evidence of actual realizations made by the defendant and is therefore unable to show that the defendant has made any realization in excess of his share. [P 16 C 2]

Radha Krishna—for Appellant.*H. Husain*—for Respondent.

Judgment.—This is a second rent appeal arising out of a suit for profits under S. 108, Cl. 15, Oudh Rent Act. The facts of the case are that the plaintiff and the defendant are both superior proprietors owning equal moieties of village Rampur. The plaintiff is also a shankalapdar of 55 bighas odd shankalap land out of the moiety share owned by the defendant as superior proprietor. The entire cultivated area of the village is 262 bighas. The plaintiff by virtue of his being the superior proprietor is entitled to the rents and profits of 131 bighas and in addition thereto he is entitled to the rents and profits of the 55 bighas as shankalapdar out of the remaining 131 bighas. In other words the defendant is entitled to the rents and profits of 131 bighas minus 55 bighas odd, that is to say, in respect of 75 bighas odd only. The plaintiff's case as stated in para. 4 of the plaint and lucidly explained by the learned District Judge in his order of remand was that the defendant had collected the rents and profits in respect of 103 bighas of cultivated land. This figure of 103 is reached in this way. If we deduct 55 bighas area of the shankalap land from the entire cultivation of 262 bighas we are left with an area of 207 bighas. Half of this is represented by the 103 bighas odd the rent of which is alleged to have been collected by the defendant. As stated before he was entitled to the rents

and profits in respect of 75 bighas odd only. So according to the plaintiff's case the defendant had realized the rents and profits of about 28 bighas or so in excess of his share. The plaintiff, therefore, claimed the profits realized by the defendant in excess of the share to which he was entitled, in the present suit.

The learned Assistant Collector who tried this case dismissed it on a preliminary ground holding that the suit was not maintainable under S. 108, Cl. 15, Oudh Rent Act. When the case came in appeal before the learned District Judge of Fyzabad he set aside the order of the Assistant Collector and remanded the case for trial de novo in accordance with law. When the case went back to the learned Assistant Collector after remand he held that the plaintiff had failed to prove that the defendant made any collection in excess of his share and on this finding the suit was dismissed. On appeal the learned District Judge agreed with the finding of the trial Court and upheld its decision. The plaintiff comes here in second appeal.

It is admitted by the learned counsel for the plaintiff appellant that he has failed to give any evidence of the actual realizations made by the defendant and is, therefore, unable to show that the defendant has made any realizations in excess of his proper share. He has, however, urged that on proper construction of the plaintiff's case the plaintiff should be held entitled to a decree, even though the defendant may not have realized anything in excess of his share. His contention is that according to the prevailing practice and understanding between the parties the defendant alone was entitled to realize the rents in respect of 103 bighas and the plaintiff could not realize any portion of those rents if he wished to do so, and that, therefore, the plaintiff is entitled to get a proportionate share representing 28 bighas. The argument is that by reason of the practice and understanding just mentioned the position of the defendant is analogous to that of a lambardar and that even if the rents collected by the defendant may not be in excess of the rents payable in respect of 75 bighas, he is in any case liable for the rents in respect of 28 bighas to the plaintiff.

The whole argument is based upon assumptions for which there is no founda-

tion so far as the pleadings go. Reference has been made to paras. 4 and 5 of the plaint. Para. 4 only says that the defendant has realized the rents in respect of 28 bighas in excess of his share to which the plaintiff is entitled. Para. 5 simply says that if any of the parties fails to realize his share of the rent from any tenant then the other party cannot be liable for it or the other party can sue the tenant for that amount. I fail to find anything in any of these two paragraphs which can support the case now set up before me. There is also not one word in the order of remand dated 15th March 1927, passed by the learned District Judge to show that any such case was set up by the plaintiff. The issues which were framed by the trial Court also give no indication of the position now sought to be taken by the plaintiff. Reference was also made to two applications made by the plaintiff dated 3rd and 6th December 1926, but I fail to find anything in these applications to support the plaintiff's contention. On the contrary the contents of these applications seem rather to show that the plaintiff's case was based upon the allegation of the defendant having actually made realisations in excess of the share to which he was entitled. I must, therefore, overrule the contention.

The appeal fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 17

WAZIR HASAN, Ag. C.J. AND PULLAN, J.

Mt. Gujrati Kunwar and others—
Defendants—Appellants.

v.

Bhagwatidin Singh and others—
Plaintiffs—Respondents.

Second Appeal No. 282 of 1928, Decided on 29th January 1928, against decree of Sub-Judge, Sultanpur, D/- 2nd May 1928.

(a) Civil P. C., S. 100—Where finding of fact is based entirely on presumptions, validity of presumptions can be examined in second appeal.

Where a finding of fact by the lower Court is based entirely on certain presumptions and there is no evidence oral or documentary on the record to prove the fact, the Court of second appeal has power to examine the validity of the presumptions.

[P 18 C 2, P 19 C 1]

1930 O/3 & 4

(b) Evidence—Persons not parties to mutation proceedings cannot be fastened with knowledge of it.

It is impossible to fasten the knowledge of mutation proceedings upon persons other than the parties in absence of evidence to show that they had such knowledge. [P 19 C 2]

(c) Adverse possession—Mortgage—Redemption—Mortgagee continuing in possession of property as mortgagee does not acquire title by adverse possession.

A manager of joint Hindu family executed a mortgage with possession. One of the members subsequently sold the property to the mortgagee who continued to remain in possession for 12 years from the date of the invalid sale :

Held : that the mortgagee did not acquire any title by adverse possession. The possession of the mortgagee must be held to have continued in the same character in which it admittedly began in absence of evidence to show that it had changed in its character. As between the mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor any acquiescence by the mortgagor not amounting to a release of equity of redemption will be a bar or defence to suit for redemption if the parties are otherwise entitled to redeem : 32 Cal. 296 (P. C.), *Rel. on.*

[P 20 C 1]

Aditya Prasad—for Appellants.

Ghulam Hasan—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the Subordinate Judge of Sultanpur, dated 2nd May 1928, reversing the decree of the Munsif of the same place dated 18th May 1927 in so far as it was under appeal before him.

There was some contest at the outset but it is now agreed that the property in dispute originally belonged to a joint Hindu family consisting of five brothers, with three of whom only we are now concerned. They were Maheshwar Singh, Hamir Singh and Jageshar Singh. Maheshwar Singh was the manager of the family estate. On 2nd July 1877, he made a usufructuary mortgage of property in suit less by two plots in favour of the plaintiffs' predecessor-in-interest, Sarup Singh. It is common ground that in pursuance of that mortgage the mortgagee entered into possession of the mortgaged property and it is also common ground that so far as bare possession, apart from the question as to title, is concerned it has always been with the mortgagee and after his death with his successors-in-interest. On 15th June 1882, the other brother, Hamir Singh, executed a sale-deed in respect of the

mortgaged property plus two more plots in favour of the mortgagee. In the recital contained in the deed of sale the mortgage of July 1877 is mentioned and it is also mentioned that a part of the sale consideration was to be utilized towards redemption of that mortgage. It is agreed that Hamir Singh as a member of a joint Hindu family could not make any alienation in respect of any portion of the family property without the consent of the other members of the family and consequently the sale of 1882 without such a consent was a void transaction. In the year 1884 certain proceedings seem to have been taken in the Courts of revenue in relation to mutation of names. We have neither the application made for mutation of names nor the order of the Court passed thereon before us. There are two papers only on the record of this case connected with those proceedings. They are Exs. 2 and 4. Ex. 2 describes the name of the case, giving details of the names of the parties, the date of the decision and it also contains a note that certain papers then existing on the file had been destroyed. One of such papers is described as a bainama. To this matter we will advert hereafter again. Ex. 4 is a certified copy of register No. 3-A. It has several columns. We will now mention some of the entries appearing in these columns. Col. 2 gives the date of order as 15th April 1884. This tallies with the entry in Ex. 2. Col. 3 is intended for an entry as to the date of a mortgage. In this column we find 15th June 1882. Col. 4 gives the description of the property. Col. 5 is for the entry of the name of the mortgagor and Col. 6 for the name of the mortgagee. In the former column the name of Hamir Singh and in the latter column the name of Sarup Singh are entered. Cols. 7 and 8 are intended for the entry of the area and the numbers of the plots mortgaged. These columns contain the plots in suit which are the same as the mortgaged lands plus two more plots. They are Nos. 1035 and 1319. As we have said before, these were added by Hamir Singh in his sale-deed of 15th June 1882.

In recent times according to the case of the plaintiffs-respondents they got information that the entries in register

No. 3-A were erroneous. Thereupon they moved the Courts of revenue for correction and the case which they put forward was that the entries instead of recording a transfer of property in suit by way of mortgage should have been by way of sale. The attempt has failed and according to the allegation contained in para. 5 of the plaint that has given the cause of action for the suit, out of which this appeal arises, the object of the present suit is to obtain a declaration that the properties in suit are held by the plaintiffs as owners thereof under the deed of sale dated 15th June 1882, and the defendants have no title thereto.

The Court of first instance on the ground that the sale of 15th June 1882 effected by Hamir Singh was void, the mortgage of July 1877 being admittedly a valid transfer holds good except in respect of the two additional plots 1035 and 1319 dismissed the suit except in respect of the two plots for which it granted a decree to the plaintiffs-respondents. The defendants acquiesced in the decree but the plaintiffs preferred an appeal. The appeal has been decided in favour of the plaintiffs-respondents on two grounds only: (1) that the sale of 15th June 1882, was consented to by Jageshar Singh, one of the three brothers whose names we have already mentioned. There is no definite finding as to the consent of third brother, Maheshar Singh, and (2) that the proceedings relating to the mutation of names in the year 1884 changed the character of possession from that of a mortgagee under the deed of 1877 into that of an owner under the deed of 15th June 1882, and, therefore, though the latter deed was void in law the plaintiffs acquired title by adverse possession.

Both the above grounds are contested in appeal before us. As to the first ground, the argument in support of the opinion of the lower Court is that it is a finding of fact and, therefore, conclusive in second appeal. We are unable to accept the argument. It is argued that there is no direct evidence, oral or documentary on this record to prove the consent of Jageshar Singh or Maheshar Singh to the sale made by Hamir Singh on 15th June 1882. This being so, the finding as to consent is based by the learned Judge of the Court be-

low entirely on certain presumptions. As a Court of second appeal we consider we have power to examine the validity of those presumptions in the agreed circumstances of the case. The foundation for the alleged consent entirely rests on the presumption which the Court below has built up in this case that mutation proceedings of 1884 must have commenced and terminated within the knowledge of Jageshar Singh and Maheshar Singh. In our opinion there is no warrant in law or in the established facts for such a presumption. We gather from Ex. 2 that the notice as to the transfer by sale of 15th June 1882, must have been given to the Tahsildar of the tahsil in which the mahal to which the land in suit belonged is situate, by the vendee, Sarup Singh. From the same exhibit we further gather that the only other party cited in the notice was Hamir Singh. It does not appear that there was any contest as regards the entries to be effected in the revenue registers in pursuance of the notice which Sarup Singh must be deemed to have given to the Tahsildar under the provisions of S. 61, Oudh Land Revenue Act, 1876, which was then in force. As we know the only other party in the proceedings was Sarup Singh, we must, therefore, take it that the citation issued in pursuance of the notice was issued to Sarup Singh and to nobody else. S. 62 of the Act mentioned above prescribes inquiry to ascertain the fact of the alleged transfer. The required inquiry could only be made in a case of contest and as there would have been no contest raised on the part of Sarup Singh in the present case there could have been no inquiry and the mutation of names would have followed. To this extent only the presumption could go according to the maxim *omnia præsumentur rite esse acta* and, no further. The learned Judge of the trial Court thinks that he is justified :

"in raising a presumption of law in favour of an issue of a proclamation at mutation."

There is no justification for such a presumption. The law does not require a proclamation and there is no evidence that it was issued. Having raised the presumption of consent the learned Judge builds on it further presumption arising out of the lapse of time since the mutation proceedings and no action

having been taken by Maheshar Singh or Jageshar Singh or their representatives as against the entries made in consequence of those proceedings. But if the presumption founded on the assumed notice to Jageshar Singh and Maheshar Singh fails, as we hold it does, the further presumption arising out of the alleged inaction on the part of those two brothers also falls to the ground.

But let us examine the result of mutation proceedings more closely. As we have said before, it ended in the name of Sarup Singh being entered in register No. 3-A as a mortgagee and the property in respect of which the entry was made was entered as mortgaged property. If that was the gravamen of the entries made at the mutation proceedings why should Jageshar Singh or Maheshar Singh have come forward to object to it even if they had notice of it. They in their life time did and their representatives now accept the validity of the mortgage made by Maheshar Singh in the year 1877. In reply to this it is argued that the entries in the columns of the register No. 3-A should be held by us as erroneous. The argument does not stop there. We are further asked to read the entries as recording a transfer by sale. The only fact on which reliance is placed in support of this argument is that the date entered in register No. 3-A of the transfer is the date of the sale and not of the mortgagee. On that fact alone we are unable to accept the argument. We do not know what date was given by the parties concerned in the application or in their statements which must have been made before the Court of revenue. Whatever evidence we have before us it is impossible to draw from it the inference that the Court was ever invited to scrutinize the details as to the transfer. Even if the entry as to the date is indicative of the mutation being based on a sale it is impossible to fasten the knowledge of it on persons other than the parties to the mutation proceedings. We know that Jageshar Singh and Maheshar Singh were no parties to those proceedings. We hold, therefore, that there is no evidence on the record, direct or presumptive to support the finding that the sale of 15th June 1882, was accepted by the other members of the family, that is Jageshar Singh and Maheshar Singh.

As to the plea of adverse possession, very little need be said. The substratum for that plea rests on the fact that Jageshar Singh and Maheshar Singh had knowledge of the sale and in spite of that knowledge they allowed mutation of names in favour of the vendee and thereby allowed without protest change in the character of the mortgagee's possession. We have already held that there is no evidence whatsoever of such a knowledge on the part of those two brothers. This being so, the possession of the respondents must be held to have continued in the same character in which it admittedly began. The case before us is parallel to the case decided by their Lordships of the Judicial Committee, *Khiarajmal v. Daim* (1). In the circumstances very similar to the present case their Lordships said :

"As between them (that is mortgagor and mortgagee) neither exclusive possession by the mortgagor for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagee not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

It is admitted that Hamir Singh had no authority to release the equity of redemption. Nor indeed any act of his could have the effect of releasing the mortgagee from his obligation as such which lie on him by a valid transfer from the manager of the family under the deed of July 1877.

We accordingly allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

R.M./R.K.

Appeal allowed.

(1) [1905] 32 Cal. 296=32 L. A. 23=8 Sar. 734 (P.C.).

A. I. R. 1930 Oudh 20

STUART, C. J. AND RAZA, J.

Sharfuzzaman and others—Appellants.
v.

H. Hunter, Liquidator, Bank of Upper India, Ltd., and another—Respondents.

Misc. Appeal No. 22 of 1929, Decided on 15th October 1929, against order of Dist. Judge, Lucknow, D/- 29th January 1929.

(a) Jurisdiction—Insolvency Court — Fact that insolvent makes valid deed of trust does not oust jurisdiction of insolvency Court.

The fact that the insolvent makes a deed of trust which is held to be valid, cannot oust

the insolvency Court from its jurisdiction. If he commits acts of insolvency and is adjudged an insolvent, the adjudication in insolvency is with the insolvency Court and the Court must administer the estate as an insolvency Court.

[P 25 C 2]

(b) Civil P. C., O. 34, R. 6—Secured creditor can obtain decree under O. 34, R. 6 and utilize it as proof of balance—He can also proceed under Provincial Insolvency Act (1920), S. 47.

Secured creditor can obtain decree under O. 34, R. 6 and utilize this decree as a proof of the balance. But even if his application for a decree under O. 34, R. 6 is refused it is still open to him under the special remedy provided by S. 47, Provl. Ins. Act, to prove for the balance due. Under this special provision no question of limitation arises. Under the provisions of S. 28 (6), Provl. Ins. Act, nothing affects the power of a secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if S. 28 had not been passed: *A. I. R. 1925 Pat. 438, Rel. on.* [P 26 C 1, 2]

(c) Interpretation of Statutes — Language should be examined and proper meaning ascertained uninfluenced by previous law or English law.

Where there is a positive enactment of the Indian legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of law or of the English law upon which it may be founded: *A. I. R. 1928 P. C. 2, Foll.*

[P 28 C 1]

(d) Provincial Insolvency Act, Ss. 47 (i) and 48—Interest due after adjudication cannot be excluded from proveable balance—S. 48 does not apply to secured creditors.

Interest due after date of adjudication is not to be excluded from the balance which is allowed to be proved under S. 47 (i). S. 48 has no application to secured creditors. [P 29 C 1]

(e) Provincial Insolvency Act, Ss. 47 and 48 — Secured creditor whose dues exceed realizations can prove balance.

A secured creditor who has advantage of security may remain outside the Act. He can realize upon his security. To the extent to which he realizes on his security will reduce the estate in insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should, however, the amount of realization be less than the amount due to him he is given the special privilege of proving for the balance. This balance is the difference between the decretal amount and the amount realized. When he has proved he will not obtain any more than his proportionate share in the estate. He will be put then on the footing of an unsecured creditor. [P 29 C 1]

M. N. Chak and Khaliquzzaman—for Appellants.

J. Jackson—for Respondents.

Judgment.—These three appeals Nos. 19, 22 and 23 are against an order passed in appeal by the learned District Judge of Lucknow, dated 29th January 1929, in

which he modified an order of the Judge of the Small Cause Court, Lucknow, on insolvency side dated 15th November 1928. This order was passed upon an application made by respondent 1, who is liquidator of the Bank of Upper India Ltd., in liquidation, on 1st August 1927, to the insolvency Court in which he asked under S. 47, Act 5 of 1920, as a secured creditor, who had realized his security, to prove for the balance due to him after deducting the net amount realized together with future interest up to the date of settlement. He further asked for permission to place the amount realized first to the settlement of interest due to him and secondly towards payment of the principal. He further asked the Court to cease paying allowances to the judgment-debtor and his family out of the money in the receiver's possession. On 15th November 1928, the insolvency Court dismissed this application in entirety. The respondent then appealed to the District Judge on 28th November 1928. The District Judge decided this appeal on 29th January 1929. In his order in appeal he allowed respondent 1 to prove for a certain balance. In calculating this balance he refused to permit the amount already realized to be credited in the first place to interest and then to principal. He refused to grant future interest, and he refused to make the order which the respondent desired to the prejudice of the insolvent and his family. The respondent has taken no exception to the dismissal of the portion of his claim. Three appeals have been filed desiring that the order of the insolvency Court be restored and that the application of respondent 1 should be dismissed completely. These appeals are as follows : Appeal No. 19 has been filed by Rani Kaniz Abid one of the creditors. Appeal No. 22 has been filed by Chaudhri Sharafuzzaman and four other persons who are trustees under a deed to which we shall refer later. Appeal No. 23 has been filed by Pande Piare Lal, who is another creditor.

It is necessary to state certain preliminary facts before we proceed to the decision of these appeals.

The insolvent is a certain Chaudhri Shafiquzzaman who is Taluqdar of Bhilwal in the Bara Banki District. He succeeded to the Taluqa on 19th September 1907. The estate was then in charge of

the Court of Wards. The Court of Wards' management ceased in 1909, and Chaudhri Shafiquzzaman succeeded to the management of the Taluqa. By the end of 1911 he had incurred considerable debts. On 30th January 1912 he executed a deed of trust by which he appointed Mr. Mohammad Nasim, Chaudhri Haji Hafiz Fida Husain, Sheikh Matinuzzaman, Chaudhri Mohammad Wajid Husain and Maulvi Mohammad Nizamuddin Hasan as trustees. Only three of these gentlemen took up their duties. Sheikh Matinuzzaman and Chaudhri Mohammad Wajid Husain never accepted the position of trustees or took any part in the administration of the trust. The trust was of a peculiar nature. Under it the whole estate was held in the end for the use and benefit of his son Sharafuzzaman. An allowance of Rs. 400 a month was to be paid to the founder and an allowance of Rs. 200 a month was to be paid to his wife and other specific allowances amounting in all to Rs. 280 a month were to be given with certain other unspecified allowances for other purposes. The balance of the income was to be devoted to the liquidation of the debts. But there followed a clause which overrode the remainder of dispositions. The trustees were given full power to transfer by sale the whole or part of the estate, and to devote the proceeds towards the satisfaction of debts. The main object of the trust was to pay off the considerable debts of Chaudhri Shafiquzzaman and the trustees were given plenary power to sell the estate in order to pay off the debts. Certain debts and liabilities were specified. These liabilities included the liability on certain mortgages executed in favour of the Bank of Upper India now in liquidation, and represented by respondent 1. The estate being seriously encumbered, it was questionable whether after the satisfaction of the debts sufficient or in excess of any property would be left in the hands of the trustees for the purpose of paying the allowances, and securing benefit for the son who was the cestui que trust. The history of this trust is as follows :

Within less than five months Chaudhri Shafiquzzaman had prevented the trustees so effectively from managing the property, that they had to apply to the District Magistrate under S. 145, Criminal P. C., to be put into possession of

the property. The proceedings show that he actually employed violence to prevent the trustees from managing the property. The District Magistrate did not put them in possession. He himself took over the property under S. 146, Criminal P. C. The trustees then applied to the Court of the District Judge for directions, with an alternative prayer for their discharge, and on 12th August 1912, the District Judge discharged these trustees under S. 72, Trust Act (Act 2 of 1882). This order of discharge was effective. He in addition refused to appoint new trustees, and held that the effect of the discharge of the trustees made the fulfilment of the trust impossible, and that under S. 77 of the Act the trust had become extinguished. He removed the trustees from the management and Chaudhri Shafiquzzaman resumed the management of the estate. He was adjudicated an insolvent by the Court of the District Judge of Lucknow on 27th January 1914 and the management of the estate passed to a receiver.

After this happened, the Bank of Upper India had closed its doors in October 1914. In addition to the four mortgages which Chaudhri Shafiquzzaman had executed before the deed of trust was executed, the trustees under the deed had executed a fifth mortgage in favour of the same Bank to obtain money for the benefit of the estate. Thus there were five mortgages held by the Bank against the estate at the time that Chaudhri Shafiquzzaman became an insolvent. The mortgagee was, of course, a secured creditor. From 12th August 1912 to 22nd July 1918 nothing more was heard of the deed of trust, but on 22nd July 1918 Chaudhri Sharafuzzaman, the son of Chaudhri Shafiquzzaman, instituted a suit as cestui que trust in the Court of the second Additional District Judge of Lucknow against the receiver in insolvency proceedings who was as such managing the Bhilwal estate, against Chaudhri Shafiquzzaman, certain transferees under transfers prior to the date of the trust deed including the liquidator of the Bank of Upper India and certain transferees under transfers subsequent to the date of the trust deed, for a declaration that certain property was comprised in the trust deed and that the trust was binding on the defendants. He further prayed that new

trustees should be appointed and in the alternative that he should obtain a declaration declaring his rights to the balance of the property after the payment of the debts. He added a prayer (which is not mentioned in the judgment of the Judicial Commissioner's Court which finally decided the suit) for possession of the property. The Second Additional District Judge dismissed the suit on 12th August 1920. Chaudhri Sharafuzzaman appealed and a Bench of the Judicial Commissioner's Court passed an order on 25th May 1922 (reported in *Sharafuzzaman v. Henry Stanyon* (1) in which they decided that the trust was a good subsisting trust. The case was then referred back to the learned Second Additional Judge for findings on certain points.

Upon receipt of these findings the appeal was finally decided on 18th September 1922. The decree granted Chaudhri Sharafuzzaman a declaration that the taluqdari and non-taluqdari property mentioned in the plaint was comprised in the trust created under the deed of settlement of 30th January 1912. The deed of trust was held to be a good deed of trust as far as it went. But no relief was granted for possession and the plaintiff failed upon the point of possession. The Judges considered that the trust was a good trust which was still alive and that, when the original trustees had been discharged on 12th August 1912, the trust fastened upon Chaudhri Shafiquzzaman who retained possession of the property. They refused to appoint trustees, and left the appointment of the trustees to be subsequently decided. Now under this decision, which must be held to be final as between parties, after the discharge of the first trustees Chaudhri Shafiquzzaman was considered in the position of a trustee, until new trustees were appointed. This fact has considerable bearing upon the proceedings into which we shall now enter. Respondent 1, as liquidator in 1921 instituted a suit on the basis of these mortgages in the Court of the Subordinate Judge, Lucknow against Chaudhri Shafiquzzaman, the receiver in insolvency and certain other persons including Chaudhri Sharafuzzaman the cestui que trust.

(1) A. I. R. 1923 Oudh 80=25 O. C. 291.

His learned counsel has stated to us the reason why the suit was not instituted sooner. Respondent 1 was only appointed as liquidator in July 1917. Before he had been appointed liquidator certain ladies had instituted a suit against Shafiquzzaman claiming the Taluqa property. This suit was instituted on 22nd June 1914. It was dismissed by the trial Court on 30th November 1917. An appeal was filed to the Judicial Commissioner's Court which affirmed the decision of the Court below on 13th April 1923. Further a suit was instituted by another plaintiff against Shafiq-uz-zaman on 8th December 1918. This was dismissed on 21st July 1921. The appeal in the Judicial Commissioner's Court was also dismissed. Both these cases were decided finally in appeal by their Lordships of the Judicial Committee in *Zarifunnisa v. Shafiquzzaman* (2). Both suits were finally dismissed. The respondent's case is that he did not consider it advisable to institute a suit on the mortgages, until there had been some determination as to the title of Chaudhri Shafiquzzaman to the mortgaged property. His learned counsel said that after the trial Court had dismissed the first suit and after the liquidator had reason to anticipate that the trial Court would probably dismiss the second suit he instituted a suit on the mortgages.

In the suit on the mortgages he had joined Chaudhri Shafiquzzaman who according to the decision in *Sharfuzzaman v. Henry Stanyan* (1) was in the position of trustee under the trust deed. He joined Mr. Nasim and Maulvi Nizamuddin who both disclaimed responsibility as they had been discharged from the trust. Sheikh Matinuzzaman, and Chaudhri Wajid Husain had never acted. Chaudhri Hafiz Fida Husain was dead. The liquidator obtained a preliminary decree on 31st May 1923, and obtained final decree on 11th March 1924. On 8th August 1924, some 12 years after the previous trustees had been discharged Chaudhri Shafiquzzaman appointed as trustees Khan Bahadur Sheikh Matinunzaman (this is the same gentleman who had previously been appointed as trustee and who had

had refused to act), Chaudhri Ehsan Husain, the Taluqdar of Khanpnr and two gentlemen who are advocates of this Court, Mr. Haider Husain and Mr. Mohammad Wasim. The mortgaged property was brought to sale in execution of the final decree and was purchased on 21st September 1926, by respondent 1 as liquidator. There have in the meantime been other transactions. The Bench which decided *Sharfuozaman v. Henry Stanyon* (1) had suggested that it was open to the receiver to apply in insolvency proceedings to have the deed of trust annulled in so far as is purported to be a gift of the insolvent's estate to his son. The receiver took action and obtained relief from the District Judge who was sitting as an insolvency Court. The Bench of the Judicial Commissioner's Court in appeal reversed the District Judge's decision on 14th April 1924 in the case of *Sharfuzzaman v. Deputy Commissioner of Bara Banki* (3) and as a result held that Chaudhri Sharafuzzaman took benefit under the deed. On 20th May 1925, the new trustees applied to the District Judge of Lucknow, who was then the insolvency Court, that under the deed of trust possession of all the properties specified in the deed of trust should be delivered to them as trustees, that all incomes and securities now in the custody of the receiver should be handed over to them, that the receiver should be called on to explain the accounts, receipts and disbursements from the time that he entered into possession and that the receiver should be called on to refund to the petitioners all payments made by him to the creditors. The District Judge dismissed this application on 21st October 1925. An appeal No. 84 of 1925 was preferred to the Chief Court. This appeal was decided on 3rd August 1926, by the present Bench. This Bench dismissed the appeal. The same questions and others were afterwards raised again. As we have said, the present respondent 1 had applied on 1st August 1927, to prove his debt. On 3rd November 1927, in the same proceedings the four trustees applied to the Judge of the Small Cause Court which was the insolvency Court which had succeeded the Court of the District Judge for the following reliefs :

(2) A. I. R. 1928 P. C. 202=3 Luck. 372=55 I. A. 303 (P. C.).

(3) A. I. R. 1925 Oudh 28=27 O. C. 392.

"That the receiver be ordered to hand over possession of all such properties which were neither mortgaged to the Bank of Upper India nor sold in execution of its decree. That the receiver be ordered to hand over the sums of money in his hands to the applicants." That in case the Hon'ble Court for any reason does not deem it desirable to hand over the money to the applicants the Court may direct the receiver not to make any payment of money to any unless and until the decrees against the applicants trustees have been obtained from a proper Court and regular execution proceedings have been taken. That in no case is the receiver entitled to make payments to any such creditor who is not mentioned in the schedule of creditors annexed to the deed of trust."

The insolvency Court refused the first three reliefs and decided on the fourth relief as follows :

"It appears that other debts were also subsequently contracted by the insolvent which are not mentioned in the deed of trust. These creditors, to my mind, cannot get any relief from the insolvency Court when the deed of trust has been held to be valid. As soon as all the debts mentioned in the deed of trust are satisfied the receiver will have to hand over whatever property or money may remain with him to the trustees, for it will be the property of the cestui que trust Choudhri Sharafuzzaman and not of the insolvent. The other creditors of the insolvent can have no claim to it."

The trustees appealed against this order to the Chief Court. Their grounds of appeal were as follows :

"(1) That the Court below should have held that the insolvency Court had no jurisdiction to determine the claims of the creditors against the trustees of the properties.

"(2) That the Court below should have held that the trust property is only liable to pay such debts as are mentioned in the deed of trust, after they have been proved in the Court of competent jurisdiction.

"(3) That the Court below should have held that the trustees were entitled to possession of such property as was neither mortgaged nor sold to the Liquidator of the Bank of Upper India.

"(4) That the Court below should have held that the trustees were entitled to the immediate possession of the money in the hands of the receiver.

"(5) That the Court below should have held that the trust property was liable to pay such debts only as were mentioned in the deed of trust, dated 30th January 1912."

A Bench of this Court consisting of the Hon'ble Hasan and the Hon'ble Misra decided this appeal on 20th December 1928. They decided with it two other appeals with which we are not concerned. In respect of the trustees' appeal they dismissed the appeal entirely on the first four grounds. But they allowed the appeal on the fifth ground. They apparently discriminated between

the relief which the Insolvency Court had already granted on the fifth ground and the relief sought. Their order in the decree is in these words :

"This appeal be allowed in part and the decree of the lower appellate Court be modified to this extent only that the trust property is liable to pay such debts only as are mentioned in the deed of trust dated 31st January 1912, and the rest of the appeal be and is hereby dismissed.

"The Court of first instance be and is hereby directed to act according to law and in the light of the observations made in this Court's judgment dated 20th December 1928, as regards the future progress of the case."

Their words in the judgment are these :

"Having regard to the conflict of titles set forth in the preceding portion of this judgment we direct that the Court of first instance shall prepare a scheme both as to the management of the immovable property now left and the satisfaction of all legitimate and due debts including debts stated in the deed of trust, which have so far remained unpaid. All creditors shall be called upon to state their case in writing and the Court shall pronounce decision on the validity and propriety of each claim. If the claim is accepted the Court shall further determine the order of payment amongst the creditors. The management of the immovable property and its expenses shall be carefully scrutinised by the Court and set forth in a judicial manner in an order of the Court. The receiver shall of course abide by and act upon the order of the Court which it may deem fit to pass both in respect of the payment of debts and the management of the property. It need hardly be added that orders passed by the Court in pursuance of our direction shall be according to law and shall also be, if law permits, open to appeal in the ordinary course."

Now it will be seen that, as matters stand, the orders in the first case which is quoted in *Sharfuzzaman v. Henry Stanyon* (1) and in the second case quoted in *Sharafuzzaman v. Deputy Commr. Bara Banki* (3) and the orders of the Benches of this Court of 3rd August 1926 and 20th December 1928, are all final as between parties to proceedings. But it is to be noted that the application of the trustees on 3rd November 1927, was disposed of finally, before the previous application of respondent 1 in the same proceedings had come up in appeal to this Court.

We proceed to consider the trustees' appeal No. 22 first. All three appeals are appeals which lie under the provisions of S. 75 read with S. 4, Act. 5 of 1920. The trustees' appeal No. 22 contains pleas which we wish to consider before we get to the main question in the appeals. They have taken the position in their eighth ground that the Court below should have held that the

judgment of the Chief Court dated 3rd August 1926 was a bar to the hearing of the appeal. It appeared in argument that the date so stated was incorrect. They were really referring in this ground to the order of 20th December 1928. Their case here is as follows: Their learned counsel argues that as the deed of trust has been held to be a good deed the insolvency Court can only be considered to be carrying out the terms of the deed of trust. They do not go so far as to say that the jurisdiction of the insolvency Court is ousted. At first they were inclined to argue that the jurisdiction of insolvency Court was ousted, but they subsequently suggested that the jurisdiction was not ousted, but that the Court in admitting proofs could not go outside the terms of the deed of trust. In other words unless the debt was covered by the deed of trust the insolvency Court could not admit it. We have already quoted the relevant words of the decision of 20th December 1928. As we have stated it is a final decision as between the parties to the appeal. How far it is a final decision in respect of creditors who were not parties to the appeal it is not for us to decide. But respondent 1 was a party to this appeal and must be held to be bound by the judgment. We fail to understand how the judgment can affect him adversely for four of the mortgages on which he obtained his decree were mortgages executed by Shafiquzzaman and are mentioned in the deed of trust, and the fifth mortgage was executed by the trustees themselves in pursuance of the terms of the trust.

The next argument that was raised upon this point was to the effect that in any circumstances his application should be rejected because it was now the duty of respondent 1 to come again to the insolvency Court and present a fresh application. We cannot accede to this view. He presented the application on 1st August 1927. The insolvency Court refused to admit it. He appealed. In appeal his application was partially allowed. The matter is now in appeal before us. If we dismiss the present appeal the application will stand as ranking from 1st August 1927, the date on which it was presented and cannot be affected by anything in the judgment of 20th December 1928. We are unable

to read anything in the terms of the judgment of 20th December 1928, which could possibly prohibit respondent 1, from filing an application under S. 47, Provincial Insolvency Act, in the insolvency Court. As we view the position of the insolvency Court it is as follows: Chaudhri Shafiquzzaman made a deed of trust. That deed of trust has been held to be a good deed of trust. But the fact that he made the deed of trust cannot oust the insolvency Court from its jurisdiction. He committed acts of insolvency and was adjudged an insolvent. The adjudication in insolvency is with the insolvency Court, and the Court must administer the estate as an insolvency Court. We are not concerned here with the manner in which the assets will be distributed. We are concerned simply and solely with the question as to whether respondent 1 has a right to prove for the balance. The peculiar history of the trust and the trustees has greatly complicated the matter.

As we have already stated Chaudhri Shafiquzzaman after creating the trust proceeded to make the position of the original trustees so difficult that they resigned and were discharged. Shortly afterwards he became insolvent. There were no trustees to administer the trust. A Court subsequently held that the duties of the trustees had vested in Shafiquzzaman. But for 12 years he did not appoint new trustees, and the trust was in a state of suspended animation. In the meanwhile the insolvency Court retained its jurisdiction and has continued to retain its jurisdiction after the new trustees had been appointed. This Bench in its previous decision saw the difficulty of the position, and endeavoured to meet it. It recognized that the trustees had certain rights, but never recognized that the trustees had any rights, to exercise the functions of the insolvency Court, and only gave them rights to be represented in the insolvency Court to watch the interests of the trust. Our decision is final as against the trustees. They could, if they had chosen, have carried the matter further in appeal. They did not do so. But even if the question were an open question, we cannot find that there is any force in the suggestion either that the trustees should be allowed to administer

as a Court of Insolvency, or that the Judge in Insolvency should consider himself nothing more than a trustee under the trust. We accordingly reject the plea taken in the eighth ground in appeal No. 22. We hold that there is nothing in any judgment of the Chief Court which is a bar to the application of 1st August 1927.

There are certain other grounds taken in respect of points decided against the appellants by the trial Court and the learned District Judge in appeal. These refer to pleas that the present application is barred by limitation and also under the principle of estoppel and also under the principle of res judicata. No direct arguments were addressed to us on these points. It is sufficient for us to say that in general accord with the views of the Courts below we find that there is no force in these pleas.

We now come to the main questions. Firstly, is respondent 1 a secured creditor? Secondly has he realized the security? Thirdly may he prove for any balance due to him after deducting the net amount realized and fourthly on the facts and law is there any balance due to him, and if so for how much? There can be no doubt as to the first point that respondent 1 is a secured creditor. There has been no real attempt to contest this fact. On the second point, as we have already said, he realized his security. This is what happened. The total decretal amount on the final decree due to him was Rs. 16,59,929-13-6. The property which he purchased was sold for Rs. 13,49,216-15-6. On this poundage was charged Rs. 13,515. This left a balance of Rs. 3,24,227,-14 and this is the amount which he has been allowed to prove. The plea taken here by the appellants is that shortly before he applied for permission to prove this balance he applied to the Court which had passed the final decree for a decree under O. 34, R. 6, Civil P. C., and that his application was refused. It is correct that he did make such an application, and that his application was refused. But we are of opinion that this fact does not prevent him from proving for the balance due to him after deducting the net amount realized. We hold that a secured creditor can, if he so wishes, obtain a decree under O. 34, R. 6 and utilize this decree as proof of the balance. But it is not

necessary for him to take this course. Even if his application for a decree under O. 34, R. 6, is refused, it is still open to him under the special remedy provided by S. 47, Act 5 of 1920, to prove for the balance due. Under this special provision no question of limitation arises. Under the provisions of S. 28 (6), Act 5 of 1920, nothing affects the power of a secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if S. 28 had not been passed. This was the course which was adopted by respondent 1. He did not prove for his whole debt, relinquishing his security for the general benefit of the creditors, but he remained outside the insolvency proceedings and realized his security. But the decretal amount which he had obtained under the decree was not satisfied fully from the sale proceeds. It was thus open to him to prove for the balance due and his application must be accepted if there is a balance due. In *Babu Lal Sahu v. Krishna Prasad* (4) it was decided that the passing of a decree under O. 34, R. 6, does not in law debar a creditor from proving the balance.

The question remains as to whether there is a balance.

This is the fourth point and this is the most important point raised in the appeal. The case for the appellants is here that in no circumstances can respondent 1 be permitted to claim interest on the original mortgages after the date of the adjudication of Shafiquzzaman as an insolvent, that is to say the 27th January 1914. It is admitted by the learned counsel for respondent 1 that if it be decided that respondent 1 can claim no interest on the mortgages after the 27th January 1914, these appeals must succeed, for although he has the right to prove for a balance due to him after deducting the net amounts realized, there would then be no balance as the amount realized by the sale of the mortgaged property came to more than the principal on the mortgages and the interest up to 27th January 1914. The appellants based their argument upon the provisions of S. 48, Act 5 of 1920. They would have us treat this section as applicable to a balance due to a secured creditor after he had realized his secu-

(4) A. I. R. 1925 Pat. 438=1 Pat. 128.

rity, and if this balance consists of interest they argue that there is in fact no balance. There would be considerable force in this argument if the balance sought to be proved is considered a debt proved under the Act including interest. The argument on behalf of the respondent is that S. 47 is the only section which deals with the case of secured creditors who have realized their security independently of the insolvency proceedings. Their learned counsel points out that respondent 1 did not at first invoke the aid of the insolvency Court and exercised his right as a secured creditor to realize his security. He argues that he has only come into the insolvency Court to prove for the balance due to him that he has not come in to prove for a debt within the meaning of S. 48. He argues that the provisions of S. 48 cannot be held to apply to secured creditors. His case is that the word "balance" means the difference between the decretal amount and the amount realized. S. 47 reproduces to a large extent the provisions of paras. 10, 11, 12 and succeeding paragraphs of Sch. 2, English Bankruptcy Act 1914. They were introduced for the first time into the Provincial Insolvency Act by Act 3 of 1907 as S. 31 and S. 31 has been reproduced in the present Act 5 of 1920 as S. 47. The words :

"Where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized,

are exactly the same as the words in para. 10, Sch. 2, English Act. Part 1, S. 48 is practically a reproduction of para. 21, Sch. 2, English Act. But we have been unable to find, and the learned counsel has been unable to show us, the original of the second part of that section. The present S. 48 is a reproduction of S. 33, Act 3 of 1907.

As we have stated, the words :

"Where a secured creditor realizes his security, he may prove for the balance due to him, after deducting the net amount realized"

occur in the English Act and the learned counsel for the appellants in this connexion referred us to certain English decisions which attach an important qualification to the words. The main decision is a decision of the Court of Appeal : *In re : Savin* (5) passed by Lord James in 1872. This decision was followed

subsequently in a case known as *Quartermaine's case* (6), *In re : London, Windsor and Greenwich Hotels Co.* (6) decided in 1892. The learned Judge, who decided *Quartermaine's case* (6) was Stirling, J., Lord James in approaching the subject as to the amount of balance for which a secured creditor could obtain relief in insolvency proceedings said at page 764 :

"There is a general rule in bankruptcy whether a right and a reasonable rule or not that there is to be no proof in bankruptcy for interest subsequent to the bankruptcy. There was also a rule in bankruptcy, that a creditor holding a mortgage security is to make up his mind whether he will rely upon his security or give it up and come in and prove with the other creditors. This rule was relaxed in favour of the creditor by a rule that his security might be sold, and then he was to apply the realized proceeds in payment of his debt. On this rule a judicial decision was made nearly 80 years ago, that the proceeds of the sale were, in case of deficiency, to be applied in payment of principal and interest up to the date of the bankruptcy, and up to the date of bankruptcy only and then the creditor was to prove for the residue of his debt, which, of course did not include any interest subsequent to the date of the bankruptcy."

"That rule has been repeated in the very same terms by every writer on the subject, and by every Judge with the exception perhaps of Mr. Commissioner Montagu's note to *ex parte Ramsbottom* (7). It seems to have been considered as the established rule in bankruptcy, and so it was laid down by Lord Westbury in the case already referred to."

"That being so, it appears to me that we cannot go into any reasoning whether the rule is unjust or unreasonable, or alter the rule, or say that the rule is only to be applied in the same cases in which it has been applied, or that the rule is not quite consistent with the existing state of circumstances."

"I believe, however, that if the question now arose for the first time I should agree with the rule, seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time."

Stirling, J., in determining a similar point examined the authorities from the decision of Lord Loughborough in 1794. He examined a large number of decisions in his learned judgment and eventually came to the judgment of Lord James. In *Quartermaine's case* (6) the circumstances were these. The mortgaged property had passed into the hands of a receiver and although interest was not allowed from the date of the commencement of the winding up of the company it was held that any profits of the receiver from

(5) [1870] 7 Ch. 760=42 L.J. Bk. 14=20 W.R. 1027=27 L.T. 466.

(6) [1892] 1 Ch. 639=61 L.J. Ch. 273=40 W.R. 293=65 L.T. 19.

(7) 2 Mont & A. 83.

the mortgaged property should be taken by the creditor. This was a company liquidation but the principles applicable and applied were bankruptcy principles.

The English authorities thus show that although para. 10, Sch. 2, permits a secured creditor to prove his balance after realization as a debt in bankruptcy proceedings, the case law does not permit him to include in the balance any interest which has accrued after the commencement of the bankruptcy. But in Indian insolvency where the Courts have to look at the terms of the Act itself it must be decided whether this principle of English law is applicable. Has it been enacted in the Act itself? The fact that the principle is applied in England, although it is not stated in the Bankruptcy Act, does not affect the question. There the case law is binding, although the Act is silent. But in India the position is different. Further in Oudh there is no case law on the subject which binds us. Their Lordships of the Judicial Committee have made no pronouncement on the point. Their Lordships of the Judicial Committee laid down in 1927 the necessity of deciding questions of this character on the exact words of the statute. In *Ramanandi Kuer v. Kalawati Kuar* (8) their Lordships say at page 23 (of 55 I. A.) :

"It has often been pointed out by this Board that where there is a positive enactment of the Indian legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded."

The decision of Lord James in *Savin's* case (5) would show that the rule in question directing no interest to accrue in ordinary circumstances after the commencement of the bankruptcy is observed in English Courts mainly because the rule has been followed consistently for a number of years. Lord James laid down clearly that it was idle to argue whether the rule was just or unjust, reasonable or unreasonable, and that no Court could alter it on the ground that it was not consistent with the existing state of circumstances. He stated that personally he would have been in favour of the proposition if it had arisen for the first time. But this pronouncement is suffi-

cient to show that he considered the question one which was not open to discussion.

The rule existed and had to be followed. This attitude on the part of the English Courts is important in considering the question of the construction of the relevant sections of Act 5 of 1920. We do not know what was in the minds of the legislature which enacted the previous Act 3 of 1907 and which reproduced the provisions of Ss. 31 and 32 in the present Ss. 47 and 48. We are debarred from a search into the question. But this much we know on Lord James finding that the rule is followed in England, because it is an old rule and arguments as to its reasonableness or unreasonableness are not permitted. It is not unreasonable to refer to the original Bill No. 5 of 1906 which eventually became Act 3 of 1907. S. 31 appears there as Cl. 20, S. 32 appears as Cl. 21 and the only remarks made in the objects and reasons which are published in Part 5 of the Gazette of India, 29th September 1906, are these:

"Clause 20. The existing law is most incomplete as regards the claims of the secured creditors. At present, neither a declaration of insolvency nor a sale by a receiver gets rid of an unscheduled mortgage. If, however, the mortgage is scheduled, it is entitled, under S. 356, Cl. (d) of the Code, to priority over all claims other than Crown debts and the costs of a decree holder. It is proposed to adopt the English procedure as to the surrender and valuation of secured liabilities. Cl. 21. The Code contains no specific directions regarding interest, and some appear to be necessary if a ready relief against acts of insolvency is to be given."

It is clear that if the legislature had intended to apply English rule to Act. 5 of 1920 the best course would have been to have drafted S. 47 as follows:

"Where a secured creditor realises his security he may prove for the balance due to him after deducting the net amount realised, but such balance shall not include any interest which has accrued upon the principal sum before the date of adjudication as an insolvent."

Further if S. 48 had been intended to apply as a restriction on the amount of balance due under S. 47 it would have been easy to draft the section to secure that object. As we read it if interest due after the date of adjudication is excluded from the balance, the provisions of S. 47 (1) would be in practice seldom or ever operative, for in the course of our experience we have never seen cases in which the security has realized less than the decretal amount in which the deficit

(8) A.I.R. 1928 P.C. 2=7 Pat. 221=55 I.A. 18 (P.C.).

has not been under the head of interest and nothing else. As we read the law the restriction imposed by English practice does not exist under the Provincial Insolvency Act. It is not laid down in S. 47 and we do not read S. 48 as having any application to secured creditors. As we understand the law, it lays down that a secured creditor who has the advantage of security may remain outside the Act. He can realise upon his security. To the extent to which he realises on his security he will reduce the estate in insolvency. But he obtains at first no part in the dividend and is unaffected by the proceedings. Should, however, the amount of realisation be less than the amount due to him he is given the special privilege of proving for the balance. This balance is the difference between the decretal amount and the amount realized. When he has proved he will not obtain any more than his proportionate share in the estate. He will be put then on the footing of an unsecured creditor.

Taking this view we consider that the amount allowed by the District Judge as balance due to respondent 1 is the correct amount. Thus we find that the appellants in appeal No. 22 have failed upon the above grounds. We, however, note that we are only concerned with the proof of the balance. We are not concerned with the amount which will eventually be payable to respondent 1. This disposes of appeal No. 22. The same grounds with the exception of ground 8 are taken in appeals Nos. 19 and 23 and we decide against them. In appeals Nos. 19 and 23 we have been asked, however, by the learned counsel for the appellants in Appeals Nos. 19 and 23 to state that so far from accepting the position taken up by the trustees under the deed of trust they oppose strongly and that they are not to be considered by their action in these appeals to have acquiesced in any way in the claims of the trustees. This question is of course immaterial to the decision of these appeals but we note the statement as the learned counsel has desired us to do so. As a result we dismiss appeals Nos. 19, 22 and 23. The appellants in these appeals will pay their own costs and also the costs of respondent 1. Chaudhri Shafiq-uzzaman is respondent 2 in appeal

No. 22 of 1929. We award him no costs as he was not represented.

R.M./R.K.

Appeals dismissed.

A. I. R. 1930 Oudh 29

MISRA AND RAZA, JJ.

Faqir Bakhsh Singh—Plaintiff—Appellant.

v.

Uderaj Singh—Defendant—Respondent.

Second Appeal No. 36 of 1929, Decided on 8th May 1929, against order of Sub-Judge, Fyzabad, D/- 17th October 1928.

(a) Civil P. C., S. 11—Administration suit—Point of genuineness of will raised and decided—Question cannot be raised in subsequent litigation between parties.

Where a legatee under a will applies for grant of letters of administration and is opposed by a party as heir of the deceased, on the ground that the will was mere forgery and the Court decides in favour of the will being genuine and grants the letters of administration it is not open to that person to raise the question of genuineness of the will in a subsequent litigation between the legatee and himself.

[P 31 C 1]

(b) Oudh Estates Act (1 of 1869), S. 14—Decree against taluqdars obtained by testator's predecessor and certain others, granting under-proprietary rights—On appeal by taluqdar decree reversed—Persons other than testator's predecessor preferring second appeal, decision of Court of first instance affirmed—Subsequently all persons including predecessors of testators recognized and recorded as under-proprietors—Fact not disputed in litigation between testator's predecessors and taluqdars—Though predecessors of testator were not parties to appeal the evidence was held sufficient to show their title as under-proprietor and bequest made by them was held valid.

It was not denied that the predecessors of the testators had obtained a decree against a taluqdar at the time of the first regular settlement from the Court of the Extra Assistant Commissioner in respect of the land in suit. Under the decree the predecessors of the testator and certain other persons were granted under-proprietary rights in respect of the lands held by them and the land in dispute. The taluqdar appealed from the decree or decrees passed by the E. A. C. to the Settlement Officer who reversed the decision holding that "the predecessors of the testator and others" will be deemed to hold the land decreed by the E. A. C. "in occupancy rights only and not as *sir*." One of the other persons appealed to the Court of the Financial Commissioner who set aside the decree of the Settlement Officer and restored that of the E. A. C. Though this judgment was not passed in favour of the ancestors of the testator it appears that after passing of the judgment all the persons who had claimed under-proprietary rights against the taluqdar were recognized as the under-proprietors of the land held by them.

They were recorded as such in the papers at the first regular settlement and also in papers at a subsequent settlement. In a subsequent litigation between the ancestors of the testator and the taluqdar, the under-proprietary right was not questioned. Also the ancestors of the testator had made transfers as under proprietors.

Held : that this was sufficient evidence to show that the title of the testator and his ancestor as under-proprietor was all along recognized as such and that the decree passed in favour of one of the persons was that not only the person appealing but all the co-sharers in the village became under-proprietors of the land held by them and since the land was held under under-proprietary tenure it was competent for the testator to execute a will with respect to that land : *A. I. R. 1925 Oudh 732 ; A. I. R. 1922 P. C. 383, Foll.*[P 31 C 2; P32 C 1]

Radha Krishna for Ali Zaheer — for Appellant.

R. D. Sinha—for Respondent.

Judgment. — This is an appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated 17th October 1928, affirming a decree of the Munsif, Haveli, Fyzabad, dated 14th August 1928.

The litigation which has given rise to this appeal relates to the property of one Sheobaran Singh, who died in 1914. The land in dispute is situate in village Intgaon in the district of Fyzabad. Sheobaran Singh died issueless. He executed a will in favour of the defendant's father Sahib Bakhsh Singh on 17th January 1914. The plaintiff Faqir Bakhsh Singh is the nephew of Autar Singh. He claims the land in dispute as the heir of Autar Singh, who is alleged to be the heir of Sheobaran Singh deceased. Autar Singh died in or about 1926. Though it is neither alleged nor shown that Autar Singh ever got possession of the property in suit as the heir of Sheobaran Singh, but the plaintiff alleges that he was in possession of the property in the absence of Autar Singh, who was in Burma, and that the defendant's father Sahib Bakhsh Singh dispossessed him (plaintiff) in 1918. It is noticeable that Autar Singh never sued for possession of the property in suit but the present suit was brought by the plaintiff Faqir Bakhsh Singh on 16th February 1928.

The suit was contested by the defendant Uderaj Singh, son of Sahib Bakhsh Singh deceased, on various grounds. He set up the will executed by Sheobaran Singh in favour of his (defendant's) father, Sahib Bakhsh Singh, on 17th

January 1914, and alleged further that Sheobaran Singh was holding the land in suit as an under-proprietor. We are not concerned with other points taken in defence.

The first Court dismissed the suit holding that the will set up by the defendant was genuine and that Sheobaran Singh was holding the land in suit as an under-proprietor and was, therefore, competent to execute the will in favour of the defendant's father.

The plaintiff appealed questioning the correctness of the finding of the first Court as to the nature of the tenure under which the land was held by Sheobaran Singh. He contended that Sheobaran Singh was holding the land simply as an occupancy tenant and could not, therefore, execute any valid will in favour of the defendant's father. He thus contended that the will set up by the defendant was invalid and could not confer any title on the defendant. Though in his memorandum of appeal the plaintiff did not question the finding of the trial Court about the genuineness of the will but his pleader applied to the Court of first appeal for permission to amend the memorandum so as to raise also the question that the will was not genuine. The application was rejected by the learned Additional Subordinate Judge. The learned Additional Subordinate Judge agreed with the finding of the learned Munsif that Sheobaran Singh was holding the land as an under-proprietor and that he was competent to execute the will. The result was that the plaintiff's appeal was dismissed by the learned Additional Subordinate Judge.

The plaintiff has now come to this Court in second appeal.

We think there is no substance in this appeal.

The appellant's learned counsel contends that the learned Subordinate Judge was wrong in disallowing the appellant from raising the question of the genuineness of the will but we think this contention is not well founded. In our opinion the learned Subordinate Judge was perfectly right in rejecting the application of the plaintiff's pleader. It is not disputed that the defendant's father Sahib Bakhsh Singh had obtained letters of administration from the Court of the

District Judge, Fyzabad, on 8th September 1917. It is Ex. 8 and with this is attached a copy of the will in question. The plaintiff was a party to these proceedings. He had questioned the genuineness of the will but the point was decided against him. These letters of administration were granted to Sahib Bakhsh Singh after contest of the plaintiff on the ground that the will was a forgery. The matter was taken in appeal to the Court of the Judicial Commissioner of Oudh, but the will was held to be genuine by that Court also. It is now too late for the plaintiff to question the genuineness of the will. Under these circumstances we think the learned Subordinate Judge was perfectly right in rejecting the application made by the plaintiff's pleader. The genuineness of the will was not, very properly, questioned by the plaintiff's pleader in his memorandum of appeal. This point must, therefore, be decided against the plaintiff in this appeal.

Now the only question for decision is whether Sheobaran Singh was holding the land in dispute as an under-proprietor or simply as an occupancy tenant. It is not denied that the predecessors or the ancestors of Sheobaran Singh had obtained a decree from the Court of the Extra Assistant Commissioner against the then taluqdar of Khaparadih at the time of the first regular settlement in respect of the land in suit. Under that decree the ancestors of Sheobaran Singh and certain other persons were granted under-proprietary rights in respect of the lands held by them including the land in dispute. This decree was passed on 18th June 1869, in the leading case of one Prayag Singh. It appears that the taluqdar appealed from the decree or decrees passed by the Extra Assistant Commissioner to the Settlement Officer. The appeals were filed against Prayag and also against the ancestors of Sheobaran Singh and others. The Settlement Officer reversed the decision of the Extra Assistant Commissioner and held that Prayag Singh and the defendant's ancestors and others:

"will be deemed to hold the land decreed by the Extra Assistant Commissioner in occupancy rights only and not as *sir*."

Prayag Singh alone filed an appeal in the Court of the Financial Commissioner of Oudh, who by his judgment dated

24th February 1870, set aside the decree of the Settlement Officer and restored that of the Extra Assistant Commissioner. Though this judgment of the Financial Commissioner was not passed in favour of the ancestors of Sheobaran Singh, as the appellant before him was only one person, namely Prayag Singh, but it appears that after the passing of that judgment all the persons who had claimed under-proprietary rights against the taluqdar were recognized as under-proprietors of the lands held by them. They were recorded as such in the papers prepared at the time of the first regular settlement and also in the papers at the time of the subsequent settlement which we understand, was made in 1301F. The entry in the khewat prepared at the settlement of 1301F. shows that the land in dispute was treated as an under-proprietary holding and rent was assessed on it accordingly, by the order of the Settlement Officer. It is also in evidence that there was some litigation between the ancestors of Sheobaran Singh and the taluqdar in 1883 and in that litigation they had claimed the rights of an under-proprietor. These rights were not questioned by the taluqdar in that litigation. It is also in evidence that the ancestors of Sheobaran Singh and their cosharers made transfers as under-proprietors from time to time and these transfers also were never questioned by the taluqdar.

We think the evidence on record is quite sufficient to show that the title of Sheobaran Singh and his ancestors as under-proprietors has all along been recognized since 24th February 1870. It was held by the late Court of the Judicial Commissioner of Oudh in the case of *Bipin Chandra v. Dewan Singh* (1) under circumstances similar to those of the present case that Dawan Singh, whose predecessor-in-title had not appealed against the Settlement Officer's judgment, which governed the case of all claimants of the under-proprietary rights at the time of the first regular settlement, must be treated on the footing of an under-proprietor. In that case also the final decree in favour of certain agricultural holders was of occupancy tenancy; but they were consistently treated at the time of settlement and afterwards as under-proprie-

(1) A. I. R. 1925 Oudh 732.

tors and whatever may have been the original effect of the decree, their title as under-proprietors was recognized for a long time. It was held that where in 1870 a Settlement Officer passed a decree declaring certain agricultural holders to be holders in occupancy right but in a subsequent litigation they were treated as *sir* holders and under-proprietors and were entered as such in the settlement record and in the abstract prepared at the time of the first settlement, the decree of the Settlement Officer cannot be referred back to show that they were occupancy tenants and not under-proprietors. In our opinion the effect of the decree which was passed in favour of Prayag Singh was that not only he but all his cosharers in the village became the under-proprietors of the lands held by them. They were recognized as such by the taluqdar and their title as under-proprietors was never questioned by the taluqdar since then. The principle of the decision in the case of *Prithipal Singh v. Ganesh Din Singh* (2), also helps the defendant in this case. In that case, in the settlement of 1887 the predecessors of the defendants held no greater interest in the village in suit than that of a thekadar and a decree was also passed in 1868 declaring that they had only thekadari and not pukhtadari rights. But ever since 1869, in the wajibularz, the khewat, the recent settlement and the various other Court proceedings they were recorded and treated as pukhtadars. It was held that whatever may have been the original effect of the decree but as from that time till now the estate had been regulated upon the footing that the defendants possessed pukhtadari right a title so long recognized could not now be overthrown. We, therefore, hold agreeing with the lower Courts that Sheobaran Singh was holding the land in dispute as an under-proprietor and that he was competent to execute the will dated 17th January 1914.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 32

STUART, C. J. AND RAZA, J.

Shah Wajihuddin Ashraf — Defendant 1—Appellant.

v.

Shah Murtaza Ashraf and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 447 of 1928, Decided on 31st August 1929, from decree of Dist. Judge, Fyzabad, D/- 8th October 1928.

(a) **Mahomedan Law — Wakf — Technically wakf means dedication in perpetuity of some specific property for pious purpose — Proprietary rights of owner are divested — Usufruct alone can be applied for benefit of human beings.**

The word wakf literally signifies "detention"; technically it means a dedication in perpetuity of some specific property for a pious purpose or a succession of pious purposes. When a wakf is made of a property the proprietary right of the grantor is divested therefrom and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings and the subject of the dedication becomes inalienable and non-heritable in perpetuity: *A. I. R. 1922 P. C. 123, Rel. on.* [P 34 C 2]

(b) **Mahomedan Law—Wakf—Want of dedication of property—Application of usufruct of property for upkeep of mosque does not constitute property as wakf.**

Where there is really no dedication of property as wakf, the mere fact that the income arising out of the property has been appropriated for the upkeep of a mosque is not sufficient proof that it is endowed property: 16 O. C. 76, *Foll. 2 Cal. 341 (P. C.)* and 7 A. L. J. 1095, *Rel. on.* [P 35 C 2]

(c) **Mahomedan Law—Wakf—Mere user is insufficient to prove dedication of property—Divestment of property must be indicated.**

User may be evidence of a dedication the origin of which is unknown, but it cannot be substituted for it. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of wakf. The mere fact, therefore, that a property is set apart for meeting the expenses of a Dargah will not make it wakf property when the right to assume possession and divide it according to the ancestral shares is reserved in a family agreement: 40 Cal. 297 (P. C.); 2 M. I. A. 390 (P. C.) and *A. I. R. 1922 Oudh. 1, Rel. on.* [P 36 C 1]

M. Wasim and Khaliquzzaman — for Appellant.

M. M. Ansari, Haider Husein, A. C. Mukherji and Sajid Husain—for Respondents.

Judgment.—This is an appeal from a decree of the District Judge, Fyzabad dated 8th October 1928 setting aside a decree of the Additional Subordinate Judge, Fyzabad, dated 17th November 1927.

(2) A. I. R. 1922 P. C. 389=25 O. C. 396=50 I. A. 210n.

The suit that has given rise to this appeal relates to certain shares in two adjoining villages namely, Rasulpur Dargah and Kachhaucha in the district of Fyzabad and the income of the Dargah (shrine) of Shah Makhdum Ashraf (a famous saint of the fourteenth century) at Rasulpur.

The parties to the suit are the descendants of Shah Niamat Ashraf, who was a descendant of Haji Abdul Razzak, the nephew and successor of Shah Makhdum Ashraf. Shah Niamat Ashraf had three sons: namely, (1) Zakarya Ashraf, (2) Maksood Ashraf and (3) Yahya Ashraf. Plaintiffs and defendants 18 to 32 belong to the branch of Zakarya Ashraf, defendant 7 to 17 and 33 to the branch of Maksood Ashraf and defendants 1 to 6 to the branch of Yahya Ashraf. Shah Wajihuddin Ashraf (defendant 1) is the present sajjadanashin of the Dargah. The office of sajjadanashin has all along been held by one of the descendants of Yahya Ashraf.

Shah Niamat Ashraf divided all the properties held by him among his three sons named above by a deed dated 15th Rabiussani, 1214 Hijri, Ex. 1. This took place about 134 years ago. Some dispute arose among the descendants of the three sons of Niamat Ashraf about the extent of their shares and this gave rise to the litigation of 1859. The disputes were settled by a compromise dated 30th September 1859 Ex. 2. The terms of that compromise were not quite clear and objection was taken to some words used therein and so a fresh compromise or agreement Ex. 3 was executed on 31st December 1859. The leading members of the family to which the parties belong were parties to these compromises or agreements. Some disputes arose again among the descendants of the three sons of Shah Niamat Ashraf at the time of the First Regular Settlement and the matters in difference were referred to arbitration through Court. The arbitrators made their award Ex. 7 on the basis of the compromises or agreements mentioned above and the Settlement Court passed a decree Ex. 8 on 4th April 1872 according to the award. A document called iqrarimakhan Ex. 9 was prepared at the First Regular Settlement in December 1872. It was duly signed and verified by all the leading members of the family on 16th Decem-

1930 O/5

ber 1872. The principal terms of the agreements of 1859 were incorporated in this document also. Thus the agreements of 1859 were duly confirmed in settlement proceedings. They were confirmed by the arbitrators and the Settlement Court and the cosharers themselves. Under the terms of the agreements of 1859 half of the property (in the villages in suit) was to be divided among the descendants of Shah Niamat Ashraf and the remaining half was to remain in the possession of the sajjadanashin with a view to the application of the income in the Urs at the Dargah and the expenses of the visitors and guests subject to the condition that they (descendants of Shah Niamat Ashraf) would divide the same (i. e., the remaining half of the property) in case of mismanagement or misappropriation of the income by the sajjadanashin.

The present suit was brought by Shah Murtaza Ashraf, Shah Tufail Ahmad Ashrafi and Shah Sayeed Ahmad Ashrafi for possession of their shares in the property held by Shah Wajihuddin Ashraf sajjadanashin in villages Rasulpur Dargah and Kachhaucha under the terms of the agreements of 1859 mentioned above. They prayed also for a declaration that they were entitled to participate in the income of the Dargah to the extent of the shares claimed by them in the said villages. They alleged that defendant 1 had failed to discharge his duties as sajjadanashin and had misappropriated the income of the property and that under the terms of the agreements mentioned above they were entitled to recover from him their shares in the property which had been set apart and the profits of which were to be used for the expenses of the Dargah. They based their claim on the agreements of 1859 and the settlement proceedings of 1872 mentioned above.

The claim was resisted by defendant 1. He denied the charges of mismanagement and misappropriation brought by the plaintiffs against him and alleged that the plaintiffs were not entitled to maintain the suit and that the property in suit was wakf property which could not be divided and in which the plaintiffs could get no share.

The learned Additional Subordinate Judge found that the plaintiffs were entitled to maintain the suit. He found

also that defendant 1 had failed to pay the expenses of Urs held on 25th and 26th of Muharram and that he had appropriated to his own use the produce of the lands which he held under his own cultivation. The charges were thus made out against defendant 1. Though the learned Additional Subordinate Judge gave his finding in favour of the plaintiffs on these points, he rejected their claim on the ground that the property in suit was wakf property. He held that the property in suit being wakf property, its ownership vests in God and therefore the condition in the agreements Exs. 2 and 5 that in case the income of the property was not properly spent by the sajjadanashin the property would become divisible among the signatories to the agreements and their heirs, was inoperative and could not be enforced.

The plaintiffs appealed and their appeal was allowed by the learned District Judge. He agreed with the findings of the learned Additional Subordinate Judge that the plaintiffs were entitled to maintain the suit and that the charges brought against defendant 1 were made out. He, however, disagreed with the finding that the property in suit is wakf property. He held that the property in suit is not wakf property and therefore decreed the plaintiff's claim with costs.

Defendant 1 Shah Wajihuddin Ashraf has come to this Court in second appeal. The appellant's learned counsel has confined his arguments to one point only. He has argued that the property in suit is wakf property. The findings of the lower appellate Court on other points have not been challenged in the course of arguments. They are based upon admissible evidence and could not be impugned in second appeal.

The only question which it is necessary for us to determine is whether or not the learned District Judge was wrong in holding that the property in dispute is not wakf property. He have heard the learned counsel on both sides at some length. We think there is no substance in this appeal.

We should begin by remarking that it is admitted that there is no deed of endowment in existence. The oldest document on the file is the partition deed (Ex. 1) executed by Shah Niamat Ashraf,

the ancestor of the parties about 134 years ago. Though no villages are mentioned in this deed, it is not disputed that it relates to all the properties (including the villages in suit) owned and possessed by Shah Niamat Ashraf. By this deed he divided all the properties (ancestral and self-acquired) among his three sons, the ancestors of the parties. We have examined this deed carefully. No wakf was really created under this deed. The deed shows that Shah Niamat Ashraf was not really holding any property as wakf property. He was holding all the properties as private properties and he dealt with them as such. There is no reliable evidence on the record to show that the family to which the parties belong was at any time in possession of any property as wakf property. We should like to note here what does the word wakf mean? The word wakf literally signified "detention"; technically it means a dedication in perpetuity of some specific property for a pious purpose or a succession of pious purposes. When a wakf is made of a property the proprietary right of the grantor is divested therefrom and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings and the subject of the dedication becomes inalienable and non-hereditary in perpetuity: see Ameer Ali's *Mohammadan Law*, Vol. 1 pp. 192 and 195, 4th Edn. and the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* (1) (at p. 312 of 48 I. A.).

We do not find and have not been referred to any evidence in this case showing that this family possessed at any time any property which might be held to be wakf property under the Mohammadan Law. (The judgment then gave the history of the family as given by Mr. Nillet in his Report of the Settlement of the Fyzabad District and proceeded.)

The history of the village Rasulpur as recorded in the iqrarimalkhan (Ex. 9) prepared at the first regular settlement shows that the land of the village was formerly in the possession of Darpan Nath Jogi who embraced Islam and became a disciple of Shah Mukhdum Ashraf. Darpan Nath then made a present of the land owned by him (i. e., Rasulpur area)

(1) A. I. R. 1922 P. C. 123=11 Mad. 831=18 I. A. 302 (P.C.).

to his preceptor. The land was then a jungle which Shah Mukhdum Ashraf got cleared and converted into a village. Since then his descendants and heirs have been in possession of the village (Rasulpur) as proprietors. After the death of Shah Mukhdum Ashraf a fair began to be held at his tomb and for this reason Rasulpur is now known as Dargah. The arrangement by which the property in dispute was placed under the management of the sajjadanashin (a member of the family) and which is also mentioned in the agreements Exs. 2 and 5 is clearly stated in this document. This document was duly signed and verified by the defendants 1's ancestor and other leading members of the family.

Thus we know how the villages Rasulpur Dargah and Kachhadcha came into the possession of this family. There is no evidence on the record to show that these two villages were really grants from any Emperor of Delhi or any Nawab or King of Oudh. On the contrary we find that these villages were not really such grants. There is no reliable evidence to show also that any person of this family made a wakf of these villages. Exs. 2 and 5 (i. e. the agreements of 1859) also do not establish any wakf. There is nothing in these documents to show that any wakf was created or acknowledged by the members of the family to which the parties belong. Their ancestor Shah Niamat Ashraf had divided all the properties (including the villages in suit) among his sons by Ex. 1. His descendants claimed the villages in suit as their private property and executed the agreements in question in respect of the same. They divided half of the property among themselves and set apart the remaining half for the expenses of the Dargah and placed the same under the management of the sajjadanashin, one of the members of their family, with the condition that they would divide it subsequently in case of mismanagement or misappropriation on the part of the sajjadanashin. This arrangement shows that they never treated these villages as wakf property. They never intended that these villages should be treated as wakf property. This arrangement does not establish a permanent dedication of the property for any purpose recognized by the Muslim Law as religious, pious or charit-

able. What they meant by this arrangement was simply that the income of the property should be applied in the way mentioned in the agreements (Exs. 2 and 5). There was really no dedication of the property as wakf. As pointed out in the case of *Abdul Gafur v. Shiam Sundar Das* (2) the mere fact that the income arising out of a particular property had been appropriated for the upkeep of a mosque (even) was not sufficient proof that it was endowed property. The ruling of their Lordships of the Privy Council in the case of *Doornanath v. Ram Chunder Sen* (3) was followed in this case. In the case of *Fakruddin Shah v. Kifayatullah* (4) it was found that there was an arrangement by which the property was put under the management of a member of the family with a view to the application of the income in the Urs and Fatiha ceremonies at the tomb of the original owner. It was held that the property could not be said to be wakf property. The following observations were made at p. 1121 in the judgment in that case :

"The finding of the lower appellate Court that there was arrangement after Qalander Shah's death betwixt Ikbalunnisa and her three sons by which the property in question was placed under the management of the family with a view to the application of the income in the Urs and Fatiha ceremony at the tomb of Qalander Shah, is quite consistent with the contention that there was no dedication of the property as wakf but that there was merely a family arrangement that the income of the property should be applied in the way mentioned and that the members of the family who succeeded Ikbalunnisa carried out the arrangement and consequently for a number of years the income of the property was applied in the way which has been mentioned."

The appellant's learned counsel has argued that the property has become wakf by user. We are not prepared to accept the argument under the circumstances of this case. It is true that when land has been used from time immemorial for a religious purpose, e. g., for the purpose of a burial ground then the land by user becomes wakf, though there may be no evidence to show when and how it was originally set apart for that purpose as held by their Lordships of the Privy Council in the case of *Court of*

(2) [1913] 16 O. C. 76=17 I. C. 303.

(3) [1876] 2 Cal. 341=4 I. A. 52=3. Sar. 681 (P. C.).

(4) [1910] 7 A. L. J. 1035=8 I. C. 578.

Wards v. Ilahi Bakhsh (5) and by this Court in the case of *Sajjad Ali Khan v. Jagmohan Dass* (6). It is also true that in order to constitute a wakf it is not necessary to use the word wakf in the grant : see *Jeewan Dass v. Kuberud-dee* (7) and *Shah Mahomed v. Mahomed Shamsuddin* (8). However, there is no sufficient evidence in this case to justify the finding that the property in dispute is anyhow dedicated as wakf. The property in dispute was never treated by the parties or their ancestors as wakf property. On the contrary the evidence on the record shows that it was always treated by them as private property. The mere fact that the property was set apart for meeting the expenses of the Dargah would not make it wakf property when the right to assume possession and divide it according to the ancestral shares was reserved in the agreements in question (Exs. 2, 5 and 9). In the present case the condition of "dedication of property in perpetuity" is wanting. The sajjadanashin holds the property in this case under an express condition that it was to go back to the rightful owners in case of mismanagement or misappropriation on his part.

We should like to note also that the words "shud amad qadim" (old practice) which were used in Ex. 2 in connexion with the arrangement under consideration were not used in Ex. 5 or 9. The ancestors of the parties had taken objection to the use of those words in Ex. 2 and this was one of the reasons for which Ex. 5 was executed on 31st December 1859. In this case we know how the property in dispute came into the possession of the family and how it was used and treated by them from time to time. The property was never dedicated permanently for any purpose recognized by the Musalman Law as religious, pious or charitable. It was always treated as private property. In these circumstances we are not prepared to accept the contention that the property in dispute has become wakf by user. As pointed out in the case of *Sadiq Husain v. K. B. Hakim Mirza* (9) user

may be evidence of a dedication the origin of which is unknown, but it cannot be substituted for it. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of the wakf.

We do not think that a case has been made out to disturb the detailed and careful judgment of the learned District Judge. We dismiss the appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 36

STUART, C. J. AND RAZA, J.

Trayamkeshar Prashadh and another
—Appellants.

v.

B. Basant Kumar Mukerji—Respondent.

Misc. Appeal No. 16 of 1929, Decided on 14th August 1929, against the order of the Dist. Judge, Gonda, D/- 21st January 1929.

Hindu Law—Joint family—Father—Insolvency of—Where receiver suing for partition makes no provision for father's debts separate shares of sons do not vest in receiver—
Provl. Insol. Act, S. 28.

Where a Hindu coparcener becomes insolvent and the Official Assignee of his estate subsequently brings a suit for partition and separate shares are allotted also to the sons of the coparcener without making a provision for the satisfaction of the insolvent coparcener's debts, the share of the sons of the insolvent coparcener do not vest in the assignee. The receiver cannot take any proceeding against the sons' separate shares where he fails before the partition to obtain an order declaring the sons' share to be liable for the father's debts : *A. I. R. 1925 P. C. 18, Rel. on: A. I. R. 1926 All. 447, not Foll.* [P 38 C 1,2]

Aditya Prasada—for Appellants.

Basant Kuntar Mukerji—for Respondent.

Judgment.—The facts of the suit out of which this appeal arises are these : Pashupati Prasad was a member of a joint Hindu family. This family consisted of two branches. The branch to which he belonged consisted of his father Lachmi Narain, Lachmi Narain's wife and the six branches of Lachmi Narain's sons. Pashupati Prasad's share in the joint family property would, if he had been childless, have amounted to 1/16th. Pashupati Prasad had, however, two sons Tryamkeshar Prasad and Baland Prasad the appellants in this appeal. As the three were entitled to a 1/16th share, each was entitled to a 1/48th share. Pashupati Prasad was

(5) [1913] 40 Cal. 297=17 I. C. 744=40 I. A. 18 (P. C.).

(6) A. I. R. 1927 Oudh 534.

(7) [1898] 2 M. I. A. 390=6 W. R. 3 (P. C.)

(8) A. I. R. 1927 Oudh 113=2 Luck 109.

(9) A. I. R. 1922 Oudh 1=26 O. C. 81.

adjudicated insolvent on 12th June 1918. In 1921 the Official Receiver instituted a suit for partition in order to obtain a separation of Pashupati Prasad's share. The suit was decided on 8th April 1924. In this suit 1/48th was awarded to his son Baland Prasad. No provision was made in the decree of the partition Court for the settlement of Pashupati Prasad's debt as a preliminary to partition. The Official Receiver who was plaintiff in this suit permitted this decree to become final. In subsequent proceedings he applied to sell the separated share of Tryamkeshar Prasad and Baland Prasad in settlement of the debts of Pashupati Prasad. The learned District Judge has granted his prayer. Tryamkeshar Prasad and Baland Prasad have appealed. The learned District Judge in support of the view which he has taken has relied upon a decision in *Om Prakash v. Moti Ram* (1). The head note of this decision reads :

"When the father of a joint Hindu family is declared to be insolvent, the whole of the coparcenary property of the family vests in the receiver."

In this decision, according to the head note, the Bench distinguished the decision of their Lordships of the Judicial Committee in *Sat Narain v. Behari* (2). The question appears to us to be determined by the decision, said to have been distinguished, though their Lordships were dealing with a case under the Presidency Towns Insolvency Act (Act 3 of 1909) and we are dealing with a case under the Provincial Insolvency Act (Act 5 of 1920). The Bench of the Allahabad High Court relied in support of their decision in the main upon a decision of a previous Bench in *Bawan Das v. C. M. Chiene* (3). That decision, it is to be noted, was of 1921 and the decision of their Lordships was of 1924. In *Bawan Das v. C. M. Chiene* (3) the Bench referred with approval to the principles laid down in *Fakir Chand Moti Chand v. Moti Chand Hurrukhchand* (4) and *Rangaya Chetti v. Thanikachalla Mudali* (5). In the decision in *Sat Narain v. Behari Lal* (2) their Lordships of the Judicial Committee discussed the pronounce-

ments in *Fakir Chand Moti Chand v. Moti Chand Hurrukhchand* (4) and *Rangaya Chetti v. Thanikachalla Mudali* (5). They considered those pronouncements in reference to the question before them. That question had been put in the form of a reference to the Full Bench of the High Court of Lahore and is worded as follows :

"Does an order of adjudication as an insolvent passed against a father vest in the Official Receiver Assignee his son's interest in the joint family property?"

The application of the reference is only to families of Hindus governed by the Mitakshara Law. All the cases to which we are referring referred to such a family. *Fakir Chand Moti Chand v. Moti Chand Hurrukhchand* (4) was a case under the Indian Insolvency Act, 11 and 12 Vic., Chap. 21 and *Rangaya Chetti v. Thanikachalla Mudali* (5) was under the same Act. This is what their Lordships say upon the point:

"In their Lordships' opinion the question referred to the Full Bench of the High Court should have been answered in the negative."

That is to say an order of adjudication as an insolvent passed against a Hindu father who is a member of a joint Hindu family governed by the Mitakshara law does not vest in the Official Receiver assignee his son's interests in the joint family property. Their Lordships went on to say (p. 39) that the authorities in *Fakir Chand Moti Chand v. Moti Chand Hurrukhchand* (4) and *Rangaya Chetti v. Thanikachalla Mudali* (5), were not inconsistent with the above conclusion as they were decided under a different statute. We find in their Lordship's decisions an even clearer direction as to the law in the matter. Their Lordships say at p. 39 :

"Having regard to these considerations and to the scope of the Act their Lordships are satisfied that it was not the intention of the Act that on the insolvency of a father the joint property of his family should at once vest in the assignee. It may be that under the provisions of S. 52, or in some other way, that property may in a proper case be made available for payment of the father's just debts ; but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee, and no such provision should be read into the Act "

Section 52, Presidency Towns Insolvency Act 1 describes the insolvent's property which is indivisible amongst his creditors. The Provincial Insolvency Act (Act 5 of 1920) states what is and what is not considered to be the property of an insolvent under the Provincial Insol-

(1) A. I. R. 1926 All. 447=48 All. 400.

(2) A. I. R. 1925 P. C. 18=6 Lah. 1=52 I. A. 22 (P.C.).

(3) A. I. R. 1922 All. 79=44 All. 316.

(4) [1883] 7 Bom. 438.

(5) [1896] 19 Mad. 74.

veney Act. The circumstance that their Lordships were deciding under the Presidency Towns Insolvency Act does not affect the applicability of these remarks to the Provincial Insolvency Act for their Lordships at pp. 37-38 based their conclusion largely on the definition of the words "property". They said ;

"It is true that S. 17 of the Act of 1909 provides that on the making of an order of adjudication 'the property of the insolvent' shall vest in the Official Assignee and shall become divisible among his creditors, and that by S. 2 'property' is defined as including any property over which any person has a disposing power which he may exercise for his own benefit ; and it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts is such a power. But the definitions in S. 2 are only to apply 'unless there is something repugnant in the subject or context'; and it is necessary therefore to consider the effect of the definition of 'property' contained in that section in relation to the subject matter which is being dealt with and the other sections of the Act. Now, as to the subject matter, namely, the joint property of an undivided Hindu family, it is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors. The father's power to dispose of the joint property is not absolute, but conditional on his having debts which are liable to be satisfied out of that property ; and S. 2 seems to contemplate an absolute and unconditional power of disposal."

Thus their Lordships' conclusions are based largely on the wording of the definition of property in S. 2, Presidency Towns Insolvency Act. The definition is as follows :

"Property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

In S. 2 (d), Provincial Insolvency Act, the definition of 'property' is word for word the same. It includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. Section 17, Presidency Towns Insolvency Act, corresponds to S. 29 (2), Provincial Insolvency Act. The view that their Lordships take is thus that when a Hindu father and Hindu sons are members of a joint Hindu family governed by the Mitakshara Law and the father becomes insolvent the property of the sons does not vest in the receiver as the father's assignee. The joint property of

the sons may possibly be available for the satisfaction of those debts in another manner but it does not vest in the receiver. As this is our interpretation of their Lordships' decision we do not accept the head note in *Om Prakash v. Moti Ram* (1) as the statement of the law. We do not find that when the father of a joint Hindu family is declared an insolvent the whole of the coparcenary property of the family vests in the receiver. It would appear that the view taken in *Om Prakash v. Moti Ram* (1) has been dissented from in the case of the *Allahabad Bank Ltd., Bareilly v. Bhagwandas Johari* (6). In any circumstances it appears to us that the decision of their Lordships of the Judicial Committee is only open to the interpretation which we would place upon it.

In these circumstances the 2/48ths share of the appellants did not vest in the receiver. Have those shares become liable to satisfy the father's debts in any other way ? It appears to us that they cannot be held to be liable. In the partition proceeding of 1921 it was for the receiver to establish the liability of those shares. He did not effect that object. Not only did he permit the sons' shares to be separated from the share of the father but he did not obtain any order declaring that those shares should be made liable for the satisfaction of the father's debts. His action in permitting the sons' shares to be divided off would, even in absence of the other considerations to which we have referred, have prevented his success in the present proceedings. Having once allowed the sons to take separate possession of their shares he cannot now claim that those shares have vested in him. Apart from that, having failed in the partition proceedings to make provision for the payment of Pashupati Prasad's debts before the partition took place, and having failed to make provision for the liability of the sons to pay the father's debts he cannot take any proceedings now against the sons' separated shares. It is unfortunate that the receiver has not been represented in these proceedings. Notice was served on him on 3rd August 1929. We have, however, endeavoured to protect his interest by examining closely the authorities. We find that

(6) A. I. R. 1926 All. 262=48 All. 343.

the appeal must succeed. It is allowed. The respondent will pay his own costs and those of the appellants in all proceedings.

R.M./R.K.

Appeal allowed.

*** A. I. R. 1930 Oudh 39**

STUART, C. J. AND SRIVASTAVA, J.

Mt. Brij Kunwar and others—Defendants—Appellants.

v.

Sankata Prasad and another—Plaintiff and Defendant—Respondents.

First Appeal No. 74 of 1928, Decided on 3rd September 1929, against decree of Sub-Judge, Kheri, D/- 24th September 1928.

(a) Hindu Law—Joint family — Ancestral property.

There is no presumption in Hindu law about any property being ancestral: 12 *Bom.* 122, *Rel. on.* [P 40 C 1]

(b) Hindu Law—Alienation by father—Person disputing consideration ought to prove that property is ancestral.

Sons and grandson disputing the consideration of mortgage-deeds executed by the father have to prove that the property is ancestral in order to entitle them to question the consideration. They cannot question alienation when the property is proved to be self acquired property of the mortgagor. [P 41 C 1]

*** (c) Hindu Law—Will — Presumption—Property is presumed to be self acquired.**

The fact of a person having made a will in respect of a property raises the presumption about the property being self acquired property as long as there is no evidence to show that the property is ancestral [P 40 C 2]

(d) Hindu Law — Will—Construction—Where legatee is to be owner of property without any coparceners, property is excluded.

Where the terms of a will clearly lay down that the legatee is to be the owner of the property without any coparcener and that no one except him shall have any right in the property the intention of the testator is that the property in the hands of the legatee should be his exclusive property and should not partake of the incidents of ancestral property. [P 41 C 1]

Ishri Prasad, Haider Husain and K. N. Tandan—for Appellants.

A. P. Sen and Mohan Lal—for Respondents.

Judgment.— This is a first appeal against the decision of the Subordinate Judge of Kheri. It arises out of a suit brought by the plaintiff Rai Bahadur Pandit Sankata Prasad Bajpai on foot of a mortgage deed and four deeds of further charge executed in his favour by

defendant 1 Thakur Gobardhan Singh. These deeds of further charge are dated 15th June 1914, 13th June 1921, 11th July 1921, and 22nd August 1921. In the array of defendants were included not only the mortgagor Gobardhan Singh but also his wife Mt. Brij Kunwar who was defendant 2, his son Balbhaddar Singh who was defendant 3 and his grandsons Potan Singh and Ganesh Baksh Singh, minors, who were defendants 4 and 5 to this suit.

The plaintiff claimed a decree for sale for Rs. 1, 17,959-6-9 on the basis of all the aforementioned deeds. Various defences were raised on behalf of the mortgagor's son Balbhaddar Singh, including the defence so common to suits of this nature, namely, that the consideration for the mortgage and the deeds of further charge was tainted with immorality. All these pleas have been decided against the defendants and the claim has been decreed in full by the learned Subordinate Judge. Defendants 2 and 4 have preferred this appeal.

The learned counsel for the appellant has impugned the finding of the learned Subordinate Judge as regards certain items forming the consideration of the original mortgage deed and of the subsequent deeds of further charge. His argument is that the items disputed by him have not been proved to have been advanced for any legal necessity or to constitute antecedent debts so as to make those items binding on the son or the grandsons of the mortgagor. The items disputed by him are item 5 of Ex. 1 and the whole of the consideration of the four deeds of further charge, namely Exs. 2, 3, 4, and 5. He has accepted the findings of the learned Subordinate Judge in respect of all the items of Ex. 1 other than item 5 just mentioned. But it seems to us unnecessary to enter into the validity or otherwise of the disputed items of consideration because of the view which we take of one of the points arising for determination which seems to us to go to the root of the whole case. It is this. It is not denied that the defendants cannot question the validity of the consideration of the mortgage deed or the deeds of further charge unless they can show that the mortgaged property is ancestral. The question about the nature of the property, whether it was ancestral or self-acquired, constitu-

ted one of the pleas raised by the defendants in defence and formed the subject matter of issue 5 which was framed by the learned Subordinate Judge in the following terms:

"Is the property mortgaged in Exs. 1 to 5 ancestral?"

This issue casts the onus on the defendants to prove the property to be ancestral. There can be no doubt that there is no presumption in Hindu Law about any property being ancestral. If any authority were needed for this proposition reference may be made to the case of *Nanabhai Ganpatrai v. Achratbai* (1).

In this case dealing with the questions whether a particular property was ancestral or not Farran, J., remarked as follows:

"If, in order that the plaintiffs should succeed in their suit it be necessary that property left by Pandurang Mankoji should be held to have been his ancestral property, it lies on the plaintiffs to prove, in some way or other, that it was ancestral in his hands. There is no presumption in Hindu Law upon the point which they can invoke in their favour."

In the present case it is necessary for the defendants, in order to entitle them to question the consideration of the mortgage made by their father, to prove that the property was ancestral. The learned Subordinate Judge was, therefore, right in throwing the onus of proving issue 5 on the defendants. His finding on the issue is that only two out of the five items of property which formed the subject of mortgage are ancestral. These properties are village Gadina Mohal Gumani Singh and Makarampur pargana Bhur. The learned Subordinate Judge seems to have assumed that the aforesaid property in the hands of Gumani Singh was ancestral and having made that assumption he has gone on to hold that Gumani Singh having made a will of the aforesaid property in favour of his adopted son, defendant 1, the property in the hands of the latter must also be considered to be ancestral property. We find ourselves unable to accept this view of the learned Subordinate Judge. The learned counsel for the defendants-appellants has not been able to refer us to any evidence showing that the said property was ancestral in the hands of Gumani Singh. All that we know about it is, as stated by Gumani Singh in his will, Ex. C-8 (p 1 of the record) that he had got this property

under a decree of Court passed in his favour. It may be conceded that this statement is as much consistent with the property being ancestral as with its being his self-acquired property. But we have also the fact that Gumani Singh undertook to make a testamentary disposition in respect of this property. He could only make such a testamentary disposition if this property was his self-acquired property. Thus the fact of Gumani Singh having made a will in respect of it raises the presumption about the property being his self-acquired property. In any case in the absence of any evidence to prove that the property was the ancestral property of Gumani Singh and there being no presumption in favour of its being ancestral, we must hold that it was the self-acquired property of Gumani Singh.

This leads us to the next question as to the nature of the property in the hands of Gobardhan Singh. It has been found by the learned Subordinate Judge and the finding is amply supported by the documentary evidence on the record, that Gumani Singh made a will of the property in favour of his adopted son, Gobardhan Singh and that Gobardhan Singh after the death of his adoptive father got mutation effected in his favour on the basis of the said will. Here we may point out that the translation of Ex. C-9 printed at p. 5 of the record is not correct. The correct translation should be "by testamentary disposition" instead of "by right of inheritance" as put down in the translation. The question whether such property in the hands of the son who gets it under the will of his father is to be treated as ancestral or as self-acquired property, is by no means free from difficulty. The decisions of the various High Courts in this country have not been consistent on this point. It is not necessary for us to enter into a detailed discussion of the entire case law bearing on the point because in the view which we take of the matter we do not consider it necessary for the purpose of this appeal to commit ourselves definitely to any of the conflicting views. The matter has been discussed at considerable length in the decision of a Bench of the late Court of the Judicial Commissioner of Oudh reported in *Rameshwar v. Mt. Rukmin* (2).

(1) [1888] 12 Bom. 122.

(2) [1911] 14 O. C. 244=12 I. C. 770.

It will appear that the view taken by the Bombay High Court: see *Jugmohan-das Mangaldas v. Mangaldas Nathubhoy* (3), and by the Allahabad High Court: see *Parsotam Rao v. Janki Bai* (4), which was accepted by the Bench of the late Court of Judicial Commissioner of Oudh is:

"That in a case where self-acquired property is bequeathed to sons it should be presumed, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, that each son takes an interest which passes to his heirs at his death."

In other words the view is that in such cases the property should be presumed to be the self-acquired property of the sons. On the other hand, in the case of *Naglingam Pillai v. Ramchandra Tevar* (5), the Madras High Court has held that the nature of the estate taken by a son on a bequest of his self-acquired property by his father was a question of intention, turning on the construction of the will. This question was also raised before their Lordships of the Judicial Committee in *Lal Ram Singh v Deputy Commissioner of Partabgarh* (6), but their Lordships did not consider it necessary to make any pronouncement on the point. We are of opinion that even if we do not go the length of the view taken by the late Court of the Judicial Commissioner of Oudh and by the Bombay and Allahabad High Courts, and if we confine ourselves to the more limited view taken by the Madras High Court, even then the terms of the will executed by Gumani Singh leave no room for doubt about his intention on the point. He says that the legatee will be the owner of the property without any coparcener and that no one except him shall have any right in the property. We are, therefore, of opinion that on the terms of the document before us the intention of Gumani Singh clearly was that the property in the hands of Gobardhan Singh should be his exclusive property and should not partake of the incidents of ancestral property. For these reasons we are of opinion that the two properties which the learned Subordinate Judge holds to be ancestral proper-

ties have not been proved to be so. They must be considered to be the self acquired property of Gobardhan Singh, mortgagor.

The learned counsel for the appellants does not dispute the correctness of the findings of the learned Subordinate Judge in respect of the three other properties being the self-acquired property of Gobardhan Singh. The result, therefore, is that the entire mortgaged property must be held to be the self-acquired property of the mortgagor. It follows that the defendants have no right to question the validity of any part of the consideration of the mortgage-deed and the deeds of further charge executed by their father. The appeal must therefore fail on this ground and it is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 41

STUART, C. J. AND RAZA, J.

Mt. Nando—Plaintiff—Appellant.

v.

Ram Balak and others—Defendants—Respondents.

Second Appeal No. 15 of 1929, Decided on 1st October 1929, against decree of Third Addl. Dist. Judge, Lucknow, D/- 4th October 1928.

Civil P. C., O. 2, R. 2—Where failure to pay interest gives rise to cause of action, suit for interest only bars subsequent suit for mortgage money and interest—Transfer of Property Act, S. 98.

Under an anomalous mortgage *A* put *B* in possession of the mortgaged property. *A* then executed a rent note to pay a monthly rent and retook possession as a tenant. Rent was to be considered as interest on principal mortgage money due. If interest were not paid in each month *B* was at liberty to recover the entire mortgage money with interest through Court from the mortgaged property. *B* sued for the interest (which was the rent in arrears) and obtained a simple money decree.

Held: that a suit by *B* for the mortgage money alleged to be due and interest as against the mortgaged property was barred under O. 2, R. 2. A default in paying interest gave *B* a cause of action to come into Court, and this cause of action entitled *B* to the whole of the mortgage money due and not only to the interest due, such money being a charge on the mortgaged property. *B*'s former suit should have included the whole of the claim which *B* was entitled to make in respect of the cause of action and as there was omission to sue in respect of a portion of the claim *B* could not be permitted to sue subsequently in respect of the portion so omitted: *A. I. R. 1922 P.C. 23* and *A. I. R. 1922 P. C. 412, Rel. on. [P 42 C 1]*

(3) [1886] 10 Bom. 528.

(4) [1907] 29 All. 354=4 A. L. J. 257=(1907) A. W. N. 77.

(5) [1901] 24 Mad. 429=11 M. L. J. 210.

(6) *A. I. R. 1923 P. O. 160=45 All. 596=26 O. C. 257=50 I. A. 265.*

Ram Bharose Lal—for Appellant.

Ali Zaheer, Makund Behari Lal, Ghulam Imam, and Har Gobind Dayal—for Respondents.

Judgment.—The hearing of this appeal has been referred to a Bench by a learned Judge of this Court, as he considered that the question was one which had never been decided in this Court, and on which there should be a definite pronouncement of a Bench. We do not consider that the decision in this appeal will ordinarily be a guide to the decision of other appeals, as in our view the decision here turns upon the wording of a somewhat peculiar anomalous mortgage. Under this mortgage the mortgagor put the mortgagee in possession of the mortgaged property. He then executed a rent note to pay a monthly rent and retook possession as a tenant. The mortgagee stated that the rent was to be considered as interest on the principal mortgage money due. The terms of the mortgage laid down that, if the interest were not paid in each month, the mortgagee was at liberty to recover the entire mortgage money with interest through Court from the mortgaged property. It is thus clear that a default in paying rent was equivalent to a default in paying interest, that a default in paying interest gave the mortgagee a cause of action to come into Court, and that that cause of action entitled the mortgagee to the whole of the mortgage money due, and not only to the interest due, such money being a charge on the mortgaged property. We find that subsequently the mortgagee sued for the interest (which was the rent in arrears) and obtained a simple money decree. It appears to us, that in these circumstances the Courts below were correct in their decision that O. 2, R. 2 bars the present suit, which is a suit for the mortgage money alleged to be due and interest as against the mortgaged property. The former suit should have included the whole of the claim which the plaintiff was entitled to make in respect of the cause of action, and as there was an omission to sue in respect of a portion of the claim, the plaintiff cannot be permitted to sue subsequently in respect of the portion so omitted. This was not a case where the plaintiff was entitled to more than one relief in respect of the same cause of

action. We have examined with respect to the principles laid down by their Lordships of the Judicial Committee in *Mohammad Hafiz v. Mohammad Zakariya* (1) and *Kishan Narain v. Pala Mal* (2) and have derived assistance from those decisions. Cases of this kind have usually to be decided upon the actual facts and the words of O. 2, R. 2 are usually sufficiently clear to permit a decision to be made as to whether a suit is or is not barred under the provisions of that rule. As a result we dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

(1) A. I. R. 1922 P. C. 23=49 All. 121=19 I. A. 9 (P. C.).

(2) A. I. R. 1922 P. C. 412=1 Lah. 32=50 I. A. 115 (P. C.).

A. I. R. 1930 Oudh 42

MISRA, J.

Parmeshwar Bakhsh Singh—Defendant—Appellant.

v.

Nokhe Singh—Plaintiff—Respondent.

Second Rent Appeal No. 57 of 1928, Decided on 21st February 1929, from an order of Offg. Dist. Judge, Hardoi, D/-7th July 1928.

Oudh Rent Act, S. 127—Position of transferee from lessor whose possession is unjustified is that of trespasser and suit for rent lies against him.

Where a proprietor executes a lease of certain land but remains in possession thereof, his possession is unjustified in the eyes of law. The position of a transferee from him is no better and he can be treated as a trespasser and a suit for determination and recovery for rent can be brought against him. [P 43 C 1]

Kashi Prasad Srivastava—for Appellant.

Raj Bahadur Asthana—for Respondent.

Judgment.—This appeal arises out of a suit brought by Nokhey Singh, the plaintiff-respondent, for arrears of rent against Parmeshwar Bakhsh Singh, the defendant-appellant. The facts of the case appear to be that one Makrand Singh the original proprietor of the land in suit executed a lease thereof on 23rd February 1920, in favour of the respondent, Nokhey Singh and the latter sold certain *sir* and *khudkasht* plots out of those lands to the appellant Parmeshwar Bakhsh Singh. The respondent claimed a decree under S. 127, Oudh Rent Act.

The defence put forward by the appellant was to the effect that since he him-

self was the proprietor of the lands of which he had executed a lease in favour of the respondent, he could not be considered as a tenant under S. 127, Oudh Rent Act. This plea has been overruled by both the Courts below.

In second appeal the same contention has again been raised on behalf of the appellant. I am of opinion that the view taken by the Courts below on the question of maintainability of the suit brought by the plaintiff-respondent against the defendant-appellant is correct. After the execution of the lease by Makrand Singh, the plaintiff-respondent became entitled to possession of the entire land of which the lease had been executed in his favour, and if Makrand Singh, the lessor, remained in possession of any lands, which were not exempted under the lease, his possession was clearly unjustified and in the eyes of law he would be treated as a trespasser so long as the lease lasted. If this was the position of Makrand Singh no better position could be allowed to the appellant who was a transferee from Makrand Singh. If the appellant is, therefore, also to be held as trespasser it was perfectly open to the plaintiff-respondent to treat him as such and to bring a suit against him for determination of rent and for recovery thereof under S. 127, Oudh Rent Act. I am fortified in this view by a decision of my learned brother Mr. Justice Raza in *Second Rent Appeal No. 19 of 1925*, which has been referred to in the judgment of the lower appellate Court. In that case one Lal Bahadur Singh had similarly executed a lease in favour of one Chhedi, but did not give him possession of his and *sir khudkasht* land and executed a lease of the same in favour of one Sheo Narain. Chhedi, the lessee, brought a suit for arrears of rent against Sheo Narain under S. 127, Oudh Rent Act. It was held by my brother that Lal Bahadur could be treated by the lessee as a trespasser and rent could be claimed against him under S. 127 of the said Act. It was also held that Sheo Narain the lessee from Lal Bahadur could not in respect of *sir* and *khudkasht* be deemed to be in a better position and that the suit for arrears of rent under S. 127 was maintainable against him. I am in entire agreement with the view of law taken in this case.

I, therefore, hold that the claim of

the plaintiff-respondent in this case was rightly brought under S. 127, Oudh Rent Act, and the decree passed by the Court below against the appellant is fully justified.

The appeal, therefore, fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 43

SRIVASTAVA, J

Avadh Behari and others—Plaintiffs—Appellants.

v.

Parmeshur Din and others—Defendants—Respondents.

Second Appeal No. 191 of 1929, Decided on 18th September 1929, from decree of Sub-Judge, Rae Bareilly, D/- 15th March 1929.

(a) Limitation Act, S. 22—Impleading necessary party which changes character of suit does not amount to correcting misdescription and S. 22 applies to such case.

A brought a suit for possession of certain property on allegation that all right in the property had been transferred to him by a reversioner, B who got the property after the death of a widow, and that C who was in possession of the property had no title. C contended that he was in possession of the property only on behalf of an idol S, in whose favour the widow has executed a deed of gift and that S was a necessary party to the suit. A made an application asking C to be described as the representative of S and for adding S as a defendant.

Held : that originally the claim being against C personally the proposed change was obviously intended to change the character of the suit by introducing a new case and it could not be said that the amendment was intended to correct a misdescription and that it did not amount to introduction of new party within the meaning of S. 22. S was a necessary party and he being impleaded after 12 years the suit was barred and A could not also get any relief against C personally as C was in possession only on behalf of S. : 33 *All.* 735 ; *A. I. R.* 1925 *Cal.* 419 and 37 *Cal.* 229 (*P. C.*) *Dist.* [P 45 C 1]

(b) Limitation Act, S. 22—Idol is necessary party when its title is challenged.

A shebait has a right of suit in matters arising out of the possession and management of the dedicated property. But a case, where the intrinsic title of the idol is challenged, stands on a different footing. In cases where the crucial question is about the ownership, the idol is a necessary party. [P 45 C 2]

Radha Krishna—for Appellants.

R. B. Lal—for Respondents 1 and 3.

Judgment.—This is a second appeal by the plaintiffs who have been unsuccessful in both the Courts below. They had brought a suit for possession of certain property on the allegations that the aforesaid property had been in the possession of one Mt. Sona as a Hindu widow, that Mt. Sona died on 5th August 1916, leaving Sital defendant 2 as her husband's nearest reversioner, that the said Sital transferred all his rights in the property to plaintiff 1 and that defendant 1 was in possession of the property without any right or title. Plaintiff 2 is the father and plaintiff 3 the uncle of plaintiff 1 and being members of a joint Hindu family they all joined in making the present claim.

The defence raised on behalf of defendant 1 was that he was in possession of the property only as manager on behalf of the idol Sheoji in whose favour Mt. Sona had executed a deed of gift in respect of the entire property in suit on 5th June 1912. He contended that Sheoji was a necessary party to the suit. The plaintiffs thereupon on 16th October 1928 made an application asking that defendant 1 be described as a representative of Sheoji and that in order to avoid controversy the name of Sheoji be added as defendant 3. This application was allowed and Sheoji was impleaded as a party defendant on the same date. Defendant 3 on being impleaded as a defendant raised the plea of limitation.

Both the lower Courts have accepted the plea and have dismissed the suit on the ground of its being barred by time. The lower appellate Court has further found that the plaintiffs were fully aware of the deed of gift executed by Mt. Sona in favour of Sheoji inasmuch as they had referred to it as far back as April 1926 in an application, Ex. A-2, made to the record officer.

The principal contention urged on behalf of the plaintiffs-appellants in support of the appeal is that Sheoji was sufficiently represented in the suit by defendant 1 and that he was therefore not a necessary party at all in the case. For these reasons it is argued that S. 22, Limitation Act, does not apply to the present case, and the suit could not be

dismissed on the ground of limitation by reason of the provisions of that section. I find myself unable to accept the contention. A cursory glance at the plaint would show clearly that the plaintiffs for some reason or other studiously avoided all reference to the idol and the dedication to the sheba. It is an ordinary plaint in the stereotyped form for possession and mesne profits against a trespasser. The learned counsel for the plaintiff-appellants has relied upon several cases in support of the contention that mere amendment of description of a party on the record does not amount to the introduction of a new party within the meaning of S. 22, Limitation Act. I do not think that the present case can be considered to be one of this class.

The first case referred to is *Jodhi Rai v. Basdeo Prasad* (1). In this case which was one of pre-emption the vendee was described as :

"Sri Thakurji installed in the temple known as Purander Lal in the town of Rasra, under the sarbarakarship of Basdeo 'Prasad.' Their Lordships of the Allahabad High Court held that defendant 1 was properly described in the plaint and further went on to remark that even if there was any defect in the description of the defendant it was nothing more than an irregularity or misdescription. Any amendment made for the purpose of correcting the description would not, in their Lordships opinion, have the effect of introducing a third party on the record and no question of limitation would . . . arise."

Reference was next made to *Naba Kumar Choudhury v. Higheazany* (2).

In this case plaintiff originally sued in his personal capacity but later on after the expiry of the period of limitation he amended the plaint adding himself in his capacity of an administrator. It was held that as the amendment made a change of form only and not of substance the suit was not barred by limitation.

The last of the cases cited from the authorized reports was *Pyary Mohan Mukerji v. Norendra Nath Mukerji* (3). The facts of this case were very different and the case has hardly any bearing on the question before me. In this case one Bijai claimed succession to the office of shebait and brought a suit to esta-

(1) [1911] 33 All. 735=11 I. C. 47=8 A. L. J. 817.

(2) A. I. R. 1925 Cal. 419=51 Cal. 845.

(3) [1910] 37 Cal. 229=5 I. C. 404=37 I. A. 27 (P. C.).

blish his title. He died on the very day on which a decree was passed in his favour. He left a will appointing certain persons as his executors. These persons brought a suit against the receiver of the debuttar estate for recovery of sums of money payable to Bijai or his representatives out of the debuttar estate. The High Court thought the debuttar estate was not properly represented and remanded the suit for inquiry in order that the prayer in the plaint might be amended so as to raise directly the question of the right to the office of shebait and the representation of the estate. On remand the Subordinate Judge found that the defendant appellant who was impleaded as a receiver must be considered to be the shebait. In these circumstances their Lordships of the Judicial Committee held that the object of the amendment was to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit was to be considered shebait.

One fact which emerges clearly from an examination of all these cases is that the amendment made in the description was in no case such as to change materially the nature of the suit. The facts in all the above noted cases were sufficiently stated in the pleadings and the object of amending the description was merely to make clear the capacity in which a particular party was being sued. It was in every case, to put it differently, a change merely of form and not of substance. In such cases therefore it could very rightly be said that an amendment which is intended to correct a misdescription or to more clearly describe parties who are already before the Court, is not an amendment which has the effect of adding or substituting a new party within the meaning of S. 22, Lim. Act. Can it be said that the position in the present case was the same? It seems to me clear that the plaint as originally framed was intended to make out a claim against defendant 1 personally. In these circumstances the proposed change was obviously intended to change the character of the suit by introducing a new case and in my opinion cannot be brought within the rule enunciated in the cases discussed above.

The matter might be looked at from

another standpoint. The plaintiffs themselves by their application dated 16th October 1928 joined Sheoji as a party in the case. As the plaintiffs claimed to be the nearest reversioners to the husband of Mt. Sona and questioned the right of Mt. Sona to make any valid transfer which could be effective after her lifetime, the nature of the plaintiffs' claim was such that it attacked the root title of Sheoji in respect of the property in suit. In the case of *Jagadindra Nath Roy v. Hemanta Kumari Debi* (4) their Lordships of the Judicial Committee remarked as follows :

"There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the decision is of the completest kind known to the law But assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the shebait. And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait, not in the idol."

It will appear from the above that a shebait has a right of suit in matters arising out of the possession and management of the dedicated property. But a case like the present, in which the intrinsic title of the idol is being challenged, stands on a different footing. There can be no doubt that the ownership of the property which has been dedicated to the idol vests in the idol from the date of dedication. In my opinion in such a case where the crucial question is about ownership the idol is a necessary party. However, it is not necessary for me for the purposes of this case to come to a definite decision on this point. It is hardly open to the plaintiffs to dispute the fact of Sheoji being a necessary party in the case when they themselves by their application dated 16th October 1928 applied to join him as a party defendant. There can be no gainsaying the fact that Sheoji was not a party to the suit before that date. Therefore the suit as regards him can under the provisions of S. 22 be deemed to have been instituted only when he was so made a party.

(4) [1905] 32 Cal. 129=31 I. A. 203=S Sar 698 (P. C.).

I am therefore in agreement with the Courts below in holding that defendant 3 having been impleaded more than 12 years after the death of Mt. Sona, the suit was barred by limitation under S. 22, Lim. Act.

Another point urged on behalf of the plaintiffs-appellants was that at all events the suit should not have been dismissed against defendant 1. This contention is without substance. As pointed out before, defendant 1 does not lay any claim to the property in his own right. He claimed to be in possession only on behalf of Sheoji. Under the circumstances the plaintiffs' claim against Sheoji being barred by time they could not get any relief against defendant 1 personally.

The appeal therefore fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 46

WAZIR HASAN, J.

Mahabir Singh and another—Plaintiffs—Appellants.

v.

Chitta Singh and others—Defendants—Respondents.

Second Appeal No. 93 of 1929, Decided on 10th September 1929, from decree of Addl. Sub-Judge, Lucknow, D/- 30th November 1928.

Limitation Act, Art. 142—Claimant must prove his possession within 12 years—Inquiry into question of adverse possession is irrelevant.

In cases falling under Art. 142 the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an inquiry into the question of adverse possession is irrelevant. It is not enough for the claimants to show an anterior title. The burden of proof is on him to prove possession at some time within 12 years next preceding the suit and this would shift the burden on to the defence to show that they were entitled to retain possession : 16 Cal. 473 (P. C.) and 17 Cal. 137 (P. C.), *Rel. on.*; 41 All. 669, *Ref.*; 27 Cal. 943 (P. C.); A. I. R. 1916 P. C. 21. and A. I. R. 1922 P. C. 181, *Dist.* [P 47 C 1, 2]

Akhtar Husain for Mohammad Khalil Siddiqi—for Appellants.

Naziruddin—for Respondents.

Judgment.—This is the plaintiffs' appeal from the decree of the Additional Subordinate Judge of Lucknow, dated 30th November 1928, affirming the

decree of the Munsif of Haveli, dated 21st May 1928.

In the suit, out of which this appeal arises, the subject-matter of dispute is a house situate in the village of Nanmau, pargana Bijnaur, in the district of Lucknow.

On the pleadings in the case it is perfectly clear that the plaintiffs claimed recovery of possession of the house in question by reason of the discontinuance of possession caused by the acts of the defendants. The defence, with which I am now concerned, was that the plaintiff has not been in possession of the house within limitation and that the defendants had perfected their title to the same by adverse possession. On the question of title both the Courts below are agreed that it is with the plaintiffs. Having regard to the defence set forth above the Court of first instance framed the following two issues :

1. Have the plaintiffs been in possession of the house within limitation ?

2. Have the defendants perfected their title to the house by adverse possession ?

Both the Courts have answered the first mentioned issue in the negative and against the plaintiffs. They have also answered the second issue in favour of the plaintiffs and against the defendants and on the finding arrived at on the first issue they have dismissed the suit.

The argument in second appeal is that the title having been found in favour of the plaintiffs and against the defendants the suit should have been decreed. I am of opinion that the decree of the Courts below is correct and should be maintained. In the case of *Mohima Chunder v. Mohesh Chunder* (1) their Lordships of the Privy Council held, to quote the head-note, that though the claimants :

"showed an anterior title but that was not enough without proof of their possession within 12 years to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession."

The burden of proof was on the claimants to prove their possession at some time within the 12 years next preceding the suit. That case specifically fell within the purview of Art. 142, Sch. 1, Act 15 of 1877. This view of the law was repeated in the case of *Mohammad Amanullah Khan v. Badan Singh* (2).

(1) [1889] 16 Cal. 473=16 I. A. 23=5 Sar. 321 (P.C.).

(2) [1890] 17 Cal. 137=16 I. A. 148 (P.C.).

It was held in this case that there has been dispossession or discontinuance of possession within the meaning of Art. 142 and that whether any proprietary right had existed or not in the plaintiffs' ancestors the 12 years' limitation ran from the date of dispossession or discontinuance. In delivering the judgment of the Privy Council in the case just mentioned Sir Robert Couch said :

"No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of Art. 142, and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Art. 144 as to adverse possession only applies where there is no other article which specifically provides for the case."

This decision is, therefore, a clear authority for the proposition that in cases falling under Art. 142, Lim. Act, the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an inquiry into the question of adverse possession is irrelevant.

On behalf of the appellants reliance was placed on the decisions of their Lordships of the Judicial Committee in the cases of *Radhamoni Debi v. Collector of Khulna* (3), *Secy. of State v. Chelikani Rao* (4) and *Kuthali Moothvar v. Kunharankuty* (5).

In the first mentioned case the plaintiff claimed title to certain chaks of land on two alternative grounds (1) that the lands in suit constituted a village owned by him and (2) that she, the plaintiff, had had 12 years' adverse possession of the lands in dispute. Both the grounds of the claim were negatived by their Lordships of the Judicial Committee. They observed. The land :

"generally speaking, is jungle; but there has been in some parts more or less of intermittent cultivation."

This makes it perfectly clear that the

case was not governed by Art. 142, Sch. 1, Lim. Act, but it was a case which fell on its merits under Art. 144 of the same Schedule on the nature of the lands in suit was jungle land. In considering the result of the evidence as to possession their Lordships observed :

"It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded. But the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the 12 years in dispute which has all or any of these qualities."

I am of opinion that this decision of their Lordships of the Judicial Committee is inapplicable to this case. The second case cited on behalf of the appellant is also inapplicable. Their Lordships of the Judicial Committee held in that case that islands formed on the bed of the sea within the territorial limits of the Indian Empire belong to the Crown. These islands were being declared part of a reserved forest under the Madras Forest Act 1882, and a notification to that effect was issued by the Government of Madras and persons claiming any rights in the lands were required to state the nature of the right claimed and to produce all documents in support thereof before the Forest Settlement Officer. The respondents in the appeal before their Lordships of the Judicial Committee claimed to be owners of certain parcels of land included in the notified area. Their claims were rejected by the Settlement Officer and his decision was affirmed by the District Judge upon appeals under the Madras Forest Act, 1882. The claimants then appealed to the High Court and the High Court finally allowed the appeal and excluded the lands in dispute from the reserved forest area. The Secretary of State for India appealed and in the arguments on their behalf it was admitted that the Crown was never in possession and it was argued that consequently Art. 142, Sch. 1, Lim. Act, did not apply and that under Art. 144 it was for the claimants to prove that their possession became adverse more than 60 years before the notification. In support of the distinc-

(3) [1900] 27 Cal. 943=37 I. A. 136=7 Sar. 714 (P.C.).

(4) A. I. R. 1916 P. C. 21=39 Mad. 617=43 I. A. 192 (P.C.).

(5) A. I. R. 1922 P. C. 181=44 Mad. 883=48 I. A. 395 (P.C.).

tion between the two articles the cases of *Maharajah Koonwar Singh v. Nund Lall Singh* (6) and *Rao Karan Singh v. Bakar Ali Khan* (7) were cited.

On behalf of the claimants the original title of the Crown was not disputed but it was argued that in a suit for possession the plaintiff must prove that he has title which is not barred by the statute. The decision in *Maharaja Koonwar Singh v. Nund Lall Singh* (6), was relied upon and it was further argued that the above decision applied to suits whether they are within Art. 142 or 144. In reply the counsel for Secretary of State for India in Council said:

"In an action for ejectment in England the plaintiff had to allege and prove a dispossession. The principle with regard to limitation under the English Statute does not apply in India except under Art. 142. In the case of jungle lands it is often not in the power of the Crown to give evidence as to when a defendant's possession became adverse."

The judgment of their Lordships of the Judicial Committee was delivered by Lord Shaw of Dunfermline. Having decided the question of title in favour of the Crown his Lordships observed:

"In these circumstances the question before the Board would appear to be extremely simple. Under the Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than 60 years. The question simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim fails".

His Lordship then quoted the following passage from the judgment of the High Court.

"In the case of lands which came into existence as land capable of occupation more than 60 years prior to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period."

His Lordship observed:

"Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting possession. It is too late in the day to suggest the contrary of this proposition."

Finally his Lordship said:

"In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think

that Art. 144, Lim. Act 15 of 1877, Sch. 11, applies, the period of 12 years thereunder being however, extended to a period of 60 years by Art. 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point."

It is therefore quite clear that Art. 144 read with Art. 149 was applied in that case and for this reason that decision is of no help to the appellants in the present case.

The third case was one in which the appellant before their Lordships of the Judicial Committee, that is the plaintiff, asserted that he was in possession of the property in suit which was a group of 24 hills in the North Malabar District of the province of Madras. The defendant in that case claimed title by adverse possession which was negatived by their Lordships of the Judicial Committee on the ground that the possession proved was not of such a nature as the law required for establishing prescriptive title. In discussing the evidence as to possession their Lordships said:

"Much importance attaches to the nature of the property itself. It is forest land apparently very little of it capable of, or at least up to the present subject to cultivation and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases."

On the question of title their Lordships found that it was in the plaintiff and on the question of adverse possession they referred to their decisions in *Radhamoni Debi v. Collector of Khulna* (3) and *Secy. of State v. Chelikani Rama Rao* (4), and said:

"Standing a title in 'A' the alleged adverse possession of 'B' must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession."

But the onus of establishing these things is upon the adverse possessor. Their Lordships also found on merits that:

"the plaintiff has been exercising during the currency of his title various acts of possession then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds."

(6) [1859-61] 8 M. I. A. 199=1 Suther 420=1 Sar. 744 (P.C.).

(7) [1883] 5 All. 1=9 I. A. 99=4 Sar. 332 (P.C.).

This case also is therefore of no avail to the appellants.

The distinction between cases falling under Art. 142 and cases where the defence to a suit for recovery of possession is 12 years' adverse possession under Art. 144 is well emphasized, if I may respectfully say so, in a decision of a Bench of the High Court at Allahabad in the case of *Jai Chand v. Girwar Singh* (8).

The appeal, therefore, fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(8) [1919] 41 All. 669=52 I. C. 366=17 A.L.J. 814.

A. I. R. 1930 Oudh 49 (1)

SRIVASTAVA, J.

Chhattarpal Singh—Defendant—Appellant.

v.

Bhadeshwar Prasad Singh and another—Plaintiff and Defendant—Respondents.

Second Rent Appeal No. 45 of 1929, Decided on 22nd October 1929, from decree of Dist. Judge, Rae Bareilly, D/- 29th June 1929.

(a) Oudh Rent Act (3 of 1926), Ss. 127 (1) and 108 (2)—Decree for arrears of rent and ejectment can be passed in one and same suit.

When a Court passes a decree for arrears of rent under sub-S. (1), S. 127 read with Cl. (2), S. 108, it is open to the Court, on the application of the plaintiff, to also pass a decree for ejectment of the defendant from the land.

[P 49 C 2]

(b) Landlord and Tenant—Lease by thekadar—Lease effective only during period of theka.

No thekadar can bind the landlord and so lease executed by thekadar is only effective during the period of theka: A. I. R. 1929 Oudh 12, *Foll.*

[P 49 C 2]

K. N. Tandon—for Appellant.

Ghulam Hasan—for Respondent 1.

Judgment.—This is an appeal by a defendant against the decision dated 29th June 1929 passed by the District Judge of Rae Bareilly affirming the decision dated 26th April 1928 passed by an Assistant Collector of the Partabgarh District.

The appeal arises out of a suit for arrears of rent and ejectment under S. 127, Oudh Rent Act. The plaintiff who is admittedly the proprietor of the land in suit came into Court on the allegation that the defendant was in possession of the land in suit without any title and without his consent and

that he had been recorded by the patwari as a bila tashya tenant. He therefore claimed arrears of rent for the period of his possession and also an order for ejectment. The defence was that the land in suit was in the possession of a thekadar Rampal Singh who had given a lease to Mt. Bhagwani, daughter of the defendant and that the defendant was in possession on behalf of the said Mt. Bhagwani. Both the lower Courts have held that the alleged lease given to Mt. Bhagwani was a bogus one and that in any case a lease like the one set up by the defendant could not bind the landlord after expiry of the theka.

The first argument urged in support of the appeal is that a decree for arrears of rent and for ejectment could not be passed in one and the same suit. It is contended that a suit for arrears of rent lies under S. 108, Cl. (2) whereas a suit for ejectment falls under S. 108 Cl. (4), Oudh Rent Act, and it is therefore argued that separate suits must be instituted for arrears of rent as well as ejectment. This contention entirely ignores the provisions of S. 127, Oudh Rent Act, which expressly provides that when a Court passes a decree for arrears of rent under sub-S. (1), S. 127, read with Cl. (2), S. 108, it is open to the Court, on the application of the plaintiff to also pass a decree for ejectment of the defendant from the land. I must therefore overrule this contention.

The only other contention urged was that the defendant could not be ejected because of the lease executed by the thekadar Rampal Singh in favour of Mt. Bhagwani. This is concluded by the decision of a Bench of this Court in *Krishna Kumari Devi v. Tribhuwan Dat* (1).

The appeal therefore fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) A.I.R. 1929 Oudh 12.

A. I. R. 1930 Oudh 49 (2)

STUART, C. J., AND WAZIR HASAN, J.

Chhotey Lal—Plaintiff—Appellant.

v.

Mt. Devi Brij Rani—Defendant—Respondent.

Misc. Appln. No. 538 of 1929, in Second Appeal No. 252 of 1929, Decided on 30th October 1929.

Limitation Act, S. 5—Counsel's advice given with due care and attention but mistaken—Client thereupon acting in good faith misled and filed appeal after limitation—Court can admit appeal.

When it is established in the first place that a counsel has given advice with due care and attention but has nevertheless arrived at a mistaken conclusion, and that the appellant, misled by that advice, has in good faith filed an appeal beyond limitation, then when compliance has been made with all these conditions a Court is justified in admitting an appeal filed after limitation, but not otherwise: 28 All. 414 and 29 All. 638 held broadly decided. *Coles Revenshear; In re*, 1 K. B. 1, Discussed 10 O.C. 291, Foll. [P 50 C 2, P 51 C 1]

B. B. Chandra—for Appellant.

Moti Bal Saxena and Suraj Sahai—for Respondent.

Order.—This is an application under the provisions of S. 5, Limitation Act, for the admission of an appeal, which on the face of it is time barred and which was dismissed accordingly on 11th September 1929. The cause alleged by the appellant for the admission of this appeal is that he was misled by the advice of his counsel as to the date when the appeal should be filed, and that, for this reason alone, his appeal should be admitted, although it is beyond time. He has quoted in support of his plea two decisions of the Allahabad High Court: one *Kura Mal v. Ram Nath* (1) and the other *Anjor Kunwar v. Babu* (2). The learned Judges composing the Bench, which decided the first appeal, the decision in which was followed in the second appeal, were of opinion that where a client bona fide accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and, misled by that advice, fails to file an appeal within time, he is entitled to the benefit of S. 5, Limitation Act, in other words he has sufficient cause for not preferring the appeal within such time. This view is opposed to the view of the English Courts. In *Coles and Revenshear, In re* (3) the Court of appeal unanimously decided that when through a mistake of counsel an appeal was not brought until after the expiration of the time thereby allowed for appeal the appeal should not be admitted. It is, however, to be noted that the Master of

Rolls (Collins, M. R.) and Cozens-Hardy, L. J., stated that if the case had been free from authority and if they had been at liberty to follow their own judgments they would have allowed the time to be extended. Farwell, J., stated that in his judgment he considered that, even if there had been no authority, he would have refused to have allowed the time to be extended for such a reason. The fact, however, remains that two out of these three learned Judges did not approve the principle which underlay the authority of previous cases. This fact is in favour of the application. But it would appear to us that the matter should not be decided on the broad lines laid down in the Allahabad decisions. We do not consider that the extension should be granted merely because a client bona fide accepts the advice of the counsel as to the proper procedure to adopt, and misled by that advice fails to file the appeal within time. The view which we take is the view which was adopted by a Bench of the late Judicial Commissioner's Court in *Mohammad Bakar Ali Khan v. Mohammad Bakar* (4). Chamier, J. C., said at p. 294:

"An affidavit has been filed by the learned advocate for the appellant which shows that his client filed the appeal in the Court of the District Judge of Sitapur, acting on the advice of Mr. Mohammad Nasim an advocate, who enjoys a large practice in the Courts in this province. The fact that the appeal was filed on this advice is not disputed, and if we were to adopt the rule of the Allahabad High Court in the case of *Cura Mal v. Ram Nath* (1) we might hold at once that sufficient cause has been made out by the defendant for not presenting this appeal within time, for it is not suggested that the defendant did not act bona fide on the advice given to him by his advocate. But except possibly in one case this Court has never held that it is sufficient for the client to show that he acted on the advice of counsel. It has, I believe, except in the case to which I have just referred, always held that the Court must be satisfied that the advice was given with due care and attention, and the Bench followed the previous practice of the Court."

This is the view which we take. When it is established in the first place that a counsel has given advice with due care and attention but has nevertheless arrived at a mistaken conclusion, and that the appellant, misled by that advice, has in good faith filed an appeal beyond limitation, then when compliance has been made with all these con-

(1) [1906] 28 All. 414 = 3 A. L. J. 218 = (1906) A. W. N. 67.

(2) [1907] 29 All. 638 = 4 A. L. J. 515 = (1907) A. W. N. 219.

(3) [1907] 1 K. B. 1 = 76 L. J. K. B. 27 = J. 45 = 23 T. L. R. 32 = 95 L. T. 750.

(4) [1907] 10 O. C. 291.

ditions a Court is justified in admitting an appeal filed after limitation, but not otherwise.

This being the view which we take of the law it now remains to be seen whether these conditions have been complied with in this particular case. We are of opinion that they have been complied with in this particular case. We find that there was a place for difference of opinion, as to whether the filing of an application for review did not extend the time. Whether it did or did not extend the time the advice given by the counsel cannot be said not to have been given with due care and attention, and the litigant acted bona fide. We, therefore, give the appellant the concession provided by S. 5, Limitation Act, and permit the appeal to be filed. But in the circumstances of the case we consider that he should pay not only his own costs of this application but the costs of the other side and we direct that he shall pay his own costs and the costs of the other side. After having permitted the appeal to be admitted we have examined the grounds of appeal. We direct that the appeal be laid before a Bench of this Court for orders as to admission under O. 41, R. 11, Civil P. C.

V.B./R.K. *Application allowed.*

A. I. R 1930 Oudh 51 (1)

PULLAN, J.

Thakur Din Singh and others—Plaintiffs—Appellants.

v.

Bhagwandin Singh and others—Defendants—Respondents.

Second Appeal No. 245 of 1929, Decided on 16th October 1929, from decree of Sub-Judge, Partabgarh, D/- 23rd April 1929.

Limitation Act, Art. 178—Award not made rule of Court within limitation period—Award does not become invalid—Award.

An arbitrator's award does not become invalid merely because it has not been made a rule of the Court within the prescribed period of limitation: 4 O. L. J. 487, *Rel. on.* [P 51 C 2]

Radha Krishna—for Appellant.

H. D. Chandra and Mata Bux Singh—for Respondents.

Judgment. — This is a plaintiffs' second appeal arising out of a suit for partition. The defendants met the plaintiffs' suit for partition by producing an award dated 4th November 1927,

under which the groves had already been partitioned and praying that a decree might be passed in the terms of the award. The Courts below dismissed the suit in toto on the ground that the plaintiff had no right to sue for partition when the matter had already been decided by a valid award. In appeal the question is raised whether such an award can operate as a bar to a suit for partition when it has never been made a rule of the Court. It is true that Art. 178, Lim. Act, prescribes a period of six months for having an arbitrator's award made a rule of the Court, but the authorities, as far as they have been shown to me, are unanimous in agreeing that an arbitrator's award does not become invalid merely because it has not been made a rule of Court. I need only refer to three decisions of the Court of the Judicial Commissioner of Oudh reported in *Sheo Narain Singh v. Bishnath Singh* (1), *Mohammad Hadi v. Mohammad Taki* (2) and *Shubrati v. Mt. Hafizan* (3).

In the grounds of appeal the appellant has asked that in any case the suit should not have been dismissed but should have been decreed in the terms of the award. This was the defendant's own prayer and counsel for the defendants agrees that such an amendment should be made in the decree. I therefore allow the appeal to this extent that a decree should be passed in the terms of the arbitrators' award dated 4th November 1927. As this was no part of the plaintiffs' prayer in the Court below and has merely been adopted from the defendants in this Court I cannot allow the plaintiffs' costs in any of the Courts but in this Court. I direct that the parties shall pay their own costs.

V.B./R.K. *Order accordingly.*

(1) [1904] 7 O. C. 269.

(2) [1915] 18 O. C. 282=32 I. C. 465.

(3) [1917] 4 O. L. J. 487=42 I. C. 116.

A. I. R. 1930 Oudh 51 (2)

PULLAN, J.

Harnarain Das—Plaintiff — Appellant.

v.

Gajraj Singh and others—Defendants—Respondents.

Second Rent Appeal No 64 of 1928, Decided on 2nd January 1929.

(a) Civil P. C., O. 22, R. 10—Suit for arrears of rent by ostensible zamindar—Appeal from decision in suit preferred by same ostensible zamindar—Ostensible zamindar's title being disputed by third party in different suit third person declared zamindar—Substitution of third person as appellant on record of appeal held proper and valid.

A suit for arrears was brought by one *B* who was at the time of the suit acknowledged to be the zamindar entitled to bring a suit for arrears of rent. During the pendency of this suit another suit was filed by one *H* disputing the title of the ostensible zamindar to the whole property and was decreed. The latter case was decided after the former. An appeal had already been preferred by the ostensible zamindar and in the course of the appeal the name of *H* the real zamindar, was substituted for the ostensible zamindar. The alteration of names was not properly and validly effected but there was no objection to the same being done in the first appellate Court. The question was raised in the second appeal.

Held: that the correction substituting *H* for *B* as appellant was proper. [P 52 C 2]

(b) Civil P. C., S. 2 (12)—“Mesne profits” does not exclude arrears for previous years which may be claimed and recovered at later years.

The term “mesne profits” does not exclude arrears for previous years which may be claimed and recovered at a later period than that for which they accrue. [P 52 C 2]

Mahesh Prasad—for Appellants.

K. P. Misra—for Respondents.

Judgment.—This is an appeal from the decree of the District Judge of Gonda in a suit for arrears of rent.

The suit was brought by one Bhaya Hari Saran Das who was at that time acknowledged to be the zamindar entitled to bring a suit for arrears of rent. During the pendency of the suit for arrears of rent a suit was filed on the original side of this Court by Mahant Har Narain Das in respect of the whole of the property, and after this suit had been decided by the first Court on 26th September 1927, an order was passed by the Chief Court on the original side decreeing the plaintiff's suit. The effect of this order was to place Mahant Har Narain Das in the shoes of Bhaya Hari Saran Das, and accordingly an application was made in the course of the appeal which had already been filed by Bhaya Hari Saran Das, for substitution of the name of Mahant Har Narain Das for that of Bhaya Hari Saran Das. There appear to have been some mistakes in the lower appellate Court, and I cannot find that this substitution was ever validly effected, but a correction of the names was made in the petition of ap-

peal although not signed by the Judge and the appeal was heard by the Judge, without any objection being made to the effect that alteration of names had not been properly effected. I am, therefore, prepared to find that the correction had been made and that Mahant Har Narain Das is now the appellant in this case.

The lower appellate Court appears to have misconceived the order passed in appeal from the decision of the Judge of this Court in the suit on the original side. The appellate Court ordered that mesne profits should be allowed to the plaintiff from the date on which the suit was filed and not from an earlier date as decided by the Court of first instance. The learned Judge of the Court below appears to have considered that this order of the appellate Court negatived the title of Mahant Har Narain Das to recover arrears of rent. As far as I am aware no such order was passed. The order related to the rights of Mahant Har Narain Das to recover mesne profits from Bhaya Hari Saran Das. The term “mesne profits” does not exclude arrears for previous years which may be claimed and recovered at a later period than that for which they accrue, and I am not satisfied that any order has been passed by the Chief Court which would affect the rights of Mahant Har Narain Das to recover arrears which were the subject of litigation between Bhaya Hari Saran Das and tenants during proceedings in the Chief Court on the original side. Moreover there are certain items in this account which became due before Bhaya Hari Saran Das took over the management of the property from Mahant Har Narain Das and it is difficult to see how any order of the Chief Court in the suit between these two persons can relate to the period when Mahant Har Narain Das was himself in undisputed possession of the property. I do not wish to fetter the lower appellate Court in any manner in the decision of this appeal but I consider that it must be decided on its merits, and it will be for the lower appellate Court itself to consider first, whether there is still any sum due to the plaintiff, and secondly, if so, what part of the arrears claimed can be lawfully decreed to him. The only point which I have actually decided is that an appeal in the name of Mahant Har

Narain Das can be and must be heard by the Court below. The costs will follow the result.

V.B./R.K.

Case remanded.

A. I. R. 1930 Oudh 53 (1)

STUART, C. J. AND RAZA, J.

Har Kishore—Applicant.

v.

Masum Ali Khan and others—Opposite Party.

Misc. Civil Revn. Appln. No. 4 of 1929, Decided on 8th November 1929 from order of Second Addl. Dist. Judge, Lucknow, D/- 1st September 1928.

Provincial Insolvency Act (5 of 1920), Ss. 35, 43 and 30—For failure to deposit costs of publication order, adjudicating insolvent cannot be annulled—Remedy for costs is by Chief Court of Oudh Rules, R. 277 (3).

An order adjudicating a person an insolvent cannot be annulled for failure to deposit costs of publication under S. 30. It can only be annulled under provisions of S. 35 or S. 43. Where costs are not deposited the only remedy for the Court is under R. 277 (3) to recover the costs from the insolvent's property if the property is sufficient for the purpose, or to remit the costs, if the property is insufficient. [P 53 C 1, 2]

A. P. Sen and G. P. Bajpai—for Applicant.

Khaliquzzaman—for Opposite Party.

Judgment.—The facts are as follows: Masum Ali was adjudicated an insolvent by the learned Additional District Judge of Lucknow at Unao under the provisions of S. 27, Act. 5 of 1920 on 20th January 1928. Under the provisions of S. 30 of the same Act a notice of the order of adjudication had to be published in the local Gazette. Under the rules framed by this Court under that Act it was for Masum Ali ordinarily to deposit the costs of publication. As he did not deposit the costs the learned Additional District Judge annulled the order of adjudication on 1st September 1928. One of the creditors has applied in revision against the annulment on the ground that the Court had no jurisdiction to annul the order for that reason. This objection must prevail. An order of adjudication once made can only be annulled under the provisions of S. 35 or S. 43, Act. 5 of 1920. Neither section provides for annulment on failure to deposit the costs of publication. R. 277 (3) of our rules gives a Court power either to recover the costs from the insolvent's property, if the property is

sufficient for the purpose, or to remit the costs, if the property is insufficient, and the Court below should have followed the rule, and should not have annulled the order of adjudication as it had no authority to do so. In these circumstances we set aside the order of annulment which we consider not to have existed and the receiver will continue to perform all such functions as functions with which he was originally invested from 1st September 1928 onwards. Costs on parties.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 53 (2)

WAZIR HASAN AND MISRA, JJ.

Mohammad Abid and others—Applicants.

v.

Jafar Husain—Opposite Party¹

Civil Revn. Appln. No. 59 of 1928, Decided on 16th March 1929, from an order of District Judge, Hardoi, D/- 26th September 1928.

Mussalman Wakf Act (42 of 1923) and Charitable and Religious Trusts Act (14 of 1920)—Applicability.

Where a substantial portion of the profits of the endowed property is earmarked for the support and maintenance of certain specified individuals who are also the relations of the settlor and the remaining portion for public of Shia community, the wakf is not wholly for public purposes and the Acts 14 of 1920 and 42 of 1923 are not applicable to it: *A. I. R. 1929 Oudh 225 (F.B.), Rel. on.* [P 54 C 1]

Ali Zahir—for Applicants.

Ghulam Hasan—for Opposite Party.

Judgment.—This is an application in revision under S. 115, Civil P. C. from the order of the District Judge of Hardoi, dated 26th September 1928. The applicants seek certain reliefs under Acts 14 of 1920 and 42 of 1923, in respect of a certain religious endowment administered by the opposite party. The reliefs have been refused by the learned District Judge on the ground that the Acts mentioned above are inapplicable for the reason that the deed of wakf on which the trust rests is a settlement partly for the benefit of poor relations and partly for the benefit of a section of the public belonging to the Shia community. It is agreed that if that is the true interpretation of the wakf in question the opinion of the District Judge is correct, having regard to the decision of the Full Bench of the Court in the case of *Syed Shabbir*

Husain v. Ashiq Husain (1), but it is argued that the wakf in question is a wakf wholly for public purposes.

We are unable to accept this interpretation. A substantial portion of the profits of the endowed property is earmarked for the support and maintenance of certain specified individuals who are also the relations of the settlor. This being the feature of the wakf in question it is impossible to hold that it is wakf wholly for public purposes. We accordingly dismiss this application with costs.

V.B./R.K. *Application dismissed.*

(1) A. I. R. 1929 Oudh 225 (F. B.).

A. I. R. 1930 Oudh 54

WAZIR HASAN, J.

Jang Bahadur and another—Plaintiffs—Appellants.

v.

Wazir Khan and others—Defendants—Respondents.

Second Appeal No. 431 of 1928, Decided on 12th November 1929, from decree of First Sub-Judge, Kheri, D/- 25th August 1928.

(a) Practice—Appeal—Facts in pleadings not altered—Party can contend for all legal consequences arising out of facts.

In an appeal so long as the facts given in the pleadings are not altered, it is open to a party to contend for the legal consequences arising out of those facts. [P 54 C 2]

(b) Civil P. C., S. 9—"Right of burial."

A right of burial is a civil right: 30 *Mad.* 15, *Foil.*; 17 *All.* 87 and 23 *Bom.* 666, *Ref.*

[P 54 C 2]

Ishri Prasad—for Appellants.

Mahabir Prasad—for Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the First Subordinate Judge of Kheri, dated 25th August 1928, reversing the decree of the Munsif of the same place dated 22nd December 1927.

The substance of the relief asked for in the suit, out of which this appeal arises, is that the defendants be estopped by means of a perpetual injunction not to use plots 1011 and 1019 situate in mahal Jang Bahadur, village Karyara, pargana Pasgavan, in the district of Kheri, as a graveyard to bury their dead therein. The defence was that the right to bury the dead had been exercised for long long years before the suit and that thereby the defendants had acquired a right in law to continue the practice. Some time this distinct statement of fact

raised in the defence was given the legal nomenclature of a prescriptive right, again of right by easement and finally in the Court of appeal it was called a customary right. The lower appellate Court on a consideration of the evidence has come to the conclusion that the defendants had been exercising the right claimed by them at least for the last 50 years and that therefore they acquired a customary right in law which cannot be taken away from them at the instance of the plaintiffs, who are the proprietors of the plots in question.

The first argument in appeal is that the lower appellate Court has made out a new case for the defendants. I am unable to accept the argument. As observed by the learned First Subordinate Judge that so long as the facts given in the pleadings are not altered it is open to a party to contend for the legal consequences arising out of those facts. A party is not bound to plead law. He is bound to plead facts and there is no question in the case that the facts pleaded embrace the case of a customary right. I, therefore, overrule this argument.

The second argument in support of the appeal is that the customary right is not established. Here again I agree with the Court below that all the elements required in proof of such a right are fully established by the evidence adduced in the case. The law bearing on the subject as to what are the essential elements which constitute such a right and which the law recognizes as such are stated in the case of *Kuar Sen v. Mamman* (1). This decision was followed in *Mohidin v. Shivalingappa* (2). In the case of *Kooni Meera v. Mahomed Meera* (3) the learned Judges who decided that case held that the right of a burial is a civil right and I agree with that view of the learned Judges.

The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

(1) [1895] 17 *All.* 87=(1895) A. W. N. 10.
(2) [1899] 23 *Bom.* 666=1 *Bom.* L. R. 170.
(3) [1907] 30 *Mad.* 15=16 *M. L. J.* 471.

A. I. R. 1930 Oudh 55

STUART, C. J., AND SRIVASTAVA, J.

Mata Baksh Singh and another—Defendants—Appellants.

v.

Mt. Thakurain Patraj Kunwar and others—Plaintiff and Defendants—Respondents.

First Appeal No. 15 of 1929, Decided on 4th November 1929, from decree of Addl. Sub-Judge, Bahraich, D/- 19th October 1928.

(a) U. P. Court of Wards Act (4 of 1912), S. 38—Certified guardian alienating property by order of Court—Lender need not enquire into expediency or necessity for loan.

Where there is an order of a Court authorizing the guardian of an infant to raise a loan on the security of infant's estate, the lender of the money is entitled to trust to that order and his is not bound to enquire into the expediency or necessity of the loan for the benefit of the infant's estate. The case would be different if fraud or underhand dealing were brought home to him: 11 Cal. 379 (P.C.), *Foll.* [P 55 C 2]

(b) U. P. Court of Wards Act (4 of 1912), S. 38—Where Court sanctions both interest and principal, minor cannot question rate of interest.

Where with relation to a loan raised by authority of a Court on security of infant's estate, the Court has sanctioned both principal and interest, it is not open to the infant to challenge the rate of interest: 11 Cal. 379 (P.C.), *Rel. on.* [P 55 C 2]

K. P. Misra—for Appellants.

M. Wasim and Khaliquzzaman—for Respondents.

Judgment.—This is an appeal by Mata Bakhsh Singh aged 24, and Sant Bakhsh Singh aged 16 under the guardianship of Thakur Mata Bakhsh Singh against a decision of the learned Additional Subordinate Judge of Gonda, decreeing the plaintiff-respondents' claim upon the basis of a deed of mortgage, dated 5th April 1913 executed by Thakurain Bhagwant Kuar the mother of the two appellants, who were then minors, transferring the minors' estate. The deed in question was executed with the express sanction of the District Judge of Gonda. Thakurain Bhagwant Kuar was the certificated guardian of her minor sons, who were wards of the Court. She could not legally alienate any of their property without the express permission of the Court, but she obtained this permission and the deed in question was executed with the express permission of the Court.

The amount of Rs. 7,000 consideration was paid in cash. The rate of interest was further sanctioned by the Court. The consideration was devoted almost entirely to the payment of the debts due from the minor's estate, a small balance of less than Rs. 100 being retained for necessary household expenses. The defence in the lower Court was that the plaintiff-respondent had failed to prove that the debts paid actually bound the defendants-appellants. We are of opinion that the evidence upon the record sufficiently established that all the debts paid actually bound the minors' estate. But we agreed with the finding of the learned Judge which decreed the suit not only for this reason. Here we have a case where there is an order of a Court authorising the guardian of the infants to raise a loan on the security of the infant's estate. In *Ganga Prasad Sahu v. Maharani Bibi* (1) at p. 50 (of 12 I. A.) their Lordships decided that in these circumstances the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infants' estate.

The case would be altered if fraud or under hand dealing were brought home to him but here there was not a suggestion of fraud or underhand dealing and the decision of their Lordships to the effect that it is sufficient for the plaintiff to say "I have got the order of the Court" affects here not only the question of principal but also the question of interest. In the case before their Lordships the District Judge had sanctioned a loan for the principal, and his order had not sanctioned any particular rate of interest, and in those circumstances their Lordships agreed that it was open to the infant to challenge the rate of interest, and in the end reduced the rate of interest to a rate lower than that allowed by the deed. But here not only did the District Judge sanction the amount of principal but also sanctioned the amount of interest, and the lender having obtained this sanction in respect of both principal and interest can meet the case on the simple assertion that the order of the Court had been obtained both as to principal and interest.

(1) [1886] 11 Cal. 379 = 12 I. A. 47 = 4 Sar. 621 (P. C.).

In these circumstances the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 56

STUART, C. J. AND RAZA, J.

Nigah Ali Khan and another—Defendants—Appellants.

v.

Aqilullah Khan—Plaintiff — Respondent.

Second Appeal No. 1 of 1929, Decided on 7th October 1929, from order of Addl. Sub-Judge, Hardoi, D/- 29th September 1928.

Limitation Act, S. 19 — Acknowledgment must be shown to have been made by party against whom right is claimed or by person through whom he derives title.

It is not sufficient to show that an acknowledgment has been made. It has to be shown that it was made by the party against whom the right is claimed or by some person through whom he derives title or liability : 32 Cal. 1077, *Appr.* [P 56 C 2]

Ali Raza for *H. Husain* — for Appellants.

Khaliquzzaman for *H. Wasim* — for Respondent.

Judgment.—There were many questions in appeal before the lower appellate Court. The only question with which we are concerned here is whether the acknowledgment made by Chandi Dayal and Bhola on 18th February 1921, binds the two appellants, Nigah Ali Khan and Kaley Khan? The learned counsel for the appellants admits that, if we accept the view taken by a Bench of the Calcutta High Court in *Krishna Chandra Saha v. Bhairab Chandra Saha* (1) at p. 1080 his contention must fail. In that appeal the learned Judges stated that one of the questions was to be decided on the construction of S. 19, Lim. Act. After quoting the words of the section they continued :

"It is not disputed that the acknowledgment made by defendant 1 in respect of the properties, which had not been sold, was perfectly good as against him. But it was also an acknowledgment given by a person through whom defendant 2 derived his title. It was given by the mortgagor and it was through that mortgagor that defendant 2 derived his title. It seems difficult therefore to get over the precise language of this section."

Here it is the case, that Nigah Ali Khan and Kaley Khan derived their title through Chandi Dayal and the acknowledgment in question was made by

Chandi Dayal and Bhola. The period from which the limitation began to run was from 11th October 1914, and the acknowledgment was made on 18th February 1921. The learned counsel for the appellants has argued that the decision of their Lordships of the Judicial Committee in *Syed Mohammad Ibrahim Husain Khan v. Ambika Prasad Singh* (2) goes against the view taken by the Bench of the Calcutta High Court. It is true that their Lordships held that in a claim on a deed of simple mortgage dated 17th February 1888, it was not possible to enforce priority on the basis of the circumstance that a zarepeshgi lease had been executed on 20th November 1874, although it might have been argued that the execution of the second deed operated as an acknowledgment within the meaning of S. 19, Lim. Act. It is sufficient to say here that no question of extension by acknowledgment was argued before their Lordships and that it is by no means certain that if such a question had been argued before them the argument would have been accepted on the particular facts of that case. The words of S. 19 have to be examined closely. The acknowledgment must be by the party against whom the right is claimed, or by some person through whom he derives title or liability. It is not sufficient to show that an acknowledgment has been made. It has to be shown that it was made by the party against whom the right is claimed or by some person through whom he derives title or liability.

In our view the decision in the *Calcutta* case states the law accurately and if that decision had not been in existence we should have arrived ourselves at the same conclusion upon the words of the section itself. Once having decided that Nigah Ali Khan and Kaley Khan derived their title from Chandi Dayal it follows that the period of limitation must be extended as a result of the acknowledgment. The view taken by the lower appellate Court is in our opinion correct. We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) [1905] 32 Cal. 1077=9 C.W.N. 868.

(2) [1912] 39 Cal. 527=14 I.C. 496=39 I.A. 68 (P.C.).

A. I. R. 1930 Oudh 57

STUART, C. J. AND RAZA, J.

Bisheshwar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 198 of 1929, Decided on 3rd May 1929, from order of Third Addl. Sess. Judge, Lucknow, D/- 15th February 1929.

(a) Criminal P. C., S. 269 (3)—Failure to write separate judgment does not vitiate the trial.

Failure to write a separate judgment in a case where the procedure laid down by S. 269 (3) is followed, does not vitiate the trial.

[P 58 C 1]

An accused was tried by a jury with an offence punishable under S. 395, Penal Code, and was acquitted being found not guilty. In the same trial he was tried for an offence under S. 396, Penal Code, with the same jury sitting as assessors. The Judge stated both cases for the benefit of jury and his summing up covered both the charges.

Held: that it was not necessary for the Judge after having summed up at great length to write again another full and elaborate judgment covering exactly the same ground so far as S. 396, I. P. C. charge was concerned and failure to write a separate judgment did not vitiate the trial where nothing was gained by accused in repeating the same remarks in two separate documents: *A. I. R. 1922 Mad. 502, Ref.*

[P 57 C 2]

K. P. Misra—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The learned counsel for the appellant has taken a preliminary objection that there is no judgment such as is required by the Criminal Procedure Code in existence against his client. The circumstances are these: Under special rules laid down by the Local Government certain Sessions cases triable in the Lucknow District are tried by a Sessions Judge and a jury and other sessions cases are tried by a Sessions Judge with the aid of assessors.

Under the provisions of S. 269, Criminal P. C., when an accused in these circumstances is charged at the same trial with several offences of which some are and some are not triable by jury, he is tried by the Court of Sessions and a jury for such of those offences as are triable by jury and by the Court of Sessions with the aid of the jurors as assessors for such of them as are not triable by jury. In this particular case the above procedure was followed. The appellant was tried by a jury for an offence punishable under S. 395, I. P. C., and was found not

guilty. He was accordingly acquitted on that charge. In the same trial he was tried for an offence punishable under S. 396, I. P. C. As this offence was not triable by a jury he was tried with the same jury sitting as assessors. It was necessary for the learned Sessions Judge to state both cases for the benefit of the jury. He did so. His summing up, which was very clear and very full, covered both charges. The heads of the charge, which he dictated, covered 30 type-written pages and in his charge he has gone over the whole ground in respect of both the charges, has stated the law, has stated the facts, and has discussed the evidence for and against in respect of every one of the accused persons. As far as he possibly could, he refrained from indicating his opinion, as to the value of the evidence. He would not have been in the wrong if he had indicated his opinion, provided he had not attempted to force his opinion on the jury, but he did not indicate his opinion against any accused. He had told the jury that in his opinion there was no evidence upon which they could convict the appellant on a charge under S. 395.

The jury accepting that view acquitted the appellant. As assessors they found him guilty under S. 396. The Judge then wrote a further order in which he stated his agreement with the views of the jury as to the value of the evidence against the appellant on the charge under S. 396. He then found him guilty and proceeded to convict him. Now it is argued that this procedure was wrong and that it was necessary for the Judge, after having summed up at great length, after having stated the heads of his charge to the jury and summarized them in a type-written note of thirty pages to write again another full and elaborate judgment covering exactly the same grounds in so far as the S. 396 charge was concerned. It is suggested that his failure to write this judgment vitiates the trial. The only decision which we can find reported in the regular law reports dealing with this point is the decision of a Full Bench of the High Court of Madras in *A. T. Sankaralinga Mudaliar v. Narayana Mudaliar* (1). In that case the Full Bench decided that the failure to write a regular judgment might be considered an error in procedure.

(1) A.I.R. 1922 Mad. 502=45 Mad. 913 (F.B.).

sure but that, if it were, it was a mere irregularity cured by S. 537, Criminal P. C. There is no decision reported in the recognized law reports to the effect that the failure to write a separate judgment vitiates the trial. The learned counsel for the appellant informs us that there is a decision in "unreported criminal cases of the Bombay High Court" edited by Ratan Lal Ranchhod Das which supports that view, but we do not consider that under the law we should be justified in considering any decision other than the authorized decisions. We would go further than the Madras High Court in this respect and would look at the substance of the Criminal Procedure Code on this point. The Criminal Procedure Code lays down among the requisites of a judgment of this nature that it should be either written by the presiding officer of the Court or taken down from his dictation. Here it was taken down from his dictation. Every page if dictated has to be signed by him. Here every page is signed by him. It has to be dated and signed by the presiding officer in open Court at the time of pronouncing it. It was dated and signed by the presiding officer at the time of pronouncing it. The judgment should specify the offence (if any) of which, and the section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. All these particulars are given. The judgment has to contain the point or points for determination. The point or points for determination are given in the charges to the jury. The judgment has to give the decision. The decision is given in the subsequent order. The judgment has to give the reasons for the decision. The reasons for the decision are given in the subsequent order. These are all the requisites.

We consider that the charge to the jury read together with the subsequent order compose a good judgment in law and we would consider it most unfortunate if they did not do so. Nothing is gained by the accused or anyone else by repeating the same remarks in two separate documents and, if it unfortunately were the law that when the Judge has already said what was requisite in one part he should have to copy it over again into another, the law would

stand in need of revision. But as we read the law the objection is not founded. We now examine the appeal on the merits. The appellant having been convicted by the Judge sitting with assessors has every right to challenge the conviction on the merits. The evidence against the appellant is that he was implicated by an approver. That in itself does not carry the case very far: but there is against him the strong evidence of one of the victims of the dacoity, a man called Prithi and of the wife of Prithi. They identified the appellant distinctly as having been one of the dacoits. Prithi did not know the appellant before but he has picked him out of a crowd as one of the men who had assaulted him. Prithi's wife had seen the appellant before and she gave a good description of his appearance. She did not previously know his name. The evidence on the other side was evidence that the appellant had quarrelled with Prithi's wife because she had taken some mangoes of his without his permission and that he had quarrelled with the approver at a fair. He further put up evidence of alibi. The learned Judge and the assessors believed the evidence of identification and disbelieved the evidence produced for the defence. After hearing the appellant's learned counsel we have arrived at the same conclusion. We do not consider the sentence passed on the appellant excessive and dismiss the appeal.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 58

STUART, C. J.

Lachhman Prasad Joshi—Appellant.
v.

Emperor—Opposite Party.

Criminal Revn. No. 96 of 1929, Decided on 3rd October 1929, against order of Dist. Mag., Sitapur, D/- 11th September 1929.

(a) Criminal P. C., S. 478—Revenue Court is not barred from proceeding under S. 478 with regard to offence committed in mutation proceedings—U. P. Land Revenue Act (1901), S. 48.

Proceedings in mutation are proceedings within the meaning of S. 476 and the Court concerned with the proceedings is a revenue Court within the meaning of S. 48, Land Revenue Act of 1901. A revenue Court has therefore jurisdiction under S. 478 when the offence is committed before it in any proceedings even

non-judicial. Moreover mutation proceedings are judicial proceedings within the meaning of the Criminal Procedure Code though ordinarily they may not be so and there is no bar, therefore, to a revenue Court from proceeding under S. 478 with regard to an offence committed in mutation proceedings before it : *A. I. R. 1926 P. C. 100, Ref.* [P 59 C 2]

(b) Criminal P. C., S. 478—Code permits no appeal against order under S. 478—Magistrate passing order not as criminal Court but as revenue Court—District Magistrate cannot interfere under S. 435.

The Code permits no appeal against an order under S. 478. The powers of the District Magistrate under S. 435 and the following sections are confined to interference with criminal Courts subordinate to himself. When, therefore, a Magistrate does not pass an order as a criminal Court but as a revenue Court the District Magistrate has no jurisdiction to revise his order. [P 30 C 1,2]

R. F. Bahadurji—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The facts are as follows: A lady called Barkatunnissa, Taluqdarni of Ant taluqa died at Lucknow on 13th April 1927. Six persons Mahbub Ali and five others applied jointly for entry of names before the revenue Court. Certain other persons opposed them. Eventually Mr. Narsingh Narain Rao, Assistant Collector, First Class, Sitapur, recorded the names of Abadi Begam, Khalil Khan and Fida Ali as entitled to engage for the revenue of the Ant taluqa. In the course of the proceedings before him an alleged will was produced. Mr. Narsingh Narain Rao considering that this will was forged and that a criminal offence had been committed before him, and considering the case triable exclusively by the Court of Sessions completed an enquiry and committed certain persons to take their trial before the Sessions Court. He proceeded under S. 478, Criminal P. C. His attention was drawn to the commission of the offence by a complaint made by the police authorities before him in the course of his enquiry. As a result he committed to Sessions Rani Abadi Begam and nine others but refused to commit to Sessions Pt. Lachhman Prasad Joshi. After he had refused to commit Pandit Lachhman Prasad Joshi to Sessions, the District Magistrate of Sitapur purporting to act under the provisions of S. 437, Criminal P. C. committed Pandit Lachhman Prasad Joshi to Sessions on the same charge.

I have before me two applications, the

first is by Rani Abadi Begam and three other persons who were committed to Sessions by Mr. Narsingh Narain Rao and the second is by Pandit Lachhman Prasad Joshi. The first application was argued by Dr. Kitchlu and the second by Mr. Bahadurjee. Dr. Kitchlu took the objection that the offence, if any, had not been committed before a revenue Court in the course of the judicial proceedings, and that thus Mr. Narsingh Narain Rao had no jurisdiction under S. 478. Dr. Kitchlu suggested that Mr. Narsingh Narain Rao was not at the time presiding over a revenue Court. I do not accept that contention. Mr. Narsingh Narain Rao was concerned with proceedings in mutation, that is to say, it was his duty to record the names of some persons or others on a disputed succession under the provisions of S. 40, Local Act, 3 of 1901. He was thus acting as a Court of record and was a revenue Court within the meaning of S. 48, Local Act 3 of 1901. The proceedings in mutation were certainly proceedings within the meaning of S. 476, Criminal P. C. I am not disposed to consider that such an officer would have no jurisdiction under the provisions of S. 478, if he were conducting proceedings other than judicial proceedings when the alleged offence was committed before him. I base my view upon the wording of S. 478 which is as follows :

“ When any such offence is committed before any civil or revenue Court, or brought under the notice of any civil or revenue Court in the course of judicial proceedings ”

The construction I place upon these words is that a revenue Court has jurisdiction when the offence is committed before it in any proceedings. When the offence is brought to its notice the Court has only jurisdiction when it is brought under its notice in the course of judicial proceedings. The argument of Dr. Kitchlu would require the section to have been drafted as follows :

“ When any such offence is committed before or brought under the notice of any civil or revenue Court in the course of judicial proceedings.”

But apart from this, mutation proceedings are judicial proceedings within the meaning of the Criminal Procedure Code. Ordinarily speaking, mutation proceedings are not judicial proceedings. Their Lordships of the Judicial Commit-

tee have laid down in *Nirman Singh v. Rudra Partab Narain Singh* (1) :

"that proceedings for the mutation of names are not judicial proceedings, in which the title to and the proprietary rights in immovable property are determined. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with the greater confidence that the revenue for it will be paid."

But the judicial proceedings contemplated under S. 478 are judicial proceedings within the meaning of the Code of Criminal Procedure, as here the words have a special meaning. S. 4 (m) defines judicial proceedings to

"include any proceeding in the course of which evidence is or may be legally taken on oath."

In mutation proceedings evidence may be legally taken on oath and evidence is usually taken on oath. In this particular case evidence was taken on oath. I thus find that there was no bar to Mr. Narsingh Narain Rao proceeding under S. 478 and refuse to quash the commitment of Rani Abadi Begam and the other persons who have applied with her. I dismiss their application.

The case of Pandit Lachhman Prasad Joshi is, however, different. Mr. Narsingh Narain Rao refused to commit him to Sessions. Mr. Narsingh Narain Rao passed no order under S. 476 either making a complaint or refusing to make a complaint. If he had passed such an order an appeal would have lain under S. 476 B. He refused to commit Pandit Lachhman Prasad Joshi. In what capacity did he pass that order? He passed that order, in my opinion, as a revenue Court, although for the purpose of his enquiry he was exercising the powers of a Magistrate. Nevertheless he was not a criminal Court but a revenue Court exercising the powers of a Magistrate. The Code permits no appeal against an order under S. 478. The powers of the District Magistrate under S. 435 and the following sections are confined to interference with criminal Courts subordinate to himself. As I understand the case Mr. Narsingh Narain Rao did not pass this order as a criminal Court but as a revenue Court and as Mr. Narsingh Narain Rao was a revenue Court the District Magistrate

as District Magistrate had no jurisdiction to revise his order. In these circumstances I consider that the application of Pandit Lachhman Prasad Joshi must succeed. I allow application No. 96 and quash the commitment of Pandit Lachhman Prasad Joshi.

R.M./R.K.

Order accordingly.

* A. I. R. 1930 Oudh 60

STUART, C. J., AND RAZA, J.

Ganga—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 192 of 1929, Decided on 3rd May 1929 from order of Sess. Judge, Fyzabad, D/- 4th April 1929.

* (a) Criminal P. C., S. 162—Oral statement made by any person to police officer during investigation cannot be used for contradicting defence witness.

No oral statement made by any person to a police officer in the course of an investigation under this chapter and no record of any such oral statement can be used for any purpose in a Court of law in respect of an offence under investigation at the time when such statement was made, except for the purpose of contradicting a prosecution witness. It can only be used for that purpose under special conditions. Such a statement cannot be used for the purpose of contradicting a defence witness.

[P 62 C 2]

(b) Penal Code, S. 302—Incident on moonless night—Identification evidence of alleged eyewitnesses disbelieved—Only evidence of identification being dying deposition—Deceased not in a position to make long statement—Declaration obtained as answers to leading questions—Family of the deceased deliberately putting attack some hours back—Conviction was set aside.

Some persons were tried under S. 302 for having murdered one B. The occurrence took place on a moonless night under a thick tree. The so called eyewitnesses were disbelieved on the point of identification. The only evidence against the accused was the first report and the dying deposition of the deceased. The deceased was not able to make a long statement. The dying declaration was not an unaided effort but consisted of answers to leading questions put by the disbelieved alleged witness. The family of the deceased had deliberately chosen to put the attack back some two hours before it actually occurred.

Held: that under the above circumstances it was impossible to uphold the conviction.

[P 62 C 1]

*Jagat Narayan A. N. Mullah, Ram Nath Shargha and L. S. Misra—*for Appellants.

*G. H. Thomas, Govt. Advocate—*for the Crown.

(1) A. I. R. 1926 P. C. 100=1 Luck. 389=48 All. 523 (P.C.).

Judgment.—Ganga, Jaggu, Rama Shankar, and Dwarka have been convicted by the learned Sessions Judge of Fyzabad on a charge under S. 302, I. P. C., and sentenced to death subject to confirmation by this Court. They appeal. The reference in confirmation is also before us. On 10th December 1928, Nageshar a Brahman who resided in a hamlet of Bhati had left his village early in the morning with his son Baijnath to appear in a case before an Honorary Magistrate in the village of Jajwara some eight miles away. He and his son were answering a charge of house trespass in order to commit an offence, under S. 451, I. P. C. this charge being brought against them by the police on a complaint of a chamar. Three of the appellants Ganga, Jaggu and Rama Shankar had given evidence in this case and they were at the Court of the Honorary Magistrate that day for the purposes of cross-examination. Ganga, Jaggu and Rama Shankar went away. They went away at 4 o'clock and at sunset Nageshar and Baijnath returned to the village. It is in evidence that Baijnath pressed on, leaving his father to follow him. It appears that sometime that night Nageshar was the victim of a murderous attack with knives which took place under a mahwa tree 320 yards distant from his house. He received severe injuries as a result of which he died the following day.

The case for the prosecution is that the four appellants together with a man called Janga, the brother of Ganga, were waiting for Nageshar on his way home and that they attacked him at about 9 o'clock in the night before he had reached his home. The evidence in support of this story is the evidence of Baijnath who says that while in his own house he was aroused by the cries of his father and that he came out at the time and the place already stated and saw the attack on his father. There is further the evidence of a Brahman called Achebar who says that hearing cries he ran towards the spot and met certain men running away from the spot. Both Baijnath and Achebar have named the four appellants and Janga as the men whom they saw. In addition there is what purports to be a dying deposition of the deceased man Nageshar and a mass of oral evidence that Nageshar

from the beginning named the five men in question as his assailants. The case has been tried very carefully by an experienced Judge and it is only due to him where we differ with him to explain why the evidence which he considered reliable is not considered reliable by us. The first fact which struck us very forcibly but which has not struck him as forcibly is this. The post-mortem examination of the body of the deceased showed that his stomach contained a pound and a half of dal and rice which had hardly been digested. We have emphasized in this Court that too much stress should not be laid upon the condition of the food in a deceased man's body when the question is what time has passed between his death and his last meal. The reason why one does not usually lay great stress on such evidence is that the most recent medical researches have shown that sometimes the process of digestion is very greatly delayed when the deceased is an Indian and the food is vegetable food. But here we consider that we are on firm ground in drawing certain inferences from the fact that this food had hardly been digested at all. We know for certain that the deceased man had left his own village to go to Jajwara which is eight miles away very early that morning. It is most unlikely that very early that morning he would have eaten a pound and a half of cooked rice and dal. While he and his son were at Jajwara they would very likely have eaten something but, being Brahmans, if that something had been cooked food, they would have had to cook it themselves and it was most unlikely that they would cook dal and rice by the wayside. There is no evidence that they took any vessel for the purpose. Thus the condition of this food in his stomach would appear to us to indicate clearly that he was murdered after he had returned to his village, and after he had partaken of a meal. In other words he was not murdered at 9 p. m. but probably about 11 p. m. and this one fact appears to us sufficient to discredit the evidence of Baijnath, Achebar, and the others.

There is thus left alone the fact that the deceased man mentioned the names of the four appellants and the name of Janga as his assailants. Now we have it in the first

place that it was a moonless night. It was the night before a new moon. There may have been some light from stars but there was no other light. The deceased met his death under a tree. It is not impossible that in these circumstances he could have recognized his assailants, but there must be a distinct doubt as to whether he could have done so and this doubt is strengthened by the following circumstances: In the first place he mentions the name of Janga. Janga is Ganga's brother and it is in evidence that Janga had been absconding from the village for the last year. It is true he might have returned that night but the inclusion of Janga's name throws a further element of doubt into the case. We next come to the form of the first report and the dying deposition taken. The deceased had been very severely cut about the throat. It was possible for him to speak but it would have been very difficult for him to make a long statement and to make a detailed statement. There is no reason why he should not have been able to give the name of the person whom it is believed to be his assailants, but we are unable to believe that either the first report or the dying deposition were the deceased's unaided efforts. They appear to us to bear every sign of being recorded as answers to leading questions. Those leading questions must have been supplied by Baijnath. There is no reason to suppose that the deceased man did not give the names of the four appellants as four of those his assailants, but the anxiety to supply details does not assist towards an acceptance of the correctness of his statement. We thus have it that the only case against the appellants consists of the fact that the deceased man stated that they and Janga were the men who had attacked him. Every attempt has been made to improve upon this story by the addition of details which are not genuine details. The night was a moonless light. The star light may or may not have supplied sufficient means of recognition. The family of the deceased have deliberately chosen to put the attack back some two hours before it actually occurred and the evidence of identification given by Baijnath and Achebar does not convince us.

In these circumstances it is impossible to uphold the convictions.

Before we leave this case we have to note one point. The learned Sessions Judge permitted statement made before the police and recorded in the diaries to be brought on the record for the purpose of contradicting the witnesses for the defence. He was not right in adopting this course. S. 162, Criminal P. C. as amended is clear on the point. No oral statement made by any person to a police officer in the course of an investigation under this chapter and no record of any such oral statement can be used for any purpose in a Court of law in respect of an offence under investigation at the time when such statement was made, except for the purpose of contradicting a prosecution witness. It can only be used for that purpose under special conditions. Such a statement cannot be used for the purpose of contradicting a defence witness.

As a result the appeals succeed, the convictions are set aside and Ganga, Jaggu, Rama Shankar and Dwarka will be set at liberty.

V.B./R.K.

Appeals allowed.

* A. I. R. 1930 Oudh 62

STUART, C. J., AND RAZA, J.

Prag Datt—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 103 of 1929, Decided on 15th November 1929, from order of Addl. Sess. Judge, Bahraich, D/- 4th September 1929.

*** Penal Code, S. 197—False affidavit sworn in by accused for supporting transfer application—No protection is given to the accused.**

Where the law does not prohibit the administration of an oath or solemn affirmation and where in fact the practice of the Court directs that an oath or solemn affirmation must be administered before the affidavit is accepted, there cannot be any protection for an accused person who commits perjury in such a document. The fact the affidavit was made for supporting transfer application in a case in which he was an accused is immaterial: 12 *Mad.* 451, *Dist.*; 19 *All.* 200 and 28 *All.* 331, *Doubted and not Foll.* [P 63 C 2]

*A. N. Mulla—*for Applicant.

*G. H. Thomas—*for the Crown.

Judgment.—One of the questions raised in this criminal revision is of considerable importance. The applicant Prag Datt filed what purported to be an affidavit asking for the transfer of two cases one of which was a case in which

he was a complainant and the other of which was a case in which he was an accused. The cases were criminal cases pending in the Courts of two Magistrates. The learned District Magistrate of Bahraich considering that a statement in the so called affidavit was false has ordered the prosecution of Prag Datt under the provisions of S. 476, Criminal P. C., and his order has been upheld by the learned Additional Sessions Judge of Bahraich. The first point taken by the learned counsel is that as Prag Datt was an accused person in one of those cases he could not be prosecuted for giving false evidence, even if he had given false evidence. The position taken by the learned counsel is that an accused person who makes an affidavit to support a transfer application or to support an application for bail or to support any other application of the same kind can make any false statement he wishes and that he cannot be prosecuted under the law.

The learned counsel has certain decisions which support his view. The first of these was a decision of a single Judge of the Allahabad High Court *In the matter of Barkat* (1). The second was a decision which followed the rule laid down in the previous decision. It was of another Judge of the Allahabad High Court in *Emperor v. Bindeshri Sing* (2). There is further a decision of a Bench of the Madras High Court in *Queen Empress v. Subbaya* (3). But this last has no bearing on the subject. In that case an accused person had been ordered by a Court to make a statement of solemn affirmation. He was subsequently prosecuted for making a false statement. As the action of the Court in directing that person to make a statement on solemn affirmation was directly opposed to the provisions of S. 5, Oaths Act (10 of 1873) the Bench decided that the statement itself could not be taken as a statement on oath and that thus there could be no prosecution. But in the two Allahabad cases the facts are very different. Here it was a question of an affidavit made by an accused person who had a right to make an affidavit and who was not

compelled to make the affidavit on oath before it could be accepted. Mr. Justice Blair at p. 201 of the first decision said :

"For my own part, I have no doubt that the legislature intended to protect an accused person from the ordeal of examination as a witness and to render him incapable, therefore, of being punished for the making of false statements upon oath, or otherwise, so long as his case is sub judice."

His Lordship did not refer to any express provision of the law which supported this view. He appears to have considered that he was following the spirit of the law in laying down that an accused person even when under the law capable of making an affidavit who made a false statement was protected in his perjury. This view was followed by Mr. Justice Richards in the second case. The learned Judge, however, added nothing to the reasons in the first case. He stated solely that he considered himself bound by the previous decision. We are of opinion that this view cannot be accepted. S. 193, I. P. C. lays down that whoever intentionally gives false evidence in any stage of a judicial proceeding has committed an offence. Giving false evidence is defined by S. 191 and an affidavit is evidence within the meaning of S. 191. The question of the fabrication of false evidence must also be considered. We cannot find it possible to accept the view of the learned Judges of the Allahabad High Court greatly as we respect them. When the law prohibits the administration of an oath or solemn affirmation to an accused person the matter is of course different. In those circumstances there can be no perjury. But where the law does not prohibit the administration of an oath or solemn affirmation and where in fact the practice of the Court directs that an oath or solemn affirmation must be administered before the affidavit is accepted we cannot see how there can be any protection for an accused person who commits perjury in such a document. If the case stood alone on the first point the present application would certainly fail, but the learned counsel has brought to our notice a circumstance which appears to have been overlooked by the Courts below. On an examination of the so called affidavit we find that it was never sworn at all. It was admittedly admit-

(1) [1907] 19 All. 200=(1897) A. W. N. 23.

(2) [1906] 28 All. 331=3 A. L. J. 98=(1906) A. W. N. 42.

(3) [1889] 12 Mad. 451.

ted by error although no oath or solemn affirmation had been taken as to the truth of its contents. The applicant cannot be prosecuted for giving false evidence or fabricating false evidence in the absence of an oath or a solemn affirmation and we allow the application and set his prosecution aside.

V.B./R.K. *Application allowed.*

A. I. R. 1930 Oudh 64

STUART, C. J. AND RAZA, J.

Mohammad Naeemullah and others—
Plaintiffs—Appellants.

v.

Rampal and others— Defendants —
Respondents.

Second Appeal No. 398 of 1928, Decided on 1st October 1929, against decree of Dist. Judge, Rae Bareilly, D/- 10th October 1928.

Limitation Act (as amended in 1922), S. 14—S. 14 applies to proceedings under S. 111, U. P. Land Revenue Act (1901)—But party displaying great carelessness is not entitled to benefit of S. 14.

Since Act 10 of 1922 was passed the provisions of S. 14 undoubtedly apply to proceedings under S. 111, Land Revenue Act of 1901. In other words, when a party is required to institute within three months a suit in civil Court for the determination of such a question and he does institute such a suit and prosecutes it with due diligence he shall have the right, if it be discovered that the Court in which he has instituted the suit has no jurisdiction, to obtain the extension contemplated in S. 14 when proceeding in the Court which has jurisdiction: 18 O. C. 343 and 4 O. L. J. 553, held no longer good law.

• But it must be shown that the party can be granted this aid; where the party is guilty of great carelessness and the error committed is not an error which could be committed by a reasonable and prudent man exercising due diligence and caution, the party is not entitled to the benefit of S. 14: 3 O. L. J. 387, *Rel. on.*

[P 65 C 1]

*Naim Ullah—*for Appellants.

*M. Wasim and Kaliquzzaman—*for Respondent 1.

Judgment.—The facts are these: Rampal a purchaser of interest of Fazilat Bibi, a cosharer in Chak Nezam, Mohal Saera Bibi, made an application for partition under the provisions of Chap. 7, Local Act 3 of 1901. Mohammad Naeemullah and others, the plaintiff-appellants, preferred an objection involving a question of proprietary title. The Assistant Collector required them under the provisions of S. 111 of the Act to institute within three months a suit in a civil

Court for the determination of the question. They instituted a suit within three months in the Court of the Munsiff. They valued the relief at Rs. 500. The Munsiff returned the plaint on the ground that the relief had been undervalued and that the suit was beyond his jurisdiction. The plaint was then presented to the Court of the Subordinate Judge, who dismissed the suit on the ground that, as it had not been instituted within three months of the order of the revenue authorities it must fail. The learned District Judge in appeal took the same view and the plaintiffs-appellants have come here.

On the general question of limitation applicable to S. 111, Local Act 3 of 1901 (The Land Revenue Act) it was laid down in Oudh by Mr. Lindsay in *Dhanesh Prasad v. Gaya Prasad* (1) that the Limitation Act (Act 9 of 1908) had no application to suits contemplated by S. 111, and that it was not possible under the law for the period of limitation to be extended with reference to provisions of S. 14, Lim. Act. The same view was taken by the present Chief Judge of the Chief Court as Additional Judicial Commissioner in *Nurul Hasan v. Sarju Prasad* (2). But both these decisions were passed before Act 10 of 1922 was passed amending the Limitation Act, Formerly the relevant portion of S. 29, Lim. Act 1908 read as follows:

"Nothing in this Act shall (a) affect S. 25 Indian Contract Act, 1872, (b) affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

Thus before 1922 the period of limitation applicable to proceedings under Local Act 3 of 1901 was to be found in that Act itself and was not affected by anything stated in the Limitation Act. But since the passing of Act 10 of 1922 the law has been altered and it now reads:

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by schedule 1, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in S. 4, Ss. 9 to 8 and S. 22 shall apply only in so far as and to the extent to which, they are not expressly excluded by

(1) [1915] 18 O. C. 343=33 I. C. 365.

(2) [1917] 4 O. L. J. 553=43 I. C. 473.

such special or local law and the remaining provisions of this Act shall not apply."

We consider that since Act 10 of 1922 was passed the provisions of S. 14, Lim. Act, undoubtedly apply to proceedings under S. 3, Act 3 of 1901. In other words, when a party is required to institute within three months a suit in the civil Court for the determination of such a question, and he does institute a suit in a civil Court for the determination of such question, and prosecutes it with due diligence he shall have the right, if it be discovered that the Court in which he has instituted his suit has no jurisdiction to obtain the extension contemplated by S. 14 when proceeding in the Court which has jurisdiction. Thus the appellants have a right to invoke the aid of S. 14, but at the same time they must show that they can be granted this aid. Upon that question, it is to be noted that on the findings of the Courts below (with which we agree) the appellants displayed the greatest carelessness in their proceedings. They valued the relief at Rs. 500 for the purpose of jurisdiction. This is a valuation which on the face of it is very much below the correct valuation. The plaintiffs-appellants are in possession of the land and should know what its value is. Yet they went into a wrong Court and valued their relief at Rs. 500 when they should have known that the relief was actually some Rs. 4,500. It is true that they did nothing fraudulent. They did not attempt to defraud the Government of stamp duty for, as the suit was a suit for a declaration, the stamp duty would in any circumstances have been what they paid, that is to say Rs. 10, but they were careless to a degree and they did not act with good faith in so much as they did not act with due care and attention. The Chief Judge of this Court decided when he was Additional Judicial Commissioner of the Judicial Commissioner's Court in the year 1916 an appeal in which this question required judicial determination: *Ram Jag Pandey v. Bhagwant Dat Pandey* (3). We accept the views enunciated in that single Judge decision, and applying those views we are of opinion that the plaintiffs-appellants cannot claim the benefit of S. 14, as they did not prosecute in the

(3) [1916] 19 O. C. 367=30 I. C. 702=3 O. L. J. 387.

Munsiff's Court in good faith. There is nothing to be said against their honesty but they cannot be held to have acted in good faith. We may repeat the remarks that were made in 1916

"Unless the provisions of S. 14 are to be applied indiscriminately to extend to the period in all cases in which the plaintiff has acted without fraud, it is obvious that some general criterion must be laid down to distinguish cases in which indulgence is to be granted from cases in which indulgence should not be granted. I do not propose to enact any hard and fast rule, but it appears to me that it would not be an unfair working rule to lay down that indulgence should be granted only in cases where the error is an error which might be committed by a reasonable and prudent man exercising due diligence and caution."

Applying these principles we find that the error here was not an error, which could be committed by a reasonable and prudent man exercising due diligence and caution. In these circumstances we accept the finding of the Courts below and dismiss this appeal with costs.

R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 65

SRIVASTAVA, J.

Drigbijai Singh and another—Judgment-debtor and objector—Appellants.

v.

Bhagwan Dass—Decree-holder—Respondent.

Execution Decree Appeal No. 39 of 1929, Decided on 23rd October 1929, from decree of the Sub-Judge, Mohanlalganj, D/- 19th April 1929.

(a) Civil P. C., O. 21, Rr. 11, 14 and 17 (as amended by Oudh Chief Court)—Amendment takes effect retrospectively—It is not obligatory to pay process fee with application.

If an application for execution is returned to the decree-holder to allow him to remedy any defect in the application, then in such a case the amendment takes effect retrospectively and dates back to the date when the application was first presented. There is no rule in the Civil Procedure Code which might make it obligatory for the decree-holder to file the process fee with his application for execution.

[P 66 C 2]

Order rejecting application which is not accompanied by process fee, is mistaken and the proper course is to order the decree-holder to file process fee within reasonable time. An erroneous order of the Court directing return of application cannot invalidate the prosecution which is valid in all other respects.

[P 66 C 2, P 67 C 1]

(b) Civil P. C., S. 11—Objection to application for execution once adjudicated as without force, operates as *res judicata*.

Where the objection against execution application is raised on the ground of limitation and

there is an adjudication between the parties it being held that the objection is without force, a fresh objection is barred by the principle of res judicata, when there has been no appeal from the order. [P 67 C 1]

Bhawani Shankar—for Appellants.

Hyder Husain—for Respondent.

Judgment.—This is an appeal by the judgment-debtors.

The relevant facts are that on 7th November 1913 the decree-holder respondent obtained a preliminary decree for sale against the judgment-debtors appellants. This decree was made final on 21st August 1915. Various applications for execution were made during the years 1917, 1919, and 1921 but they are not material for the purposes of this appeal. On 31st May 1924 the decree-holder made his fourth application for execution and on 23rd March 1925 the judgment-debtors made an objection on the ground that the application in question was barred by limitation. This objection was overruled. Another application was made in 1926 but it was also consigned to records. Ultimately the sixth application which has given rise to the present appeal was made on 22nd August 1927. It was returned because the process fee did not accompany it. It was filed again the next day namely on 23rd August 1927.

The judgment-debtors objected on two grounds: (1) that the application was barred by the 12 years rule under S. 48, Civil P. C., and (2) that the present application was not maintainable by reason of the 4th application for execution dated 31st May 1924 having been barred by time. These objections have been overruled by the Courts below. The same objections have been pressed before me in support of this appeal. The period of 12 years from the date of the final decree expired on 21st August 1927. Admittedly 21st August 1927 was a public holiday. Therefore the application presented on 22nd August 1927 was under the provisions of S. 4, Lim. Act (9 of 1908), within time. Order 21, Rr. 11 to 14 lay down the requirements for a valid application for execution. Order 21, R. 17, sub-R. (1) as amended by the Oudh Chief Court provides that if any of those requirements:

“have not been complied with, the Court may allow the defect to be remedied then and there or may fix a time within which it may be remedied and in case the decree-holder fails to

remedy the defects within such time, the Court may reject the application.”

Sub-rule (2) of this rule provides that: “where an application is amended under the provisions of sub-R. (1) it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.”

Thus it will appear that if an application for execution is returned to the decree-holder to allow him to remedy any defects in the application, then in such a case the amendment takes effect retrospectively and dates back to the date when the application was first presented. I am not aware of any rule of law contained in the Civil Procedure Code or any of the rules framed by the Oudh Chief Court, and I have not been referred to any such rule by the learned counsel for the appellants, which might make it obligatory for the decree-holder to file the process fee with his application for execution. All that I find in the Oudh Civil Rules is that R. 178 provides that:

“the execution application may, if the decree-holder so desires be accompanied by all the fees payable for the several steps in execution at different stages of the execution proceedings.”

I am therefore of opinion that the application for execution as it was presented on 22nd August 1927 was not in any way defective and the order passed by the learned Munsif directing the return of the application was a mistaken order. The proper course for the learned Munsif to adopt was to order the decree-holder to file the requisite process fee within reasonable time and not to have returned the application by reason of its not being accompanied with the process fee. As it is, the decree-holder complied with the order passed by the learned Munsif and filed the application with the necessary process fee at the earliest possible opportunity, namely, on the day following the Munsif's order. The question, therefore, arises whether under the circumstances the decree-holder is to suffer for the mistake of the Court and whether he is, by reason of the process fee not having been affixed to the application at the time when it was presented, to be placed in a worse position than he would have been in case the application had been defective in the matter of any of the particulars laid down in Rr. 11 to 14, O. 21, Civil P. C. I think the answer is obvious. It is a well recog-

nized principle that "an act of the Court shall prejudice no man." Further the application as it was presented on 22nd August 1927, not being defective in any way its presentation to the Court on 22nd August must be considered to be a valid presentation. The erroneous order of the Court directing its return cannot invalidate this presentation which was valid in all respects. I am, therefore, in agreement with the Courts below that the application must be deemed to have been an application in accordance with law and presented on 22nd August 1927, which is the date of its first presentation. It follows that the application was not barred by the 12 years rule, and the objection based on that ground must be overruled.

As regards the second objection it would be sufficient to say that the judgment-debtors on 23rd March 1925 raised an objection on the ground of limitation against the application for execution dated 31st May 1924. There was an adjudication by the Court in respect of the objection and it was held that the objection was without force. There was no appeal against this order and it became final between the parties. The question having once been raised and decided between the parties, the present objection is barred by the principle of *res judicata*.

The appeal is therefore without force and must fail. It is accordingly dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Oudh 67

STUART, C. J., AND WAZIR HASAN, J.

Balbhaddar Singh and another—Defendants—Appellants.

v.

Sheo Pearey Lal—Plaintiff—Respondent.

First Appeal No. 99 of 1928, Decided on 15th October 1929 from decree of Sub-Judge, Unao, D/- 21st April 1928.

Limitation Act, S. 19—Written statement in another suit, admitting rights of mortgagee is sufficient acknowledgment.

Section 19 does not prescribe that an acknowledgment should be express; it may be implied. Nor is it necessary that it should specify the exact nature of the right. The question as to whether there is or is not an acknowledgment is one of construction of document in which the alleged acknowledgment is contained and to construe the document is

function of the Court : 33 *Cal.* 1047 (*P. C.*), *Rel. on.* [P 68 C 2, P 69 C 1]

A sued B and C for foreclosure of a mortgage. The suit was *ex facie* time barred but A alleged written acknowledgment on the part of B and C. One D had filed a suit against B and C. D impleaded A as a defendant-mortgagee. B and C in the written statement of D's suit signed by them admitted the allegation of A's mortgage.

Held: that there was sufficient acknowledgment. In D's suit A was clearly impleaded by D in the character of a mortgagee under the particular mortgage-deed and this was admitted in writing by B and C. This being so, the requirements of S. 19 were amply satisfied. D's plaint and written statement by B and C could be read as evidence of acknowledgment. *Furston v. Clogg*, 10 *M. & W.* 572, *Rel. on.*

[P 68 C 2]

K. P. Misra and Kashi Prasad—for Appellants.

M. Wasim, Ali Zaheer and Bishambhar Nath—for Respondent.

Judgment.—This is the defendants' appeal from Unao dated 21st April 1928 in a claim for foreclosure of a mortgage dated 22nd December 1910. For the purposes of this judgment it is sufficient to state that one of the items of property comprised in the mortgage in suit is a two pies share in village Ranipur, pargana Gauranda Parsandan, district Unao.

The suit, out of which this appeal arises, was instituted in the Court of the Subordinate Judge of Unao on 21st May 1927 and the deed of mortgage provided for repayment of the mortgage money on the expiry of six months from the date thereof. Under Art. 132, Sch. 1, Lim. Act, 1908, the plaintiff's suit was *ex facie* barred by limitation but in para. 3, sub-para. (a), of the plaint the plaintiff pleaded that by reason of a certain written acknowledgment dated 8th November 1917 made by the two defendants the suit was not barred by the rule of limitation mentioned above. The question in the case, with which we are concerned in the appeal and this was the only question argued before us, is as to whether there is or there is not evidence on the record of this case to establish the requirements of an acknowledgment in writing as prescribed by S. 19, Lim. Act, 1908. The learned Judge of the trial Court has answered this question in the affirmative and we have come to the conclusion that he is right.

On 17th August 1917 one Puttu Lal filed a plaint in the Court of the Sub-

ordinate Judge of Unao for the purpose of obtaining a decree for redemption in respect of certain mortgages, which, according to the allegations made in the plaint, related to a 2 annas zamindari share in the village of Ranipur, pargana Gauranda Parsandan, in the district of Unao. The plaintiff of the present suit was impleaded as defendant 8 in that suit. There was also one Lala Atal Behari Lal who was impleaded as defendant 9 in the array of the defendants in Puttu's case. In para. 3, sub-para. 3 of Puttu's plaint it was stated that "defendants 8 and 9 are mortgagees of a part of the mortgaged property." The defendants to the present suit were also the defendants in Puttu's suit as defendants 1 and 2 respectively. These defendants filed their written statement in answer to Puttu's plaint on 8th November 1917 in the Court of the Subordinate Judge of Unao. In this written statement they stated as regards the allegations in para. 3 of the plaint, "is correct." Both the defendants signed the written statement with their hands. The plaintiff of the present suit, who was defendant 8 in Puttu's suit as already mentioned, filed a certified copy of the registered deed of mortgage dated 22nd December 1910, now in suit. In the proceedings of Puttu's case as well as on the list accompanying the certified copy, the mortgage of 22nd December 1910 was admitted by the defendants. Balbhaddar Singh defendant 1, also signed the endorsement as to admission on the list mentioned above. In the present case also it was admitted on behalf of the defendants that:

"there never existed any mortgage deed other than the mortgage deed in suit"

between the parties. It follows therefore that the mortgage now in suit was the mortgage which was alleged by Puttu in para. 3 of his plaint under which the present defendants held a two pies share in the village of Ranipur and that it was the same mortgage which was admitted by the defendants to be correct in the written statement filed by them in Puttu's suit.

The argument in appeal is that the aforementioned admission of the mortgage in suit is an admission only as to the fact of the execution of the mortgage and not of a liability thereunder and therefore S. 19, Lim. Act, 1908, does not

apply. We are unable to accept this argument. In Puttu's suit the plaintiff of the present suit was clearly impleaded by Puttu in the character of a mortgagee and as a person possessed of a mortgagee's title under the mortgage of 22nd December 1910 and this was admitted in writing by the defendants. This being so, we are of opinion that the requirements of S. 19, Lim. Act, are amply satisfied. It is true that the learned Subordinate Judge found in Puttu's case that the mortgage of 22nd December 1910 related to property different from the property in respect of which Puttu had claimed redemption and on that ground he had discharged the present plaintiff from the array of the defendants. We think that this finding in Puttu's suit does not affect the acknowledgment of liability which these defendants made in writing in respect of the mortgage of 22nd December 1910. Puttu had clearly set forth that mortgage as a subsisting mortgage held by the present plaintiff and this, as we have already stated, was admitted by the defendants.

There can be little doubt that Puttu's plaint and the defendant's written statement in answer to that plaint can both be read as evidence in proof of the defendant's acknowledgment of the mortgage in suit. This is clear from the decision in the case of *Fursdon v. Clogg* (1). In considering the meaning of the word "acknowledgment" in S. 19, Lim. Act, their Lordships of the Judicial Committee in the case of *Maniram v. Rupchand* (2), said:

"Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian Law. The question is whether a given state of circumstances falls within the natural meaning of a word which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the statute law of either England or India."

Section 19 of the Act mentioned above does not prescribe that an "acknowledgment" should be express. It may therefore be implied and according to the explanation attached to that section nor is it necessary that an acknowledgment should specify the exact nature of the right. On the evidence it is quite

(1) 10 M. & W. 572.

(2) [1908] 83 Cal. 1017=2 N. L. R. 130=39 I. A. 165 (P. C.).

clear that what was acknowledged in Puttu's suit by the defendants was the mortgagee's right under the mortgage of 22nd December 1910 and no other right.

The question as to whether there is or there is not such an acknowledgment as is required by S. 19, Lim. Act, must always be a question of construction of documents in which the alleged acknowledgment is contained and to construe the document is clearly the function of the Court. A large number of cases decided by the High Court in British India were cited before us on both sides but as just now said the question being one of construction it will serve no useful purpose to refer to those cases. In so far as the principle of law bearing on the question under consideration is concerned we think that the decision of their Lordships of the Judicial Committee already quoted supports the view which we are taking in this case.

Accordingly we dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 69

. SRIVASTAVA, J.

Mindai—Defendant—Appellant.

v.

Sajid Ali and another—Plaintiff—Defendant—Respondents.

Second Appeal No. 90 of 1929, Decided on 12th November 1929, from decree of Sub-Judge, Hardoi, D/- 4th December 1928.

(a) **Jurisdiction**—Suit partly cognizable by revenue Court and partly by civil Court—Civil Court must try whole case.

Where a suit is partly cognizable by the civil Court and partly by the revenue Court, the civil Court must decide the whole case. If therefore, a tenant brings a suit against the landlord and a subsequent tenant jointly, such suit is not cognizable by the revenue Court.

[P 70 C 2]

(b) **Jurisdiction**—Revenue Court's jurisdiction is limited to suits brought by tenant on ground of illegal ejection—Suit wherein tenant alleged his dispossession by rival tenant, is excluded from operation of Oudh Rent Act, S. 108 (10).

The exclusive jurisdiction of the revenue Courts is limited to suits brought by a tenant on the ground of his being illegally ejected by his landlord. But where a tenant comes into Court on the allegation that he has been dispossessed by the rival tenant, on the allegations made in the plaint, the case is excluded

from the operation of S. 108, Cl. (10), Oudh Rent Act : 18 O. C. 48 : A. I. R. 1924 Oudh 14 Dist. : A. I. R. 1927 Oudh 108, Expl. [P 70 C 2]

(c) Oudh Rent Act, S. 20—S. 20 is not exhaustive—Relinquishment under private arrangement between tenant and landlord is possible—But in such relinquishment tenant must make actual surrender of possession.

The provisions of S. 20, Oudh Rent Act, in respect of the relinquishment of land by a tenant are not exhaustive and it is possible for a tenant to make a valid relinquishment under a private arrangement between himself and the landlord. But in order that any such relinquishment by means of an amicable arrangement between the tenant and landlord may be valid it is necessary that the tenant must make actual surrender of possession in favour of the landlord. [P 71 C 1]

(d) Evidence Act, S. 103—Subsequent tenant alleging valid surrender by former tenant—Burden lies on him to prove that possession was given over Oudh Rent Act S. 20.

It is for the rival tenant in order to make out a valid surrender to establish that the previous tenant has given over possession at the latest by the commencement of the year, when the patta in his favour took effect.

[P 71 C 1]

K. P. Srivastava and L. S. Misra—for Appellant.

Kedar Nath Tandon—for Respondent 1.

Judgment.—This is an appeal by the defendant against the judgment and decree dated 4th December 1928 passed by the Subordinate Judge of Hardoi setting aside the decision dated 29th May 1928 passed by the Munsif of Shahabad.

The appeal arises out of a suit for possession in respect of a plot No. 512. The plaintiff brought a suit on the allegation that his father Nasir Ali was a tenant of the plot in suit along with other plots under a patta, Ex. 1 dated 23rd June 1919; that on his father's death he succeeded to the tenancy holding and was wrongly dispossessed of the plot in dispute by the defendant 1, on 26th June 1926. The defendant denied the plaintiff's allegations and pleaded that he had lawfully entered into possession of the plot in dispute under a patta dated 10th January 1925 executed in his favour by the landlord who had obtained a relinquishment of the said plot from the plaintiff. The landlord though not originally impleaded as a defendant was subsequently joined as a party defendant. It appears that defendant 1 in his oral pleadings also raised the plea about the suit

not being maintainable in the civil Court.

The learned Munsif decided the question of jurisdiction against the defendant but decided the other points in his favour. He was of opinion that the plaintiff was no longer a tenant of the plot in suit and that defendant 1 was lawfully in possession as a tenant of the landlord, defendant 2. On these grounds he dismissed the plaintiff's suit. On appeal the learned Subordinate Judge has disagreed with the decision of the trial Court and held that there had been no valid relinquishment of the plot in suit by the plaintiff and that the landlord was not therefore competent to let it out to the defendant. He accordingly reversed the decision of the trial Court and decreed the plaintiff's claim.

The learned counsel for the defendant appellant has pressed two contentions in support of the appeal. The first contention relates to jurisdiction. His argument is that the evidence shows that the dispossession of the plaintiff was by the landlord and not by the defendant appellant and that therefore it must be held that the suit was one cognizable by the revenue Court and that the jurisdiction of the civil Court was excluded by the provisions of S. 108, Cl. (10), Oudh Rent Act. I find myself unable to accept the contention. It is common ground between the parties, and the provisions of S. 108, Cl. (10) also are quite clear on the point, that a suit by a tenant against a landlord for recovery of possession of land from which he has been illegally ejected by the landlord is exclusively cognizable by the revenue Court. It is also admitted by the learned counsel for the defendant appellant that if a tenant is dispossessed by another tenant and a suit is brought against the said tenant, then such a suit between the two rival tenants is cognizable by the civil Court and not by the revenue Court. In the present suit as I have stated before the landlord was subsequently joined as a party defendant. So the suit as it stands now is a suit by a tenant against his landlord and a rival tenant jointly. If the suit had been against the landlord alone it would have been cognizable by the revenue Court. Similarly if it had been against the tenant alone

it is not denied that it would have been cognizable by the civil Court alone. The question is if the suit has been instituted jointly against the landlord and tenant whether cognizance of such a suit lies with the civil Court or with the revenue Court. It is well settled that where a suit is partly cognizable by the civil Court and partly by the revenue Court, the civil Court must decide the whole case. Applying this principle to the present case it will follow that the present suit against the landlord and the tenant jointly is not cognizable by the revenue Court. The matter may be looked at from another standpoint. The exclusive jurisdiction of the revenue Courts is limited to suits brought by a tenant on the ground of his being illegally ejected by his landlord.

In the present suit the plaintiff came into Court on the allegation that he had been dispossessed by the rival tenant defendant 1; so on the allegations made in the plaint the case is excluded from the operation of S. 108, Cl. (10), Oudh Rent Act. The learned counsel for the defendant appellant has relied on *Kalap Nath v. Mata Din* (1) *Gayadin Singh v. Chauharja Pande* (2) and *Gayadin v. Lodhi* (3). The first of these cases, *Kalap Nath v. Mata Din* (1) is a case in which the contest lay between two rival tenants. The landlord was not a party to this suit. It was held that S. 108, Cl. (10) did not apply. The case of *Gayadin Singh v. Chauharja Pande* (2) is also a case of the same nature in which the dispute was between two tenants and the zamindar had not been impleaded. The learned counsel has relied upon an observation in this judgment to the effect that if it were a case in which the plaintiff by impleading the zamindar might have filed a suit in the revenue Court, the learned Judge would have taken a different view of the question of jurisdiction. This observation is a pure obiter and I cannot attach any value to it. The statement of the facts of these two cases given by me above is sufficient to show that both of them are quite distinguishable from the present case. Lastly in *Gayadin*

(1) [1915] 18 O. C. 48 = 28 I. C. 859.

(2) A. I. R. 1924 Oudh 14.

(3) A. I. R. 1927 Oudh 108 = 2 Luck. 137.

v. *Lodhi* (3) a tenant had brought a suit for recovery of possession against a rival tenant in which the landlord also had been impleaded. It was observed in this case that :

"If somebody else besides the landlord has illegally taken possession of the holding, the remedy must be sought in the civil Court and not in the revenue Court. The mere fact that the landlord was impleaded cannot, in our opinion, convert this suit into a suit of the class contemplated by the legislature to be one cognizable by the revenue Court under S. 108, Cl. 10."

The remarks quoted above by me seem to negative rather than support the contention of the defendant appellant. In my opinion none of the cases cited by the defendant appellant help him and this plea of jurisdiction must fail.

The next contention is that the provisions of S. 20, Oudh Rent Act in respect of the relinquishment of land by a tenant are not exhaustive and that it is possible for a tenant to make a valid relinquishment under a private arrangement between himself and the landlord. In my opinion the contention is quite correct so far as it goes, but in order that any such relinquishment by means of an amicable arrangement between the tenant and landlord may be valid, it is necessary that the tenant must make actual surrender of possession in favour of the landlord. The lower appellate Court has found that the plaintiff did not relinquish the plot in suit in January 1925 when the landlord gave the patta to defendant 1. This finding is not enough to dispose of the matter. The patta dated 10th January 1925 shows that it was to take effect from 1333-F. The patta could be valid if the plaintiff did actually relinquish his possession of the plot in suit by the commencement of the Fasli year 1333. I do not consider it necessary to remand the case for a finding as regards the possession in 1333-F as the parties have given all the evidence which they wanted to give and it is possible for me to arrive at a finding on the evidence on the record. Obviously it was for the defendant in order to make out a valid surrender to establish that the plaintiff had given over possession at the latest by the commencement of 1333-F, when the patta in his favour took effect. The learned counsel for the defendant-appellant relied upon

the statement of Maqbool Hasan and Bhimma the two sub-tenants of the plaintiff who were in possession of the plots in suit. I have looked into the evidence of both these witnesses. It does not support the defendant. Maqbool Hasan definitely states that he remained in possession of the plot in suit during the year 1333-F. Bhimma though he began by saying that he had cultivated the plot in 1333-F yet in cross-examination he said that he had shared the produce with defendant 1. This is inconsistent with the case of either party. I must therefore hold that the defendant has failed to prove that the plaintiff had made actual surrender of possession in 1333-F. The result therefore is that the lease set up by the defendant appellant must be held to be invalid. The appeal, therefore fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 71

WAZIR HASAN AND SRIVASTAVA, JJ.

Zahuran and others—Defendants — Appellants.

v.

Abdus Salam and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 194 of 1929, Decided on 28th November 1929, against order of Third Addl. Dist. Judge, Lucknow, D/- 2nd March 1929.

(a) Mahomedan Law—Gift—Seisin in case of gift may either be actual or constructive—Gift is validated by even constructive possession when actual possession is not possible.

The need of seisin in a case of gift on the part of the donee is satisfied according to the nature of the possession of which the gifted property is capable. Such seisin may be either actual or constructive. Where, therefore, the subject matter of the gift is only capable of constructive possession and such possession accompanies the gift, the gift must be held to be valid : 15 Cal. 684 (P. C.); 11 Cal. 121 (P. C.); A. I. R. 1922 P. C. 281; A. I. R. 1929 P. C. 149; 28 All. 439 (P. C.) and 11 All. 460 (P. C.), *Rel. cn.* [P 73 C 2]

(b) Mahomedan Law—Gift—Definite share in immovable property is separate estate—Rule of mushaa is inapplicable to such estate.

A definite share in immovable property zamindari, houses or shops, is a separate estate with separate and defined rents. The rule of mushaa, therefore, which aims at prohibiting confusion between estates gifted and not gifted is wholly inapplicable to such an estate : 35 Cal. 1 (P. C.); 11 All. 460 and (P. C.) 15 Cal. 684 (P. C.), *Ref. 2 I. A. 87 (P. C.), Dist.* [P 74 C 2]

Ghulam Hasan—for Appellant.

Rauf Ahmad and Raj Narain Shukla—for Respondents.

Srivastava, J.—This is an appeal by some of the defendants from the decree of the Third Additional District Judge of Lucknow dated 2nd March 1929, affirming the decree of the Subordinate Judge of the same place dated 12th April 1928.

The plaintiff, Abdus Salam, in the suit, out of which this appeal arises, seeks to recover possession by partition of a 1/16th share in certain immovable property situate in the city of Lucknow. The property consists of shops and houses. His case is that the property in question belonged to one Abdur Rahim whose estate on his death was inherited under the Hanafi Mahomedan Law by his heirs, the defendants in the suit. One of such heirs was Mt. Haliman, defendant 9, being the widow of Abdur Rahim. Her share in the estate of her deceased husband was admittedly 1/16th. No issue was born of Mt. Haliman. On 14th June 1927 Mt. Haliman made a gift of her one-anna share in the estate of her husband in favour of the plaintiff, who is the son of a brother of Abdur Rahim. The gift was reduced to writing and is incorporated in a registered deed of that date. It is this gifted property and on the title resting on the gift in respect of which the relief of possession is prayed.

Mt. Haliman, the donor, supported the plaintiff's claim. Some of the defendants, however, contested it and the defence of those who contested the plaintiff's claim was that Mt. Haliman was not married to the deceased Abdur Rahim, that the gift in favour of the plaintiff being a simple gift and not bil ewaz required for its perfection delivery of possession by the donor to the donee and that the gift was not accompanied with such delivery. Both these defences have been negatived and the plaintiff's suit decreed in terms of the prayer contained in the plaint.

From the materials on the record of the case it appears that the plaintiff's first contention in support of the gift in question was that the transaction was a hiba bil ewaz and therefore did not require seisin for its completion. In the alternative he contended that if the gift were construed to be simple in its character it was accompanied with delivery of possession. Both these alternative

positions have been decided by the Courts below in favour of the plaintiff.

The contention in second appeal is:

(1) That the gift of 14th June 1927 when properly construed is not a gift bil ewaz but is a simple gift.

(2) That there was no delivery of possession by the donor to the donee, and

(3) That the gift is invalid by reason of the doctrine of mushaa.

After having heard arguments at great length in this appeal we have come to the conclusion that it is not necessary to decide the question as to whether the gift of 14th June 1927 is a hiba bil ewaz as the plaintiff contends that it is. Having regard to the opinion which we have formed on the other two arguments urged in appeal before us we assume for the purposes of this judgment that the gift in question is not a gift bil ewaz but is a simple gift. It therefore remains for us to decide as to whether this gift fails for either of the two reasons:

1. that it was not accompanied with delivery of possession or

2. that it was vitiated by the rule of mushaa.

For the determination of both the above lines of contention it is necessary to appreciate accurately the nature of the property which was made the subject matter of the gift in question. We have already stated that it consists of certain shops and houses situate in the city of Lucknow. It is not disputed that before the suit was instituted these shops and houses were accepted by the family as the property exclusively belonging to Abdur Rahim. Abdur Rahim being a Hanafi Sunni Mahomedan, his estate according to the law applicable to that sect came to be vested by right of inheritance into a large number of heirs. One of such heirs was Mt. Haliman, and her share in the estate of Abdur Rahim was 1/16th. In the deed of gift which she executed in favour of the plaintiff she specifically refers to the one-anna share in the estate of her husband and the operative part of the deed states that the donor has made a gift and put the donee in proprietary possession in the same way in which the donor held the same of the specific one-anna share. It further states that the donor has no connexion or right whatsoever left in the gifted property and authorizes the donee to enjoy the gifted share

either in coparcenary with other co-sharers or to obtain a division thereof through Court.

This being the nature of the property gifted and the nature of the possession which the donor expressly herself held in the gifted property and which she handed over to the donee, the question which arises for consideration is as to whether possession of any other nature could be delivered to the donee and not having been delivered the gift fails for that reason.

In the case of *Mahomed Bakhsh Khan v. Hosseini Bibi* (1) Lord Macnaughton, in delivering the judgment of their Lordships of the Judicial Committee on a question similar to the one which we are called upon to decide in this appeal made the following observations:

"The other point was that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884, *Kali Dass Mullik v. Kanhaiya Lal* (2). There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases of relating to voluntary contracts or transfers, where, if the donor has not done all he could do to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with utmost publicity, the hibanama itself authorizes the donees to take possession and it appears that in fact they did take possession."

Except the fact mentioned in the last observation of their Lordships of the Judicial Committee every other act required to perfect the contemplated gift was done by the donor and nothing more was required of or could be done by her in the circumstances of this case. For sometime after her husband's death the donor received the benefits of the profits of the property in recognition of her interest in her estate from the manager of the family estate. This is found in clear words by the Court of first instance and the lower appellate Court has not disagreed with that finding of fact. The donor therefore was in the very nature of things making a gift of the same benefits in favour of the donee. Physical possession of the 1/16th share in the estate of Abdur Rahim was

as much impossible in her case as it was impossible in the case of the donee. Where the subject matter of the gift is only capable of constructive possession and such possession accompanies the gift the gift must be held to be valid. This was decided by their Lordships of the Judicial Committee in the case of *Mohammad Abdul Ghani v. Fakhar Jahan Begum* (3). In that case possession taken of a portion of the gifted property was held to be sufficient as constructive possession in respect of the rest of the same property. Laterly, in the case of *Amjad Khan v. Ashraf Khan* (4) their Lordships of the Judicial Committee referred to their decision in the case just now mentioned and said:

"In order therefore to constitute a valid gift inter vivos under the Mahomedan Law applicable to this case, three conditions are necessary: (1) Manifestation of the wish to give on the part of the donor; (2) The acceptance of the donee, either impliedly or expressly; (3) The taking possession of the subject matter of the gift by the donee, either actually or constructively.

The above decisions establish without any doubt the view of law that the need of seisin in a case of gift on the part of the donee is satisfied according to the nature of the possession of which the gifted property is capable. Such seisin may be either actual or constructive. The same view of law was expressed by their Lordships of the Judicial Committee in the case of *Chaudhri Mehdi Hasan v. Mahammad Hasan* (5). On the question of delivery of possession in a case of a simple gift their Lordships said:

"Unless accompanied by delivery of the thing so far as it is capable of delivery it is invalid.

In the present case the subject matter of the gift was not capable of being delivered in any manner other than that which the donor adopted. She executed a deed of gift evidencing her intention to make the gift. She registered the deed thereby giving publicity. She put the donee in possession of the gifted property, the possession being of the same nature as she herself had had and finally she authorized the donee to appropriate the profits of the gifted property and to obtain a partition thereof at any time he thought fit to do so.

(1) [1888] 15 Cal. 681=15 I. A. 81=5 Sar. 175 (P. C.).

(2) [1885] 11 Cal. 121=11 I. A. 218=4 Sar. 578 (P. C.).

(3) A. I. R. 1922 P. C. 281=44 All. 301=25 O. C. 95=49 I. A. 195 (P. C.).

(4) A. I. R. 1929 P. C. 149=1 Luck. 305=56 I. A. 213 (P. C.).

(5) [1906] 28 All. 439=33 I. A. 68=9 O. C. 196 (P. C.).

Before we take leave of this part of the case we would quote the following observations of their Lordships of the Judicial Committee in the case of *Muhamad Mumtaz Ahmad v. Zubaida Jan* (6) which it seems to us is wholly applicable to the present case:

"The lady (donor) had merely proprietary, not actual possession that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connexion with them and that the donee was to have complete control of every kind in respect thereof Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual.

We therefore hold that the gift in question is not invalid by reason of absence of delivery of possession and that such possession was given as the gift admitted.

As already stated, the second line of defence is that the gift fails by reason of mushaa. The doctrine of mushaa is stated as follows in Hedaya: see Hamilton's Hedaya, Vol. 3, Book 30, Chap. 1:

"A gift of part of a thing which is capable of division is not valid unless the said part be divided off and separated from the property of the donor The arguments of our doctors upon this point are twofold. First seisin in cases of gift expressly ordained and consequently a complete seisin is a necessary condition but a complete seisin is impracticable with respect to an indefinite part of divisible things, as it is impossible, in such, to make seisin of the thing given without its conjunction with something that is not given and that is a defective seisin. Secondly, if the gift of part of a divisible thing, without separation, were lawful, it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for namely a division which may possibly be injurious to him whence it is that a gift is not complete and valid until it be taken possession of; since if it were valid before seisin a thing would be incumbent upon the donor which he has not engaged for, namely, delivery.

The first matter to be considered in this rule is the emphasis laid on 'seisin' and that element of gift is the reason of the rule. The second matter to be considered is that the rule is framed in relation to the intention of the donor as to the subject matter of gift. Once it is held, as we have already held that a complete seisin is possible in respect of a share in immovable property the first reason of the rule disappears. Nor does the gift before us is in any sense incon-

sistent with the intention of the donor inasmuch as she expressly authorized the separation of the gifted share from the rest of the property and also because she herself retains no interest whatsoever after the gift in any portion of the entire property. The second reason of the rule therefore also disappears and that being so we are of opinion that the rule is inapplicable. Seisin in this case, as we have already shown, is possible of the thing given without its conjunction with something that is not given, there being no interest left in the donor in the entire property outside the gifted share nor is the donor laid under an obligation to do a thing for which she is not engaged, that is the separation of the gifted share. In the first place, she had given the authority for division as already stated. In the second place there remains no interest in her from which the gifted interest has to be separated.

Ameeeroonnissa Khaton v. Abedoonnissa Khaton (7), was a case in which the question as to the validity of the gift of defined shares in certain zamindari on the ground of mushaa came to be considered. Their Lordships said:

"The High Court held that the rule of the Mahomedan law did not apply to property of this description. In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zamindari, which are in their nature separate estates, with separate and defined rents."

These observations are wholly apposite to the case before us. A definite share in immovable property, zamindari, houses or shops, is a separate estate with separate and defined rents. The rule of mushaa, therefore, which aims at prohibiting confusion between estates gifted and not gifted is wholly inapplicable to such an estate. Again in *Ibrahim Ghoolam Ariff v. Saiboo* (8), their Lordships reiterated the observations which they had made in the case of *Mahomed Mumtaz Ahmad v. Zubaida Jan* (6), that

"the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules."

(7) [1874] 2 I.A. 87=23 W.R. 208=15 B.L.R. 67=3 Suther. 87=3 Sar. 423 (P.C.).

(8) [1908] 35 Cal. 1=34 I.A. 167=11 C.W.N. 979 (P.C.).

(6) [1889] 11 All. 460=16 I. A. 205 (P. C.).

Again in the case of *Ibrahim Goolam Ariff v. Saiboo* (8), just now mentioned, the gift related to shares in a company and in freehold estate in the town of Rangoon consisting of houses and vacant lands. In considering the question of the validity of the gift in relation to such properties on the ground of objection of mushaa Lord Robertson, in delivering the judgment of the Judicial Committee said :

"but the serious question is whether it applies to property of the nature described In the first place, even if the duty of the Courts were to construct a prohibition of gifts of undivided shares of what is divisible which should be applicable to the conditions of modern life, it would seem impossible in the case of free hold property in a town, to carry it out. But the attitude of the law towards this doctrine of mushaa does not involve any such constructive application of the doctrine."

His Lordship then quotes the dictum already quoted in the case of *Mumtaz Ahmad v. Zubaida Jan* (at p. 207 of 16 I. A.) and proceeds:

"Their Lordships concur in the conclusion arrived at below, that it would be consistent with that decision to apply a doctrine, which in its origin applied to very different subjects of property to shares in companies and freehold property in a great commercial town."

We may legitimately ask as was asked by Lord Macnaughten in the case of *Mahomed Baksh Khan v. Hosseini Bibi* (1) what confusion can it introduce if the owner of a definite share in immovable property makes a gift of that share in favour of another person and has himself nothing left in that property after the gift? It seems to us that the only answer that can be given to this question is in the negative.

One of us had occasion to consider this question as a member of the late Court of the Judicial Commissioner of Oudh in the case of *Amjad Khan v. Ashraf Khan* (9) in another connexion and much which we might have said in the present case on this question will be found to have been said in that case. It will serve no useful purpose to repeat here what was said there. We accordingly repel the second line of defence also.

It may be mentioned that the principle of mushaa was not raised in the written pleadings nor was it embodied in any issue framed by the Court of first instance. It appears from the judgment of that Court that when the hearing of

the case had completed and arguments came to be addressed the learned pleader for the contesting defendants raised the objection of mushaa against the gift in suit. The Court allowed the objection of mushaa against the gift in suit. The Court allowed the objection to be argued but overruled it. When the defendants preferred an appeal from the decision of the Court of first instance they embodied this objection in their memorandum of appeal but at the hearing of the appeal it appears that the objection was not pressed by the learned advocate who addressed the Court on behalf of the appellants. The appeal therefore fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

* A. I. R. 1930 Oudh 75

WAZIR HASAN, J.

Deputy Commr. Fyzabad—Plaintiff—Appellant.

v.

Bhagwan Dei and others—Defendants—Respondents.

Second Appeal No. 152 of 1929, Decided on 25th November 1929, against a decree of Dist. Judge., Fyzabad, D/- 5th February 1929.

*** Adverse possession—Person holding possession of land of grantee adversely acquires same title as grantee by prescription and no more—Trespasser is subject to the terms of the grant.**

P made a grant of land in favour of *M*. The land was to be used for planting a grove and not for any other purpose. Grantee was to have no right to transfer grove when planted and if he died without leaving male issue, *P* was to have the right to enter into possession of the grove and it was to become his property. *M* died without leaving any male issue and one *J*, *M*'s brother's grandson took possession of the land and had the possession for over twelve years:

Held: that *J* came into possession of *M*'s estate which *M* had in the grove and *J*'s adverse possession had the effect of creating the same title in him as *M* had in the property. *P* possessed full proprietary title in the land in suit and *J*'s possession had not been of such nature as to oust that title. *J* acquired by prescription the same title in the land as *M* had and no more and *J*'s or his successor's acts of alienating any portion of the property and of making use of subject matter of the grant contrary to the terms of it gave a right of re-entry to the landlord: 27 Cal. 943 (P. C.) and A. I. R. 1930 Oudh 46, Ref. [P 77 C 1]

H. K. Ghosh—for Appellant.

H. D. Chandra—for Respondents.

(9) A.I.R. 1925 Oudh 568=23 O.C. 265.

Judgment.—This is the plaintiff's appeal from the decree of the District Judge of Fyzabad, dated 5th February 1929 affirming the decree of the Munsiff of the same place dated 29th September 1928.

The plaintiff is the Deputy Commissioner of Fyzabad in charge of the Ajudhia estate as manager on behalf of the Court of Wards of the United Provinces of Agra and Oudh. In the suit out of which this appeal arises the plaintiff claims possession of a piece of land 2 bighas 5 biswas in area out of plots 103 and 104/2 situate in the village of Baretha, perganna Haveli, district Fyzabad. A further relief prayed for is the demolition of a house which Sheopal Pujari, defendant 4, has constructed on the land in suit.

The lower appellate Court has found that the estate of Ajudhia is not only the proprietor of the village of Baretha but is also the proprietor of the plots of land 103 and 104/2. Further facts on which the decision of this appeal rests are as follows :

On 4th March 1881, Raja Pratab Narain Singh the then owner of the Ajudhia estate made a grant of the land in suit in favour of one Manni Lal under a registered deed of that date. One of the conditions of the grant was that the land would be used for the purpose of planting a grove and sinking a well and that it would not be used for any other purpose. Another condition was that the grantee would have no right to transfer the grove when planted. It was also a condition of the same grant that the grantee and his descendants would remain in possession but if the grantee died without leaving male issue the grantor would have the right to enter into possession of the grove and in that event the grove would become the property of the grantor. Manni Lal died without leaving any issue, male or female, in the year 1911 and left an heir-at-law of the name of Durga but one Janki who was the grandson of Manni Lal's brother took possession of the grove and the land in suit. It is common ground that Janki had no title in law to Manni Lal's estate. Janki died in the year 1926. He therefore held possession of the property in suit from the year 1911 to the year 1926. Defendant 1 Mt. Bhagwandeï is the widow

of Janki, Ram Das defendant 2 is a grandson of another brother of Manni Lal and Chhedi defendant 3 is the nephew of Ram Das. From time to time these defendants have made alienations of the property in suit in favour of Sheopal Pujari, defendant 4, who has set up the construction in respect of which the relief of demolition is prayed for.

There were several defences to the suit but only one has succeeded and it is as against that defence that this appeal is preferred. The learned District Judge's opinion is that Janki not being the heir of Manni Lal was a trespasser in possession, and his possession having continued for more than twelve years the title in the plaintiff was extinguished and a new title by prescription accrued in favour of Janki and therefore the plaintiff was not entitled to the reliefs for which he brought the present suit. The suit was accordingly dismissed.

In my judgment the learned District Judge has failed to appreciate the true scope of the prescriptive title in favour of Janki. Admittedly Janki came into possession of Manni Lal's estate which the latter had in the grove in suit and Janki's adverse possession could have the effect of creating the same title in him as Manni Lal had in the property in suit. It is not claimed that Janki came into the possession of the property in suit on the assertion of a title higher than that of Manni Lal. Janki being a trespasser, obviously no presumption of any sort can be made in his favour. In the absence of any proof or even suggestion to the effect that Janki when entering into the possession of this property claimed title in conflict with the proprietary title of the owner of the estate, it cannot be presumed that he claimed any title higher than the title which gave him the right of possession as was the right of the original grantee, Manni Lal. Nor do the frequent alienations made by the defendants lead to any conclusion other than this, that one of the conditions of the grant was broken, and further that the plaintiff for his right of re-entry cannot now rely on the breach of that condition evidenced by an alienation more than twelve years old. It is not argued that there is any alienation so

old as that, In *Radhamoni Debi v. Collector of Khulna* (1) their Lordships of the Judicial Committee defined the scope of adverse possession. They said:

"It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor But the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor."

I had occasion to refer to this decision of their Lordships of the Judicial Committee in *Mahabir Singh v. Chitta Singh* (2). Who is the competitor in the present case? The estate of Ajudhia admittedly possessed of the full proprietary title in the land in suit. Adverse possession on the part of Janki has not been of such a nature as to oust that title. The learned District Judge's opinion is expressed in the following passage:

"Under the terms of the agreement, the estate had the right to take possession over the land and the grove on the death of Manni Lal. It, however, did not choose to exercise that right. So Janki who was in possession without any right since 1911 till his death in possession adverse to the plaintiff."

It is true that the estate could have taken possession on the death of Manni Lal but if it did not and acquiesced in Janki's possession as a trespasser, on the reasoning stated above, Janki acquired by right of prescription the same title in the estate as Manni Lal had and no more. It is not disputed that Janki or his successors' act of alienating any portion of the property in suit within the last twelve years and also their act of making use of the subject matter of the grant contrary to the terms of it has given a right of re-entry to the landlord.

I accordingly allow this appeal, set aside the decrees of the Courts below and decree the plaintiff's suit with costs in all the Courts.

R.M./R.K.

Appeal allowed.

* * A. I. R. 1930 Oudh 77

STUART, C. J. AND SRIVASTAVA, J.

Badri Nath and another — Defendants—Appellants.

v.

Hardeo —Plaintiff —Respondent.

Second Appeal No. 101 of 1929, Decided on 9th December 1929, from decree of Sub-Judge, Barabanki, D-/ 15th December 1928.

* * Hindu Law—Succession—Sons —All sons, irrespective of separation, should succeed equally to their father's self-acquired property.

In the absence of any text to the contrary self-acquired property is not subject to the rights of survivorship but is governed by the general rules of inheritance according to which all sons of the deceased should succeed in equal shares irrespective of any consideration of their being united or separate. The rule is equally good in a case where a son is separated and the father acquires the property after such separation : 9 M. I. A. 539 and 30 Mad. 348, *Rel. on.*; 17 A. L. J. 151, *Foll.*; 20 All. 267 (P. C.) and A. I. R. 1921 Mad. 163, *Ref.*; 22 Bom. 101 and 32 Mad. 377, *Diss. from.* [P 79 C 1]

R. P. Varma for *R. B. Lal* — for Appellants.

S. N. Srivastava for *Radha Krishna* —for Respondent.

Stuart, C. J.— The second appeal, though it arises out of a suit relating to property of trifling value, involves an important question of law and one not altogether free from difficulty.

The facts are these: the plaintiff instituted the suit against his brother defendant 1 for a declaration that he was the owner of a half share in two kathal trees which had been planted by and belonged to his father Sri Gopal. In the alternative he claimed that if he be found to be out of possession then a decree for possession be passed in his favour. Defendant 2, the wife of defendant 1 was also impleaded. The defendants pleaded in reply that Sri Gopal had six sons, of whom plaintiff was born of the first wife and defendant 1 and four other sons by the second wife. They alleged that the plaintiff and his mother separated from Sri Gopal about forty years ago and that defendant 1 and his brothers continued to remain joint with their father. Their case about the two kathal trees was that they had been planted by one of the brothers of defendant 1 named Mahadeo, that Mahadeo

(1) [1900] 27 Cal. 943=27 I. A. 136= 4 C. W. N. 597=7 Sar. 714 (P. C.).

(2) A. I. R. 1930 Oudh. 46.

and his four brothers remained in possession of the trees and that defendant 1, who was the last survivor of all the five brothers, was in possession of the said trees when he sold them to one Aharwar Din in 1916 from whom the trees were repurchased by his wife defendant 2 who was in possession of them.

The learned Munsiff who tried the suit held that the plaintiff had failed to prove that the trees in question belonged to Sri Gopal and that the plaintiff had a half share therein. He accordingly dismissed the suit. On appeal the learned Subordinate Judge has found that the plaintiff had separated from his father in mess and residence but there was no partition of any joint family property between him and his father because the father was not possessed of any property at that time. He has further found that the trees in suit had been planted by Sri Gopal after the separation of the plaintiff and were the self-acquired property of Sri Gopal. Having arrived at these findings and relying on the case of *Kunwar Bahadur v. Madho Prasad* (1), he held that the plaintiff, though a separated son was entitled to a share along with the sons who were living jointly with the father in the self-acquired property of the father. He therefore came to the conclusion that the plaintiff was entitled to a one-sixth share in the trees in suit and gave him a decree to that extent.

The learned counsel for the parties have accepted before us the correctness of the findings of fact arrived at by the lower appellate Court. The only point urged on behalf of the defendants appellants is that the plaintiff having separated from his father was not entitled to any share in the self-acquired property of Sri Gopal. The learned counsel for the appellants has questioned the correctness of the decision of the Allahabad High Court in *Kunwar Bahadur v. Madho Prasad* (1) and has relied upon the decision of the Bombay High Court in *Fakirappa v. Yellappa* (2) and of the Madras High Court in *Nana Tawker v. Ramchandra Tawker* (3)

in support of his contention. We are of opinion that in a case like the present the sons who have remained united with the father cannot claim any preference as against the son who had previously separated, as regards succession to the self-acquired property of the father. It cannot be denied that the rule of survivorship applies only to joint family property. Nor can it be disputed that a member of a joint Hindu family can possess separate property which he can deal with as he likes. His sons have no interest in such property and cannot claim any partition of it and on his death such separate self-acquired property passes by succession to his heirs and not to the surviving coparceners. In *Katama Natchier v. Moottoo Vijaya Ranganadha* (4) their Lordships of the Judicial Committee at p. 611 observed as follows:

"According to the principles of Hindu Law, there is coparcenaryship between the different members of a united family, and survivorship following upon it. There is, community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails and there are no grounds for postponing the widow's right to any superior right of the coparceners in the undivided property."

In *Rao Balwant Singh v. Ravi Kishori* (5) Lord Hobhouse in delivering the Judgment of their Lordships of the Judicial Committee discussed the conflicting texts of the Mitakshara as regards the father's powers of disposition and the control allowed to his sons in the matter of self-acquired immovable property and ultimately came to the conclusion that the father of an undivided Hindu family subject to the Mitakshara has full power of disposition with regard to his self-acquired immovable property. We therefore consider it now to be well settled that a member of a joint Hindu family is at

(1) [1919] 17 A. L. J. 151=49 I. C. 620.

(2) [1898] 22 Bom. 101.

(3) [1909] 32 Mad. 377=2 I. C. 519=5 M. L. T. 67.

(4) [1861-63] 9 M. L. A. 539=2 W. R. 31 (P. C.).

(5) [1898] 20 All. 267=25 I. A. 54=7 Sar. 279 (P. C.).

liberty in his lifetime to make any alienation of his self-acquired property he may think fit and that on his death such property is not governed by the rule of survivorship. If the rule of survivorship does not apply to self-acquired property then the question arises on what other ground can the sons who remain united with the father claim preference as against the sons who have previously separated regarding succession to such property. The cardinal rule of Hindu Law embodied in the well known text of Baudhayana is that "male issue of the body being in existence, the wealth goes to them." The Mitakshara, Chap. 1, S. 6 para. 15 is as follows:

"So, among brethren, dividing the allotment of their parents who were separated from them after the demise of those parents (as may be done by the brothers, if there be no son born subsequently to the original partition) what had been given by the father and mother to each of them, belongs severally to each, and is shared by no other."

This shows that partition does not destroy the right of inheritance. As remarked in *Marudayi v. Doraisami Karambiam* (6), partition does not annul the filial relation nor the right of succession incidental to such relation. We, therefore, think that in the absence of any text to the contrary self-acquired property is not subject to the rights of survivorship but is governed by the general rules of inheritance according to which all sons of the deceased should succeed in equal shares irrespective of any consideration of their 'being united or separate. Speaking with all respect, it seems to us that these basic principles have not always been clearly kept in view and confusion has sometimes arisen by mixing up the rules relating to different though allied subjects. For instance, the Mitakshara lays down specific rules as regards rights of sons born after partition and as regards devolution of a share acquired by the father on a partition between himself and sons. These rules, however, can afford no guidance in determining the rights of succession in the case of property like that in dispute in the present case which was acquired by the father after the separation. We have been unable to discover

any text in the Mitakshara which may exclude a separated son from inheritance as regards such self-acquired property. The only text we have come across and which we notice has sometimes been relied upon in support of the contrary view is that contained in Mitakshara Chap. 1, S. 6, para. 4. This section is headed "Rights of a posthumous son and of one" born after partition." Para. 4 is to the following effect:

"The same rule is propounded by Manu: 'A son, born after a division, shall alone take the parental wealth.' The term parental (pitryam) must be here interpreted 'appertaining to both father and mother'; for it is ordained, that 'a son, born before partition has no claim on the wealth of his parents; nor one, begotten after it, on that of his brother.'"

This should be read with the next paragraph which contains an exposition of it. Para. 5 runs as follows:

"The meaning of the text is this, one born previously to the distribution of the estate has no property in the share allotted to his father and mother who are separated (from their elder children) nor is one born of parents separated (from their children) a proprietor of his brother's allotment."

It seems to us clear from the above that the separated son is excluded only as regards property allotted to the father on partition. The case here is obviously quite different.

Now let us examine the cases relied upon by the learned counsel for the defendants-appellants. In *Fakirappa v. Yellappa* (2), it was held that as between united sons and a separated grandson the succession on the grandfather's death to the property, both ancestral and self-acquired, left by him goes in preference, according to Hindu Law, to the united sons. Ranade, J. referring to the Shivaganga case remarked:

"The appellant relies on this ruling chiefly because it speaks of the right of the male issue to succeed to such self-acquired property, but it is clear from the context that the male issue here spoken of does not refer to separated sons so much as those sons who are in union with their deceased father."

With the utmost respect for the learned Judge, we would venture to say that we fail to find anything in the context to exclude separated sons from the category of male issue. Then the learned Judge has relied upon the authority of two passages from West and Buhler's Hindu Law. One of them is:

(6) [1907] 30 Mad. 348=17 M. L. J. 275.

"Sons separated cannot claim any portion of their father's property which he acquired after division. This property goes to his after born son, along with the father's separated share of joint property."

The rule referred to here relates to the rights of after-born sons and, as mentioned before, has, in our opinion no application to the present case. The second passage cited runs as follows :

"Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him or were born after separation : West and Buhler, 4th Edn., 64."

In the new edition of West and Buhler, from which we have made the above quotation, reference is made in the footnote to Mitakshara Chap. 1, S. 2, paras. 1 and 5 as authority for it. We have only to quote these paragraphs to show that they have no relevancy to the matter under consideration :

"1. At what time, by whom, and how partition may be made, will be next considered. Explaining those points, the author says, 'when the father makes a partition, let him separate his sons (from himself) at his pleasure and either (dismiss) the eldest with the best share or (if he choose) all may be equal sharers.'"

"5. The term 'either' (S. 1) is relative to the subsequent alternative 'or all may be equal sharers.' That is, all, namely the eldest and the rest, should be made partakers of equal portions."

Jardine, J., the other Judge who was a party to the decision, also referred to certain considerations of inconvenience which would arise if a separated son is allowed a share in the self-acquired property. The considerations mentioned do not appeal to us and cannot in any case be allowed to overrule the law. In *Nana Tawker v. Ramachandra Tawker* (3), it was held that under the law of the Mitakshara, on the death of a father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the father. In the course of their judgment their Lordships remarked :

"The succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than by inheritance and he who took by survivorship would exclude those, such as divided sons, who could only take in any case by inheritance."

This view seems to be based upon the dictum contained in Chap. 1, S. 1, para.

27 of the Mitakshara that the son has an interest by birth in the property of the father, whether ancestral or self-acquired. As pointed out by their Lordships of the Privy Council in *Balwant Singh v. Rani Kishori* (5), this text is in conflict with the provisions of Chap. 1, S. 5, Cls. 9 and 10 of the Mitakshara and in our opinion in the face of the pronouncement of their Lordships of the Judicial Committee in the *Shivagunga* case and in the case just mentioned, it is no longer possible to apply the rule of survivorship to such property. We might also point out that the Full Bench of the Madras High Court in *Vairava Chettiar v. Srinivasachariar* (7), has dissented from the view as regards succession in respect of the self-acquired property being governed by the rule of survivorship.

On the contrary we have the decision of Richards, C. J. and Banerji, J., in *Kunwar Bahadur v. Madho Prasad* (1) in which it was held that in the self-acquired property of a Hindu father, sons who are living separate from him will be entitled to share along with the sons who may be living jointly with him. We are in full agreement with this view.

For the above reasons we hold that the plaintiff, though he separated from his father in the latter's lifetime, has an equal right with his other brothers to a share in the trees in dispute which were planted by the father after the plaintiff's separation. The lower appellate Court is therefore right in holding the plaintiff entitled to a one sixth share in the trees in question. The appeal fails and is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 81

WAZIR HASAN AND SRIVASTAVA, JJ.

Mt. Indarani—Judgment-debtor—Applicant.

v.

Bimla Prasad—Decree-holder—Opposite Party.

Execution of Decree Appeal No. 33 of 1929, Decided on 8th November 1929, from order of Sub-Judge, Sitapur, D/- 11th May 1929.

Civil P. C., O. 21, R. 66—Order rejecting objection to misstatement of value of property is not appealable—Such objection can still be raised after sale under Civil P. C., O. 21, R. 90—Civil P. C. S. 47.

If an objection is raised by the judgment-debtor to the valuation of property contained in proclamation of sale by public auction under O. 21, R. 66, and is rejected, there is no appeal against the order rejecting the objection. The judgment-debtor is not left without any remedy if the order in question results in any injury to him. For if the undervaluation results in substantial injury to the appellant he can have it set aside under O. 21, R. 90. And so unless such contingency happens, the rules of procedure do not entitle the judgment-debtor to question the propriety of the statement as to the value of the property which the Court has directed to be made in the proclamation of sale. And further the proviso added by Oudh High Court to R. 90 will be no bar to questioning such misstatement, if any, as to the value of the property after the sale has taken place because the proviso bars the objection only if it is taken for the first time after the sale. (*Case law considered.*) [P 82 C. 1]

Khaliquzzaman—for Applicant.*Haider Husein*—for Opposite Party.

Judgment.—This is the judgment-debtor's appeal from the order of the Subordinate Judge, Sitapur, dated 11th May 1929.

The relevant circumstances are as follows :

In execution of a decree against the appellants held by the respondent a certain immovable property was attached and now steps are being taken for its being sold by public auction. Consequently a sale proclamation is being prepared and particulars required by sub-R. (2), R. 66, O. 21, Civil P. C. are being enquired into for the purpose of their being specified in the proclamation of sale. One of these particulars is the estimated value of the property sought to be sold. The Court seised of the execution proceedings issued a commission for the purpose of ascertaining as far as possible the value of the property mentioned

above. The commissioner has made his report as to the valuation. The respondents accepted the valuation given by the commissioner but the appellant raised objections in respect of it. The objections were not supported by evidence. The result was that the Court rejected the objections and accepted the valuation as found by the commissioner. From the order just now mentioned the present appeal has been preferred.

At the hearing of the appeal a preliminary objection was taken on behalf of the respondents. It is argued that the order under appeal is not the determination of any question within S. 47, Civil P. C. and if it is not so, the order is not a decree within the meaning of sub-S. 2 of the same Code. It is agreed that the order in question is not appealable as an order under any provision of the Civil Procedure Code. The question, therefore, for decision is as to whether it is a determination of any question within S. 47.

It appears to us that the preliminary objection is supported by a preponderance of decisions of several High Courts in India : vide *Sivagami Achi v. Subrahmaniam Ayyar* (1), *Ajudhia Prasad v. Gopi Nath* (2), *Deoki Nandan Singh v. Banai Singh* (3), *Panch Daur v. Mani Raut* (4), *Deokinandan Singh v. Dhakeswar Prasad* (5). These decisions give various reasons in support of the view that a question of the nature decided by the order under appeal is not a question within the meaning of S. 47, Civil P. C., but the one reason which appeals to us most is that the judgment-debtor is not left without any remedy if the order in question results in any injury to him. In *Saadatmand Khan v. Phul Kdar* (6) their Lordships of the Judicial Committee have definitely held that when value of the property sought to be sold is stated in the proclamation of sale it is a statement of material fact and that a misstatement as to the value of the property in the sale proclamation :

“ is something more grave than an ordinary irregularity of procedure, but the fact that it

(1) [1904] 27 Mad. 259=14 M. L. J. 57 (F.B.).

(2) [1917] 33 All. 415=39 I. C. 578=15 A. L. J. 337.

(3) [1912] 16 C. W. N. 124=10 I. C. 371=14 C. L. J. 35.

(4) [1912] 16 C. W. N. 970=17 I. C. 88.

(5) [1917] 2 Pat. L. J. 13=38 I. C. 616.

(6) [1898] 23 All. 412=25 I. A. 146=7 Sar. 380 (F.C.).

is so, and that it was made gratuitously by the decree-holder and the Court, does not prevent it from being a material irregularity in publishing or conducting the sale, such as to bring the case within the special remedy provided by S. 311."

If, therefore, the alleged under-valuation results in any substantial injury to the appellant when the sale of his property takes place, he shall have a right to get an order setting aside the sale under R. 90, O. 21, Civil P. C. Before such a contingency happens we are of opinion that the rules of procedure do not entitle the appellant to question the propriety of the statement as to the value of the property which the Court has directed to be made in the proclamation of sale by the order under appeal. It may be pointed out that the proviso added to R. 90 mentioned above by this Court will be no bar in the appellant's way to questioning the misstatement, if any, as to the value of the property after the sale has taken place because the proviso bars the objection only if it is taken for the first time after the sale.

Accordingly we dismiss this appeal with costs.

V.B./R K.

Appeal dismissed.

A. I. R. 1930 Oudh 82

WAZIR HASAN AND SRIVASTAVA, JJ.

Iqbal Narain and others—Defendants
—Appellants.

v.

Bankey Lal—Plaintiff—Respondent.

Second Appeal No. 292 of 1929, Decided on 13th December 1929, against decree of Sub-Judge, Mohanlalganj, Lucknow, D/- 23rd July 1929.

Limitation Act, Art. 44—Condition precedent is that property must belong to ward.

One condition precedent for the application of Art. 44 is that the property should be property belonging to the ward and where it does not so belong, Art. 44 has no application : 23 *Mad. 271 (P.C.), Dist.* [P 83 C 1]

Hyder Husain, A. C. Mukerji and Bhawani Shankar—for Appellants.

Ali Zaheer and B. K. Mathur—for Respondents.

Judgment.—This is a second appeal by the defendants who have been unsuccessful in both the Courts below. It arises out of a suit for possession brought by Bankey Lal, plaintiff, in respect of certain zemindari property on the ground that it belonged originally to his maternal grandfather, Gur Dayal,

that after Gur Dayal's death the property was inherited by Gur Dayal's daughter Mt. Rukmin, that on Mt. Rukmin's death which took place on 16th June 1916, the plaintiff as the grandson of Gur Dayal became entitled to the property. It was further alleged that on 26th September 1898 Mt. Rukmin had sold the property to Pandit Ram Narain, the predecessor-in-title of the defendants. The plaintiff challenged this sale deed on the ground that it was not justified by legal necessity and was not binding upon him.

Various defences were raised but ultimately they boiled down to the plea about the property in suit not being the property of Gur Dayal but that of Gur Dayal's brother Har Dayal and about the sale deed dated 26th September 1898 having been executed by Mt. Rukmin not in her own right but as guardian of her minor sons one of whom was the plaintiff Bankey Lal.

Both the Courts below have rejected the pleas raised in defence and found that the property belonged to Gur Dayal and that Mt. Rukmin succeeded to it as Gur Dayal's daughter. They have also found that the sale deed executed by Mt. Rukmin was without legal necessity.

• The first contention urged on behalf of the defendants appellants is as regards the ownership of the property. It was contended that the finding about Gur Dayal having been the owner of the property was contrary to the provisions of S. 66, Civil P. C. This contention has no substance. The sale certificate Ex. 2, is in favour of one Gajadhar who admitted that he was a benamidar for Gur Dayal. If the sale certificate had been in favour of Har Dayal there could be some justification for the plea based on S. 66, Civil P. C.

However, as the sale certificate stands in favour of Gajadhar S. 66 has no application and it cannot help the defendants-appellants. It might also be mentioned that the defendants in the trial Court had admitted that the property belonged to Gur Dayal and had on his death devolved upon his daughter Mt. Rukmin. Under the circumstances we must uphold the finding of the learned Subordinate Judge about the ownership of the property.

Next it was contended that the plaintiff had acquired title to the property by adverse possession against Mt. Rukmin. This is a new plea. It was never raised in the pleadings in the lower Court. All that the defendants pleaded in the trial Court was that they were in adverse possession against the plaintiff, and this plea was negatived by the trial Court. Further there is absolutely no evidence to show that the plaintiff who was a minor was in adverse possession of the property against his mother Mt. Rukmin. This plea must therefore fail.

Lastly, it was argued that the plaintiff's suit was barred by Art. 44, Lim. Act. Reference was also made to a decision in *Gnanasambanda Pandara Sannathi v. Velu Pandaram* (1), in support of the contention. In our opinion there is no room for the application of Art. 44, when it has been found that property belonged to Gur Dayal and after his death to Mt. Rukmin for her lifetime. One condition precedent for the application of Art. 44 is that the property should be property belonging to the ward. In this case on the finding regarding ownership which we have accepted above, the property on the date of the sale deed was held by Mt. Rukmin as a Hindu daughter for her lifetime. It could not by any means be considered to belong to the plaintiff Bankey Lal on that date. He had at best a mere expectancy of succession. *Gnanasambanda Pandara Sannathi v. Velu Pandaram* (1), has also no application to the present case when the property could not be considered to be the property of the ward at the date of the transfer.

The appeal therefore fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1900] 23 Mad. 271=27 I. A. 69=7 Sar. 671 (P.C.).

A. I. R. 1930 Oudh 83

STUART, C. J., AND WAZIR HASAN, J.

(*Earnest Arthur*) *Wylie*—Plaintiff—Appellant.

v.

Mrs. Ruth Shanti Wylie—Defendant—Respondent.

First Appeal No. 25 of 1929, Decided on 11th November 1929, from order of Pullan, J., reported as *A. I. R. 1929 Oudh 238*.

Divorce Act, S. 19 (1)—Venereal disease in woman does not constitute impotency—(Obiter).

Per *Stuart, C. J.*—The existence of venereal disease in a woman does not constitute impotency within the meaning of S. 19 : *A. I. R. 1921 Cal. 459, not Appr.* [P 84 C 2]

St. G. Jackson and Satya Nand Roy—for Appellant.

Moti Lal Saxena—for Respondent.

Stuart, C. J.—This is an appeal against the decision of Pullan, J., in which he refused to grant the petitioner Earnest Wylie either a decree for nullity of marriage or for a divorce against his wife Ruth Wylie. The petitioner appeals. His allegations were that at the time of his marriage to his wife Ruth Wylie she was suffering from venereal disease and that in addition after her marriage she had committed adultery with a person unknown. In so far as the prayer for nullity is concerned the case is governed by S. 19, Divorce Act (Act 4 of 1869). None of the last three clauses of S. 19 were pleaded. The plea was that the wife was impotent at the time of her marriage and at the time of the institution of the suit and there was an additional plea that the Court might grant a decree for nullity on the ground that the consent of the husband to the marriage was obtained by fraud.

It was suggested that the wife had wilfully kept from her husband the fact that she was suffering from venereal disease and that this was the fraud. In so far as the prayer for divorce was put forward that prayer was based upon the allegation of adultery. The learned trial Judge arrived at the following conclusion. He found that Ruth Wylie displayed symptoms of venereal disease immediately after her marriage, and that the disease had been acquired before marriage. He found that it was not established that the disease in question was syphilis. He found that the fact that she was suffering from venereal disease did not justify the finding that she was impotent at the time of her marriage, and that she is not impotent now as there is nothing to show that the disease is not curable. He further found that the petitioner did not know at the time of the marriage that his wife was suffering from venereal disease but that the wife did not know the fact herself, so that there was no fraud. He

disbelieved the evidence as to adultery. On these findings he arrived at the conclusion that the respondent was not impotent at the time of her marriage, that there was no fraud and that she had not committed adultery.

He, therefore, dismissed the suit. In the appeal the learned counsel representing the petitioner has not pressed the case in respect of adultery and I state shortly that the evidence does not justify any conclusion that the respondent Ruth Wylie had ever committed adultery. I accept the learned Judge's conclusions on the other two points as to absence of fraud and as to the fact that the respondent was not impotent at the time of her marriage. But I go further. On the evidence I find that there is no justification for the conclusion that Ruth Wylie was suffering from venereal disease. The evidence upon this point is that of her husband, his mother, a Sub-Assistant Surgeon called Padum Singh and a man called Amir Ali who lets out tents on hire but who deposes that he is an expert in the treatment of syphilis, gonorrhea and cancer, he having acquired his knowledge in the cure of these diseases from verbal instructions given him by his diseased father. The evidence of the petitioner and his mother may be rejected at once. The learned Judge did not believe them and rightly did not believe them. The evidence of Dr. Padum Singh is certainly to the effect that in his opinion Ruth Wylie was suffering from venereal disease. The following facts are, however, important in this connexion.

As far as can be gathered Dr. Padum Singh, who has only taken the lesser qualifications which is granted by the Agra Medical School for subordinates does not assert that he has any special knowledge in women's diseases and he arrived at his confident conclusion that Ruth Wylie was suffering from venereal disease without examining her. He said that he was convinced that the girl must have venereal disease because she told him that she thought she had a sore (which he did not see) that she had a rash and that she had pain in menstruation. I do not lay claim to great knowledge as to such symptoms but it is clear to me that the statement that a girl has a sore does not carry a medical

man very far unless he has seen the sore. As to the pain in menstruation and a rash both these symptoms may be caused from many other causes than venereal disease. The evidence of the hirer of tents cannot really hardly be taken seriously and it would be worthless, even if believed. Thus if this evidence stood unrebutted there would in my opinion be no justification for the finding that Ruth Wylie had ever had venereal disease. But it does not stand unrebutted.

It is rebutted and strongly rebutted by the evidence of a Lady Specialist Dr. Lowther who was in charge of Gynaecological Department of King George's Medical Hospital. Dr. Lowther had Ruth Wylie under her charge as in-patient for nearly a month. She examined her. She found that she was suffering not from syphilis but from chronic vaginitis, that is to say, inflammation of the vagina and also from cervicitis which I understand to be the inflammation of cervix a portion of a woman's internal generative organs. She had a discharge. The disease was chronic. The disease might have been communicated by a man or it might not have been. An examination of her blood did not show that she had syphilis.

In these circumstances I arrive at the conclusion that it is not proved that the girl had venereal disease, so the case there failed in limine. I, however, do not accept the view that the existence of venereal disease in a woman constitutes impotence within the meaning of S. 19. I have been referred to a decision of a Bench of the Calcutta High Court in *Birendra Kumar Biswas v. Hematta Biswas* (1) but I cannot accept this decision as authoritative. With the greatest respect to the learned Judges who decided it I find that they have laid down much which is not authorized by the law of England or the law of India. I say the law of England advisedly as our matrimonial practice under the Divorce Act is based upon the matrimonial practice in England. There is no authority in English law for the proposition that a woman, who is suffering from venereal disease, is considered to be impotent

(1), A. I. R. 1-21 Cal. 45 = 18 Cal. 283.

within the meaning of that word in English law.

The learned Judges who decided that case based their decision upon various decisions of Courts in America. I do not consider that there is anything of value likely to be derived from the discussion of American decisions under the numerous divorce laws which exist in the United States as both the law and the methods of applying the law there differ so very greatly from English law and English practice. I, therefore, would dismiss this appeal with costs.

Wazir Hasan, J.—I propose to say a few words on the petitioner's case as to whether the respondent was impotent at the time of the marriage within the meaning of sub-S. (1), S. 19, Divorce Act, 1869. The petitioner was married to the respondent on 9th July 1928, and on 24th October of the same year the latter was admitted into King George's Medical College, Ladies Ward, for treatment. The only reliable evidence on this part of the case is Dr. Miss Lowther to which reference has been made by the learned Chief Judge in his judgment just now delivered. Dr. Lowther says :

"She (that is, the respondent) was suffering from vaginitis and cervicitis. Her blood was tested for syphilis and the test was negative. She was suffering from a woman's disease but not in my opinion syphilis. The blood test was negative: so it is possible that she may have been suffering from syphilis but that was not my opinion. The disease was chronic She was discharged cured Cure merely means that the symptoms she had been suffering from had been removed The two diseases from which the girl was suffering may be the result of venereal disease. All these diseases are to some extent venereal diseases."

To my mind on the evidence quoted above it is impossible to hold that the petitioner has succeeded in proving the case which the law requires him to prove, that is, that the respondent was impotent at the time of the marriage. A question of law may arise which will have to be decided on a future occasion as to whether, when a wife suffers from a disease which might or might not be venereal and the husband has reasonable and well founded apprehension of infection in case he has sexual intercourse with such a wife, in those circumstances the Court would be justified to record a finding that the wife was

impotent. I agree in the order that the appeal be dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 85

WAZIR HASAN AND SRIVASTAVA, JJ.

Muneshwarendra Nath and others—
Defendants 4-6—Appellants.

v.

*Ram Din and others—*Defendants 1-3
—Respondents.

First Appeal No. 34 of 1929, Decided on 6th December 1929, from decree of Sub-Judge, Hardoi, D/- 19th December 1928.

Hindu Law—Debt—Father—Debt incurred on personal concern — Debt not binding on sons.

The mortgage created on joint property to meet the debt incurred by the father of a joint Hindu family, not for the purposes of the "joint family business," but for a business started and continued as his own and personal concern, does not bind his minor sons : *A. I. R. 1922 P. C. 237, 6 M. I. A. 393 and A. I. R. 1917 P. C. 33, Rel. on. ; A. I. R. 1927 P. C. 121 ; A. I. R. 1928 All. 403 ; A. I. R. 1929 Bom. 251 ; A. I. R. 1922 Mad. 236 and A. I. R. 1929 Pat. 422, Ref.* [P 88 C 1]

*Ali Zaheer, Radha Krishna Har-govind Dayal and Raghubar Dayal Bajpai—*for Appellant.

M. Wasim and Khaliquzzaman — for Respondent 1.

Srivastava, J.—This is an appeal by three defendants in a suit from the decree of the Subordinate Judge of Hardoi dated 19th December 1928.

Lokeshwar Indar Nath, defendant 1, borrowed from the plaintiff, Ramdin, a sum of Rs. 4,000 on 15th May 1922 and charged a certain share in the village of Urli, pargana Sarra Shumali, in the District of Hardoi, as security for its repayment. The mortgage carried interest at the rate of 1 per cent per mensem and was evidenced by a deed of that date executed by Lokeshwar Indar Nath. The mortgagor agreed to repay the mortgage money within four years. The suit, out of which this appeal arises, was instituted for the purpose of recovering the mortgage money due on the deed just now mentioned by sale of the mortgaged property.

There were several defendants to the suit but we are concerned in the present appeal with only three of them, Muneshwar Indar Nath, Sureshwar Indar Nath and Jaideo Singh. The first two mentioned are the sons of the mortgagor

and Jaideo Singh is the son of Hanuman Singh, brother of Lokeshwar Indar Nath. The defence raised by these defendants is that the property charged for the repayment of the borrowed money was not liable for the reason that it was joint family property and that the debt was incurred by Lokeshwar Indar Nath without any legal necessity. There was some controversy between the parties in the trial Court on the question as to whether on the date of the mortgage in suit Lokeshwar Indar Nath and his sons on one side and Hanuman Pershad and his sons on the other constituted one joint Hindu family or two different branches of the same family. The trial Court has held that the two brothers with their respective issues had separated before the mortgage in suit. The finding was not accepted before us by the learned counsel who argued the appeal on behalf of the appellants but we hold that the finding is correct on merits.

There was one more matter in controversy between the parties in the trial Court and it was on the question as to whether any of the sons of Lokeshwar Indar Nath was born before the mortgage in suit was executed. The plaintiff's case was that there were no sons of Lokeshwar Indar Nath in existence on that date. The trial Court on this question has found that there were two sons of Lokeshwar Indar Nath in existence on that date. One of them had died and the other is defendant 4, Muneshwar Indar Nath one of the appellants before us. At the hearing of the appeal in this Court the learned counsel for the plaintiff accepted this finding. This controversy must therefore, also be taken to have been set at rest.

The situation on the findings recorded above is, therefore, this that on the date of mortgage in suit Lokeshwar Indar Nath and his two sons, Muneshwar Indar Nath and one since dead, both minors, constituted a joint Hindu family and that the zamindari share, which was hypothecated by Lokeshwar Indar Nath as a security for the repayment of the loan of Rs. 4,000 was ancestral joint family property. The validity of the defence that the money, for which the suit has been laid was borrowed without any legal necessity is, therefore

the main question in the case. The learned Subordinate Judge has answered this question against the defendants. His answer is challenged in appeal before us. The facts on which this defence rests are agreed to upto a certain extent. It is agreed that the sum of Rs. 4,000 was borrowed by Lokeshwar Indar Nath for the purpose of opening a new cloth shop. It is also agreed that there was no ancestral business of this nature in the family. The serious controversy in respect of this part of the case between the parties is as to the exact time when the business in cloth was commenced by Lokeshwar Indar Nath. Having regard to certain pieces of oral testimony, which is not in our opinion definite, the learned Subordinate Judge thinks that Lokeshwar Indar Nath started dealing in cloth at a very early age probably when he was only 10 or 11 years old and the loan incurred under the mortgage in suit was incurred for the purpose of extending the same business. On these premises alone the learned Subordinate Judge holds as a proposition of law that a mortgage is binding on the sons of Lokeshwar Indar Nath. Having regard to the view which we have formed on the question in dispute between the parties it is not necessary for us to examine the evidence with any exaggerated scrutiny. We are of opinion that the true view of the facts as disclosed by trustworthy evidence is that Lokeshwar Indar Nath started this business of dealing in cloth after he had separated with his sons from his brother, Hanuman Parasad, and that the business began with the opening of the shop for which purposes he borrowed the money in suit. This view of facts is supported by documentary evidence on which the plaintiff himself relies. It is further supported by the recitals in the deed of mortgage of 15th May 1922. It is also supported by the plaintiff's pleadings in the case. To this state of facts therefore, we have to apply the law.

We are prepared to assume without deciding the argument advanced by the learned counsel for the plaintiff that Lokeshwar Indar Nath initiated the business in dealing with cloth while he and his brother, Hanuman Prasad, and their descendants constituted a joint Hindu family. In advancing this argument the learned counsel very rightly

did not claim that Hanuman Prasad in any manner participated in this business or accepted it as a family concern.

The position on facts therefore is this: Lokeshwar Indar Nath, who was a member of a joint Hindu family consisting of his brother, Hanuman Prasad, himself and of their descendants, started the business in cloth on his own account without the concurrence of the other members of the family; some of them being minors were incompetent to accord consent, or he had started or continued the same business after he had separated from his brother, Hanuman Prasad and alienated the ancestral joint family property of his and his sons for the purpose of investing money in that business. We have already said that Lokeshwar Indar Nath's sons are still minors. They could not therefore give their consent either to the commencement or to the continuance of the business.

Having determined the facts as stated above, it now remains to consider the rights of the plaintiff and of the defendants appellants, minor sons of Lokeshwar Indar Nath. In the leading case of *Hanooman Pershad Pandey v. Mt. Babooee Munraj Koonwaree* (1) their Lordships of the Judicial Committee stated the general principle in the following words:

"The power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

It is agreed that the case before us is not a case of need. The only question therefore is as to whether the mortgage in question was for the benefit of the estate. That it might have been so had the business been ancestral and devolved upon the survivors with the ancestral estate or had it been undertaken with the concurrence of the entire body of the family need not be decided. That aspect of the question does not arise in the present case and if it does not arise we can find no circumstance which can be construed to justify the view that the mortgage in question was made in order to benefit the estate. The phrase "bene-

fit to the estate" was considered in the case of *Palaniappa Chetty v. Deivasi-kamony Pandara Sannadhi* (2) by their Lordships of the Judicial Committee. After noting and analysing several previous decisions of the Committee Lord Atkinson said:

"No indication is to be found in any of them as to what is, in this connexion, the precise nature of the things to be included under the description, 'benefit to the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not."

True, the passage quoted above does not prescribe an exhaustive definition of things to be included under the description "benefit to the estate," but clearly so far as it goes the case before us does not fall within it. The mortgage was not made for the preservation of the estate from extinction, for the defence against hostile litigation affecting the family estate, for the protection of it or portions from injury or any deterioration whatsoever. The family is a family of Hindu zamindars maintaining itself solely by the income of the zamindari property which, according to the evidence on the record, amounted to nearly Rs. 1,200 a year as the share of Lokeshwar Indar Nath and it was a small family consisting of Lokeshwar Indar Nath and his two sons, one of whom was about two years and four months old (since dead) and the other about 25 days old on the date of the mortgage in suit and the wife of Lokeshwar Indar Nath. There is no evidence on the record to suggest that Lokeshwar Indar Nath was put to any strain as to the means of the family subsistence and therefore he entered into the cloth business for the purpose of augmenting them. In the case of *Niamat Rai v. Din Dayal* (3) their Lordships of the Judicial Committee held that:

"Where there is a joint family business, the manager has authority to raise money not only for the payment of debt, but also for the purpose of carrying on the business."

(2) A. I. R. 1917 P. C. 33=40 Mad. 709 = 44 I. A. 147 (P.C.).

(3) A. I. R. 1927 P. C. 121=8 Lah. 597=54 I. A. 211 (P. C.).

(1) [1854-57] 6 M. I. A. 393 = 18 W. R. 81 = 2 Suther 29=1 Sar. 552 (P.C.).

This view of law is inapplicable to the present case for the simple reason that the business was not a "joint family business" but it was started and continued by Lokeshwar Indar Nath as his own and personal concern. It might be that when the business first commenced Lokeshwar Indar Nath had drawn to some extent on the family purse but that could not make the business a business of the joint family in the circumstances of this case. It seems to us that the decision of their Lordships of the Judicial Committee in the case of *Sanyasi Charan Mandal v. Krishnadhan Banerji* (4) is decisive on the point under consideration. In that case it was found as a matter of fact that the money in suit was borrowed exclusively for the purposes of a particular business and that this business was neither ancestral nor the extension of the ancestral business. Their Lordships observed:

"These findings must now be deemed conclusive, and this strikes at the very root of the case made by the plaintiffs in the first Court. The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In one case these relations result by operation of law from a succession on the death of an ancestor to an established business with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties. The inability of a karta to impose on a minor coparcener the risks and liabilities of a new business started by himself, is fully discussed by both Courts, and their Lordships agreeing with the conclusion at which they have arrived on this point, do not deem it necessary to enter in a further discussion of this aspect of the case."

The learned counsel for the appellants also cited the following cases in support of the appeal; *Inspector Singh v. Kharak Singh* (5) *Ragho v. Zaga Ekoba* (6); *T. Tammireddi v. T. Gangireddi* (7) and *Biswanath Singh v. Kayestha Trading and Banking Corporation Ltd.*, (8) The view, which we have taken in the present case, is consistent with the view adopted in the case just now mentioned.

The learned counsel for the plaintiff-respondent contended that in case it was held that the plaintiff was not entitled to a decree for sale of the mort-

gaged property he was entitled to a personal decree against the borrower Lokeshwar Indar Nath. We are of opinion that the contention must be allowed. There is no bar of limitation to such a decree and the deed of mortgage of 15th May 1922 clearly contains personal covenant on the part of Lokeshwar Indar Nath to repay the loan.

We accordingly allow this appeal, set aside the decree of the lower Court and dismiss the plaintiff's suit as against the appellants, Muneshwar Indar Nath, Sureshwar Indar Nath and Jaideo Singh, with costs in both Courts, but we grant a decree in favour of the plaintiff against Lokeshwar Indar Nath personally for the sum of money claimed in the plaint with costs in both Courts. The other defendants will bear their own costs in both Courts and shall not pay any costs to the plaintiff.

V.S./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 88

STUART, C. J., AND SRIVASTAVA, J.

Indar—Defendant—Appellant.

v.

Raghubir Singh and others—Plaintiffs and Defendants — Respondents.

Second Appeal No. 126 of 1929, Decided on 6th November 1929, from decree of Sub-Judge, Partabgarh, D/- 8th January 1929.

Transfer of Property Act, Ss. 3 and 6 (e)—Claim for interest by way of damages is not actionable claim but is mere right to sue which cannot be transferred.

A claim for interest by way of damages under S. 73, Contract Act, cannot be considered to be an actionable claim as defined in S. 3, as the interest cannot be considered to be a "debt," nor can it be regarded as any "beneficial interest in moveable property." It can therefore be regarded only as a right to sue and as such cannot be transferred. [P 89 C 1]

*S. C. Das—*for Appellant.

*H. Hussain—*for Respondents 1 to 3.

*H. D. Chandra—*for Respondents 4 and 5.

Judgment.—This is a second appeal against the decision of the Subordinate Judge of Partabgarh who affirmed the decision passed by the Munsiff of the same place.

The facts are these :

On 16th June 1926 defendants 2 and 3 executed a deed of further charge in favour of defendant 1 for Rs. 4000.

(4) A. I. R. 1922 P. C. 237=49 Cal. 560=49 I. A. 108 (P. C.).

(5) A. I. R. 1928 All. 403=50 All. 776.

(6) A. I. R. 1929 Bom. 251=53 Bom. 419.

(7) A. I. R. 1922 Mad. 236=45 Mad. 281.

(8) A. I. R. 1929 Pat. 429=8 Pat. 450.

Rs. 1,000 out of the mortgage money was left in the hands of the mortgagee to be paid by him whenever he was required by the mortgagors to do so. It has been found by both the Courts below that on 20th June 1926 defendants 2 and 3 made a demand for payment of this amount but the money was not paid. Subsequently the plaintiffs realized Rs. 377-12-0 from defendant 1 in execution of a decree which they had obtained against defendant 2. On 21st May 1928 defendants 2 and 3 sold to the plaintiffs their right to realize the unpaid balance amounting to Rs. 622-4-0 together with a sum of Rs. 473-4-0 claimed to be payable as interest by way of damages at the rate of 2 per cent. per mensem. On 2nd July 1928 the plaintiffs instituted the suit which has given rise to the present appeal, on the basis of the above mentioned deed of assignment. It has been decreed by both the Courts below.

The defendant appellant does not in this appeal contest his liability for the amount of Rs. 622-4-0 the balance of the mortgage money which still remains unpaid. The only point which he has pressed in this appeal is as regards his liability for the amount of interest claimed by way of damages. The contention is that the claim for interest could not be transferred and the plaintiffs could not enforce payment of it under the deed of assignment made in their favour. We are of opinion that the contention is correct and must succeed. The defendant appellant was under no contractual liability for the payment of the interest in question nor can it be said to be payable under the provisions of the Interest Act. The interest, therefore, can be claimed only by way of damages under S. 73, Contract Act. The question is whether such a claim is an actionable claim within the meaning of the definition given in S. 3, T. P. Act, or whether it is a mere right to sue within the terms of Cl. (e), S. 9, T. P. Act. We have no doubt that the interest in question cannot be considered to be a 'debt' nor can it be regarded as any "beneficial interest in moveable property." It follows that it cannot be considered to be an actionable claim as defined in S. 3, T. P. Act. It can therefore be regarded only as a right to sue and as such it could not be transferred.

We, therefore, allow the appeal to the extent of Rs. 473-4-0 claimed for interest. The rest of the decree of the lower Court will stand. The appellant will receive proportionate costs in all the three Courts.

R.M./R.K.

Order accordingly.

A. I. R. 1930 Oudh 89

WAZIR HASAN AND SRIVASTAVA, JJ.

Ram Charan—Defendant—Appellant.

v.

Mt. Jasoda—Plaintiff—Respondent.

First Appeal No. 49 of 1929, Decided on 13th December 1929, from order of Sub-Judge, Hardoi, D/- 20th February 1929.

(a) Civil P. C., Sch. 2, Para. 13 — Court can make order as to costs in absence of any provision in award regarding costs.

In the absence of any provision in the award in the matter of costs it is open to the Court seised of the proceedings to make an order as to costs under para. 13. [P 89 C 2]

(b) Civil P. C., Sch. 2, Para. 17 — Oudh Civil Rules of 1929, R. 289 (6)—Proceedings subsequent to award — Only one-fourth of pleader's fee in case of suits decided on merits can be charged.

Proceedings before an arbitrator and proceedings subsequent to the award are all proceedings in the matter of an application made by a party under para. 17, Sch. 2, and according to R. 289 (6) only one-fourth of the fee payable to pleaders in the case of suits decided on merits on contest can be taxed. [P 90 C 1]

Ram Bharosey Lal—for Appellant.

K. N. Tandon—for Respondent.

Judgment.—This appeal arises out of certain arbitration proceedings which ended in an award against the appellant. The award made no provision as to the costs of the proceedings. The appellant raised several objections to the award but they were all decided against him and in the matter of costs the Court made the following order :

"The plaintiff will get his costs from the defendant who shall pay the plaintiffs' costs and bear his own costs."

It is against this order that the present appeal has been preferred.

On behalf of the appellant the learned advocate argued that as the award made no provision as to costs, the Court could have made no order in respect thereof. We are unable to accept the argument. It seems to us that in the absence of any provision in the award in the matter of costs, it was open to the Court seised of the proceedings to make an order as to costs under para. 13, Sch. 2, Civil P. C.

The next argument arose as to the scale of fee payable to the pleader of the respondent in such proceedings. In the decree framed on the basis of the award such fee is taxed against the appellant and in favour of the respondent as if it were a case of a suit decided on the merits after contest. We think that this should not have been done. The proceedings before the arbitrators and the proceedings subsequent to the award were all proceedings in the matter of the application made by the respondent under para. 17, Sch. 2, Civil P. C., and therefore according to sub-R. 6, R. 289, Oudh Civil Rules of 1929, only one-fourth of the fee payable in the case of suits decided on the merits after contest, could be taxed against the appellant and in favour of the respondent.

Accordingly we direct that the decree prepared in the Court below shall be amended as just now indicated in the matter of the pleader's fee.

We make no order as to costs in this Court.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Oudh 90

PULLAN AND SRIVASTAVA, JJ.

Mohammad Sharif Khan and another
—Plaintiffs—Appellants.

v.

Achhaibar Dubey and another—Defendants—Respondents.

First Appeal No. 5 of 1929, Decided on 30th October 1929, from decree of Sub-Judge, Gonda, D/- 24th September 1928.

(a) Oudh Laws Act, S. 9 (2) — Pre-emptor claiming preferential right under S. 9 (2)—Onus lies upon him to prove that he is co-sharer.

If the pre-emptor claims a preferential right under S. 9, Cl. (2), the onus lies upon him to establish that there is an under-proprietary mahal of which he is a co-sharer. [P 91 C 2]

(b) Oudh Laws Act, S. 9 (3) — Sale of under-proprietary interest in village to superior proprietor — Pre-emption claimed by under-proprietor—Both vendee and pre-emptor being members of village community can claim equally.

Where in the case of a sale of an under-proprietary interest in the village there is competition between the vendee who is a superior proprietor and a pre-emptor who holds under-proprietary rights, the pre-emptor and the vendee are both members of the village community and are equally entitled to claim the property under S. 9 (3): 9 O.C. 271 and A.I.R. 1927 Oudh 124. *Rel. on.*: 5 O. C. 266, *not Foll.* [P 92 C 1]

S. N. Roy—for Appellants,
Khaliquzzaman and M. Wasim—for Respondents.

Srivastava, J.—This is a first appeal arising out of a pre-emption suit. Ishtiaq Ali and Ashfaq Ali two under-proprietors in village Rajpur sold by a sale-deed dated 30th June 1927, the entire under-proprietary khata No. 4 of village Rajpur and a share in another khata in another village with which we are not concerned in this litigation, in favour of Achhaibar Dubey and Sheo Ram Dubey, defendants 1 and 2, for Rs. 11,500. The plaintiff Nawab Khan who holds under-proprietary rights in khata No. 5 of village Rajpur instituted the suit which has given rise to the present appeal claiming a preferential right of pre-emption. He also pleaded that the price entered in the sale deed was fictitious, the sale having actually been made for a sum of Rs. 8,500 only. He, therefore, asked for a decree in respect of khata No. 4 of Rajpur on payment of a proportionate share of the price. The defendants vendees are admittedly co-sharers in the superior proprietary right comprising the under-proprietary share sold. They denied that the plaintiff had any preferential right or that any portion of the sale consideration was fictitious.

The learned Subordinate Judge has found that the plaintiff can neither be considered to be a co-sharer of a subdivision of the tenure in which the property is comprised within the meaning of Cl. (1), S. 9, Oudh Laws Act, nor a co-sharer of the mahal under Cl. (2) of that section. He held that the plaintiff as well as the defendants vendees both were members of the village community under Cl. (3), S. 9, and as such had an equal right of pre-emption. Lots were drawn and the plaintiff being unsuccessful in the drawing of lots, his suit has been dismissed. On the question of the price not being fixed in good faith, the learned Subordinate Judge held that no portion of the consideration was proved to be fictitious. As regards the comparative values of the two items of property which formed the subject of the sale-deed he held that the proportionate value of 16 annas of khata No. 4 of Rajpur which alone formed the subject of pre-emption would, in case the plaintiff be found entitled to a

decree, amount to Rs. 8,640. The learned counsel for the plaintiff-appellant has accepted the correctness of this finding before us. The only question urged by him in this appeal is that the plaintiff has a preferential right of pre-emption as against the defendants. He has conceded that as the plaintiff holds under-proprietary rights in khata No. 5 whereas the property forming the subject of pre-emption is khata No. 4, therefore, the plaintiff cannot claim any right of pre-emption on the ground of his being a cosharer of the sub-division of the tenure in which the property is comprised within the meaning of Cl. (1), S. 9, Oudh Laws Act. His contention is that the plaintiff has a preferential right under Cl. (2) as a cosharer of the mahal and failing this under Cl. (3) as a member of the village community.

As regards the first point, namely, the application of Cl. (2), S. 9, the argument is based upon two khewats Ex. 3 and Ex. 6. Ex. 3 is a copy of register No. 5 under-proprietary khewat of village Rajpur for 1307 F. This khewat shows that there are five khatas of which the first one is rent-free and the other four have rents assessed in respect of each of them. At the end there is a note to the effect that under an order passed by the Settlement Deputy Collector, Rs. 87 was entered as rent of khatas Nos. 2 to 5. It may be mentioned that this sum of Rs. 87 is the total amount of the rents noted separately against each of the four khatas. Ex. 6 is the under-proprietary khewat for the year 1335 F. This is practically the same as Ex. 3 except for the fact that the note at the end of Ex. 3 does not find place in this khewat and that the rents entered against each khata are slightly in excess of the rents entered in Ex. 3 and the total of the rents of the four khatas amounts to Rs. 98-2-0 instead of Rs. 87. It has been argued on behalf of the plaintiff that the reference to the sum of Rs. 87 as a lump rent in the note entered at the foot of Ex. 3 shows that all the under-proprietors are jointly liable for payment of the entire rent. I am not prepared to accept this contention. The plaintiff in para. 3 of his plaint admitted that there had been a partition in the village and that as a result of it the under-proprietary lands had been divided into five khatas.

They never suggested in the pleadings that in spite of the partition there was any joint liability amongst the under-proprietors for payment of rent. They have not produced any copy of the order of the settlement Court referred to in the foot-note in Ex. 3. For anything we know the Settlement Deputy Collector may have fixed rents separately for each of the khatas as shown in the body of Ex. 3 and the official responsible for the foot-note may have only put down the total of all the khatas. If the plaintiff claimed a preferential right under Cl. (2), the onus lay upon him to establish that there was an under-proprietary mahal of which he was a cosharer. The necessary elements for the purpose of making out the existence of a mahal are, as held in *Sheoraj Kunwar v. Harihar Bakhsh Singh* (1), the existence of a separate Record-of-Rights and the joint liability for rent. The plaintiff has absolutely failed to prove that there was any such joint liability. I, therefore, agree with the learned Subordinate Judge that the plaintiff has failed to prove the existence of any under-proprietary mahal and cannot, therefore, claim any right as a cosharer of the mahal under Cl. (2), S. 9.

Next as regards the plaintiff's claim as a member of the village community. The plaintiff's argument is that the village community should in each case be determined by reference to the nature of the tenure which forms the subject of pre-emption. In other words the learned counsel for the plaintiff argues that if the property which forms the subject of pre-emption is an under-proprietary tenure then it is only the members of the under-proprietary body who can constitute members of the village community within the meaning of Cl. (3) and similarly in the case of a pre-emption relating to a superior proprietary tenure it is only the body of superior proprietors and not the under-proprietors who can be regarded as constituting the village community under Cl. (3) of that section. Reliance has been placed upon a decision of Mr. Young, Judicial Commissioner, in *Ashrafunnissa v. Parbhu Narain*. (2). This

(1) [1910] 32 All. 351=7 I. C. 196=13 O. C. 165=37 I. A. 124 (P.C.).

(2) Select Case No. 140.

case no doubt supports the appellant's contention. Mr. Young was of opinion that the Oudh Laws Act, makes a distinction between the proprietary village community and the under-proprietary village community. The same view was taken by Mr. Spankie, Additional Judicial Commissioner in *Drighijae Singh v. Court of Wards, Ramnagar Estate* (3). Speaking for myself I think a good deal can be said in support of this view. One thing which appeals to me strongly in favour of it is that it does not make Cl. (4), S. 9, redundant. But the matter is by no means free from difficulty. It is not easy to reconcile Cls. 3 and 4 or to construe them without making one more or less overlap the other. I find it, therefore, difficult to put an interpretation upon this clause with any degree of confidence. Under the circumstances I think I must follow the view which has held sway in this province for about the last 28 years. It will be enough to make a brief reference to the course of decisions on this point.

In *Darilijae Singh v. Court of Wards* (3), Scott, J. C., disagreed with the opinion of Spankie, A. J. C., to which reference has been made above. The case was referred to the High Court of Judicature, N.W.P. and a Full Bench of the High Court consisting of Stanley, C. J., and Blair and Burkett, JJ., agreed with the opinion of Scott, J.C., and held that in the case of a sale of a proprietary mahal of a person holding an under-proprietary interest in a portion of the mahal was entitled to pre-emption under Cl. (3), S. 9, as a member of the village community. This view has been consistently followed in this province ever since. In *Raja Ali Mahommed Khan v. Ram Bilas* (4), a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Messrs. Chamier and Griffin held that where in the case of a sale of an under-proprietary interest in the village there was competition between the vendee who held under-proprietary rights and a plaintiff pre-emptor who was the superior proprietor, the plaintiff and the vendee were both members of the village community and were equally entitled to claim the property. In *Masih*

Uddin Ahmed v. Munir Ahmed (5), my learned brother Raza, J., took the same view and held that in the case of the sale of an under-proprietary plot, a superior proprietor and a person holding other under-proprietary plots have both an equal right of pre-emption.

The decisions referred to by me above fully support the view taken by the learned Subordinate Judge. I must, therefore, on the principle of stare decisis hold in agreement with the lower Court that the plaintiff and the vendees are both members of the village community and have, therefore, an equal right under Cl. 3, S. 9. It follows that the lower Court was right in drawing lots between them. The appeal, therefore, fails and I would dismiss it with costs.

Pullan, J.—In this appeal the plaintiff-appellant claims a right of pre-emption over a proprietor in the village on the ground that he, the plaintiff-appellant, is an under-proprietor, and, in the first instance, he attempted to show that he came under Cl. (1), S. 9, Oudh Laws Act, as being a cosharer of the subdivision of the tenure in which the property is comprised, but the Court below held that the under-proprietary land in this village had been divided by partition among the under-proprietors in the year 1879 into separate khatas. The land in suit is in khata No. 4, and the plaintiff-appellant is an under-proprietor in khata 5. These khatas have a separate rent assessed to them and cannot be held to be separate sub-divisions of a single tenure, and in appeal the learned counsel for the plaintiff-appellant has not pressed this point. He has fallen back upon Cl. 2, S. 9, and argued that the plaintiff-appellant and the vendor are cosharers in one mahal.

It is not clear whether Cl. (2), S. 9, Oudh Laws Act, contemplates any mahal except a proprietary mahal but undoubtedly the term "under-proprietary mahal" is recognized by the Land Revenue Act, and I see no reason why an under-proprietor in an under-proprietary mahal cannot claim pre-emption in respect of a share of that under-proprietary mahal under Cl. (2), S. 9, but the plaintiff-appellant in order to succeed had to prove that this land was situated in an under-proprietary mahal. In 1910 their Lordships of the Privy Council

(3) [1902] 5 O. C. 266.

(4) [1906] 9 O. C. 271.

(5) A. I. R. 1927 Oudh 124=1 Luck. 2.

decided the case of *Sheoraj Kuar v. Hari Har Bakhsh Singh* (1), and they accepted the definition given by Chamier, J. C., of the term "mahal," and also presumably, of the term "under-proprietary mahal." This opinion appears on p. 356 of the report, Mr. Chamier, said:

"When the Act speaks of an under-proprietary mahal it must, I think, mean a parcel or parcels of land separately assessed to revenue, the holder or holders of which is, or are, liable for the rent as a whole."

Now in the present case the under-proprietary khatas are all contained in the shamilat patti of the village, they do not form a separate entity and they are not assessed to revenue. Even if the word "revenue" is used by Mr. Chamier, to mean rent, I cannot find that there is any assessment to rent of these under-proprietary holdings as a whole. On the contrary each khata is separately assessed and the mere fact that a total is given in the revenue papers of the separate amounts due on each khata, does not render the holder or holders liable for the rent as a whole. The rent of each khata is due only from the under-proprietors in that khata and not from the whole body of under-proprietors in the other khatas. Thus the property in suit is not an under-proprietary mahal and the plaintiff-appellant cannot claim pre-emption under Cl. 2, S. 9. The lower Court decided that the case falls under Cl. 3 which enacts "that the third class of pre-emptors are members of the village-community." The vendee is a proprietor in the village and there is authority to the effect, that as residence is not an essential qualification for membership of a village community all proprietors may be included in Cl. (3).

It is not necessary to consider that aspect of the case in the present appeal, because the plaintiff contended before the lower Court that the vendee was a member of the village community and, as such, came under Cl. (3). He, therefore, conceded this point, and, as he himself has failed to establish that he has a right of pre-emption either under Cl. (1) or Cl. (2), it follows that he also comes under Cl. (3), that he and the vendee had equal rights of pre-emption, and that the only course open to the Court below was to decide their respective claims by drawing lots. This is the

course adopted by the lower Court and in my opinion this appeal should be dismissed.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 93

STUART, C. J. AND SRIVASTAVA, J.

Badri Singh and another—Plaintiffs—Appellants.

v.

Hazari Singh and others—Defendants—Respondents.

Second Appeal No. 147 of 1929, Decided on 27th November 1929, from decree of Third Addl. Dist. Judge, Lucknow, D/- 12th January 1929.

(a) Transfer of Property Act, S. 53 — Preference given to one set of creditors as against another set does not come under S. 53.

Where a transfer of property by sale deed amounts to nothing more than a preference given to one set of creditors as against another set, such preference even if given in anticipation of an attachment for which application was made two days before the execution of the sale deed, does not bring the case within the provisions of S. 53: *A. I. R. 1915 P. C. 115, Foll.* [P 94 C 2]

(b) Civil P. C., O. 34, R. 6—Proceedings under R. 6, are not governed by Transfer Property Act, S. 52.

A proceeding under O. 34, R. 6, Civil P. C., is not a proceeding in which any right to immovable property is directly and specifically in question, and therefore, S. 52, T. P. Act has no application to such a proceeding: *4 Cal. 402 (P. C.), Dist.* [P 95 C 1]

Radha Krishna and Gaya Prasad Srivastava—for Appellants.

K. P. Srivastava—for Respondents.

Judgment.—This is a second appeal by the plaintiffs. It arises out of a suit for a declaration that the property in suit is liable to attachment and sale in execution of the plaintiffs' decree.

It appears that one Jangbahadur Singh had made a mortgage of some immovable property belonging to him, in favour of the plaintiffs. The plaintiffs obtained a decree for sale on foot of their mortgage. When the mortgaged property was sold in execution of the decree on 20th July 1923, the sale proceeds were insufficient to satisfy the decree and so the plaintiffs on the following day made an application against the legal representatives of Jangbahadur Singh who had died before this date, under O. 34, R. 6, Civil P. C. Simultaneously with this the plaintiffs also made an application for attachment.

before judgment of the property in suit which formed part of the assets of Jangbahadur Singh. Two days later, on 23rd July 1923, three of the legal representatives of Jangbahadur Singh, viz., Dunia Singh, Ranjit Singh and Muthra Singh, executed two sale deeds in respect of the property in suit in favour of defendants 1, 2, 4 to 6 and the husband of defendant 3. Each of these sale deeds was for Rs. 3,000. The plaintiffs ultimately on 15th December 1923 succeeded in getting a simple money decree for Rs. 4069-6-3 against the assets of the deceased Jangbahadur, under O. 34, R. 6, Civil P. C. In execution of this decree the plaintiffs applied for sale of the property in suit. The vendees under the two sale deeds dated 23rd July 1923 filed an objection under O. 21, R. 58, Civil P. C., alleging themselves to be the owners of the property in suit which the plaintiffs had attached before judgment. This objection was allowed and the property was released from attachment. The plaintiffs accordingly instituted the present suit for a declaration that the property was liable to attachment and sale in execution of their decree.

The suit was decreed by the trial Court but on appeal the learned District Judge has reversed the decision of the trial Court and dismissed the suit.

Three points have been urged by the plaintiffs-appellants in support of this appeal. The first point is that S. 53, T. P. Act, applies to the case and the sale deeds dated 23rd July 1923 should be held to be fraudulent and voidable at the instance of the plaintiffs-creditors. It is necessary to state a few facts in order to understand the argument addressed on this point. It appears that Jangbahadur Singh died leaving considerable property and a will in favour of one Shamsher Singh. The legal heirs of Jangbahadur Singh disputed the will and a suit was instituted by three of these heirs, namely, Dunia Singh, Ranjit Singh and Muthra Singh impugning the will and claiming the property by right of inheritance. This suit was decided on the basis of a compromise which provided that the heirs of Jangbahadur should get the property on payment of Rs. 7,300 within a prescribed time to Shamsher Singh. Dunia Singh, Ranjit Singh and Muthra Singh were unable to pay the money and so they borrowed it from

some of their friends who in their turn raised the money by making mortgages of their own property. The money having thus been raised was paid to Shamsher Singh and after the property had been recovered from Shamsher Singh, Dunia Singh, Ranjit Singh and Muthra Singh executed the two sale deeds in dispute in favour of the vendees who had raised the money and advanced it to them. The argument urged on behalf of the plaintiffs-appellants is that there is nothing to show that the mortgages which had been executed by the vendees defendants have actually been paid off and that in any case the position of these vendees defendants was not that of creditors. We do not think that the argument has any substance. It is obvious that the defendants did not advance money to Dunia Singh, Ranjit Singh and Muthra Singh as a free gift. It must under the circumstances be regarded as a loan and the position of the defendants was nothing more or less than that of creditors in respect of this money. As regards the other point, namely, that it does not appear that the money has yet been paid to the mortgagees from whom the defendants had raised the money, it seems to us to be a matter of no consequence. The defendants have mortgaged their property and if they fail to make payments to their mortgagees those mortgagees will be entitled to enforce payment against the defendant's property.

Under these circumstances we are in agreement with the lower appellate Court that the position of the defendants in relation to Dunia Singh, Ranjit Singh and Muthra Singh was that of creditors. This being so the fact of Dunia Singh, Ranjit Singh and Muthra Singh having transferred the property in suit to the defendants, amounts to nothing more than this, that they have given preference to one set of creditors as against another set. Even assuming that this preference was given in anticipation of an attachment for which application had been made two days before the execution of the sale deed, that would not bring the case within the provisions of S. 53, T. P. Act. In *Musahar Sahu v. Hakim Lal* (1), their Lordships of the Judicial Committee held

(1) A. I. R. 1915 P. C. 115=43 Cal. 521=43 I. A. 104 (P.C.).

that a transfer of property is not made with intent to defraud, defeat or delay creditors within the meaning of the Transfer of Property Act, 1882, S. 53, because its effect or object is to prefer one creditor to another, even if it is made with the intention to defeat an anticipated execution. What the section invalidates is a transfer which removes the whole, or a part, of the debtor's property from the creditors as a body, to the benefit of the debtor. It is not suggested and there is no evidence to show that the property in suit still continues to belong to Dunia Singh, Ranjit Singh and Muthra Singh. The sale deeds in question are therefore perfectly valid and the plaintiffs are not entitled to avoid them under S. 53, T. P. Act.

The next contention urged is that the sale deeds in question are invalid under S. 52, T. P. Act, by reason of their having been made pendente lite. The lis set up is the proceedings under O. 34, R. 6, initiated by means of the application dated 21st July 1923. S. 52 applies to a contentious suit or proceeding in which any right to immovable property is directly and specifically in question. It is obvious that in this case there was no suit whether contentious or otherwise. All that we are concerned with is a proceeding under O. 34, R. 6 Civil P. C. The question therefore arises whether it was a proceeding in which any right to immovable property was directly and specifically in question. We are clearly of opinion that it was not such a proceeding. The decree which was passed under O. 34, R. 6 was a simple money decree. It cannot be said that a proceeding under this rule is a proceeding in which any right to immovable property is directly and specifically in question. Reliance has been placed on a decision of their Lordships of the Judicial Committee in *Bazayet Hossein v. Dooli Chand* (2). In this case the suit which was brought by two defendants to set aside a mukurrari was set up by the son of their deceased husband and for possession of the estate and for a declaration that the dower claimed by them should be paid out of the estate. This was clearly a case in which there was a contentious suit and therefore an alienation made during the

pendency of the suit was held to be affected by the doctrine of lis pendens. The case is quite distinguishable and can afford no guidance in the present case in which the question arises with reference to a proceeding and not a suit. We must therefore overrule this contention also.

Lastly, it was argued that the plaintiffs are at any rate entitled to execute their decree by attachment and sale of the shares of certain legal representatives of the deceased Jangbahadur other than Dunia Singh, Ranjit Singh and Muthra Singh. Their names are Naga Singh, Lalta Singh and Sheonath Singh.

These persons are no parties to the present suit. We do not, therefore, want to express any opinion as regards the right of the plaintiffs in relation to any interest possessed by Naga Singh, Lalta Singh and Sheonath Singh in the property in suit. If the plaintiffs have any claim to enforce their decree against them or their interest if any in the property in suit, they must seek an adjudication of it in a separate suit or proceeding. For the above reasons the appeal fails and is dismissed with costs.

V.S./R. K.

Appeal dismissed.

A. I. R. 1930 Oudh 95

STUART, C. J. AND SRIVASTAVA, J.

Ram Bharosay Lal and another—
Plaintiffs—Appellants.

v.

Janki Prasad and another—Defendants—Respondents.

Second Appeal No. 204 of 1929, Decided on 19th November 1929, from decree of Addl. Sub-Judge, Fyzabad, D/- 6th April 1929.

Evidence Act, S. 92 (1)—In case of mutual mistake either party can prove mistake in written contract—Specific Relief Act, S. 31.

Where a mortgage deed stipulates that Re. 1 per month shall be paid interest and the mortgagee contends that the rate of interest agreed upon is Re. 1 per cent. per month, the words "per cent." having been omitted from the mortgage deed, through clerical mistake, it is a case of mutual mistake of the parties and not one of patent ambiguity as contemplated by S. 93. The case is similar to one in which a description of property intended to be conveyed in a particular deed has been wrongly entered. Therefore the combined effect of S. 92 (1), Evidence Act, and S. 31, Specific Relief Act, is to entitle either party to the contract to protect his rights by proving the mistake in the written contract: 39 *Mad.*

(2) [1879] 4 Cal. 402=5 I. A. 211=3 Sar. 353 (P.C.).

392 and A. I. R. 1922 All. 42, Rel. on ; 41 Cal. 742, Dist. [P 96 C 1, 2]

R. D. Sinha—for Appellants.

H. D. Chandra—for Respondents.

Judgment.—This is a second appeal by the plaintiffs who have been unsuccessful in both the Courts below. The appeal arises out of a suit for redemption in respect of a mortgage deed dated 14th February 1928 executed by one Rudr Pratab Singh in favour of the defendants respondents. The principal money secured by this mortgage deed was Rs. 900. The only point in controversy between the parties in the present appeal is as regards the interest payable in respect of the mortgage money. The plaintiffs' contention is that on a proper construction of the terms of the mortgage deed, the mortgagees are entitled only to a sum of Re. 1 per month as interest in respect of the entire mortgage money. The defendants on the other hand contended that the agreement between the parties was that interest was payable at the rate of Re. 1 per cent per month but by reason of a clerical omission the words "per cent" were left out from the deed. Both the Courts below have, on an examination of the evidence led by both parties, come to the conclusion that the rate of interest agreed upon was Re. 1 per cent per month and that it was due to a clerical mistake that the words "per cent" had been omitted from the mortgage deed. At the face of it, it is absurd to think that Re. 1 per month was the interest agreed upon in respect of the whole mortgage money. Be it as it may, the finding arrived at by the lower appellate Court is obviously a finding of fact which is binding on us in second appeal. But it is contended that no evidence aliunde the mortgage deed was admissible to prove the intention of the parties or the agreement between them. It has been argued that at best it is a case of a patent ambiguity and no evidence can, therefore, be admitted to clear it by reason of the provisions of S. 93, Evidence Act. We are not prepared to accede to this contention. We think it is a case of mutual mistake for which provision is to be found in proviso, 1, S. 92, Evidence Act. In principle, the case is similar to one in which a description of the property intend-

ed to be conveyed in a particular deed has been wrongly entered. In *Runjasami Ayyangar v. Souri Ayyangar* (1) where there was 'a mistake in the description of the property sold, a Bench of the Madras High Court held that the combined effect of S. 92 Cl. (1), Evidence Act and S. 31, Specific Relief Act, is to entitle either party to a contract to protect his rights by proving a mistake in the written contract. *Abdur Hakim Khan v. Ram Gopal* (2) is to the same effect. We agree with the principle laid down by their Lordships of the Madras and Allahabad High Courts in the above cases and think that it applies to the present case.

The learned counsel for the plaintiffs appellants has relied upon a decision of the Calcutta High Court in *Pratap Chandra Saha v. Mahomed Ali Sarkar* (3). No reference has been made in this case to prov. (1), S. 92, Evidence Act. Further the case seems to us to be distinguishable. On the facts of that case the learned Judges were of opinion that as the deed did not provide whether the interest was payable monthly or annually, the position was similar to a case in which there was a blank which would give rise to a patent ambiguity which could not be removed by any extraneous evidence. The language used in the document before us is to the effect that interest was payable at the rate of Re. 1 per month. The point at issue between the parties is whether the interest at this rate is payable per cent or in respect of the entire mortgage money. It does not seem to us possible to construe this clause as implying that the interest of Re. 1 was chargeable in respect of the entire amount because the deed clearly refers to a rate of interest. It is not therefore a case of any patent ambiguity such as is contemplated by S. 93, Evidence Act. It is merely a case of a clerical omission of the amount in respect of which this rate of interest was chargeable due to the mutual mistake of the parties. We are therefore in agreement with the Courts below that the case is covered by prov. (1), S. 92, Evidence Act.

(1) [1915] 39 Mad. 792=29 M. L. J. 229=29 I. C. 588=(1915) M. W. N. 448.

(2) A. I. R. 1922 All. 42=44 All. 246.

(3) [1914] 41 Cal. 342=19 C. L. J. 66=20 I. C. 443=18 C. W. N. 592.

The appeal fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 97.

STUART, C. J., AND SRIVASTAVA, J.

Mehdi Ali and others — Plaintiffs—
Appellants.

v.

Walayat Husain Khan and another — Defendants—Respondents.

Second Appeal No. 177 of 1929, Decided on 9th December 1929, from decree of Addl. Sub-Judge, Lucknow, D/- 23rd February 1929.

(a) Civil P. C., O. 34, R. 1—Mortgagee should not raise controversy regarding title of third person.

The mortgagee plaintiff should not ordinarily be allowed, in his suit based on the mortgage to raise a controversy as regards the title of a third person who is not connected with the mortgage and claims a paramount title: 33 Cal. 425; 40 All. 584; A. I. R. 1927 P. C. 81 and A. I. R. 1929 Oudh 463. *Rel. on.* [P 99 C 2]

(b) Civil P. C., S. 11, Expl. 4—Party to mortgage suit in different capacity than mortgagor—Paramount title not expressly in controversy—Plea of *res judicata* in respect of paramount title cannot be set up.

The plea of *res judicata* in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it: 33 Cal. 425; 40 All. 584; A. I. R. 1920 P. C. 81 and A. I. R. 1929 Oudh 463. *Rel. on.* [P 99 C 2]

(c) Evidence Act, S. 101—Minor plaintiff must prove that he became major within three years of suit.

It is the duty of the person bringing a suit and claiming exception under Limitation Act, S. 8 to show that he attained majority within three years of the institution of the suit.

[P 100 C 1]

(d) Evidence Act, S. 35—Entry in guardianship certificate is sufficient to prove age of persons.

The entry in the certificate of guardianship is sufficient evidence to prove the age of particular persons: A. I. R. 1926 Oudh 8 and A. I. R. 1929 Oudh 134. *Foll.* [P 100 C 1, 2]

Ghulam Husnain Naqvi—for Appellants.

Ghulam Hasan and Shahanshah Husain—for Respondents.

Srivastava, J.—This is an appeal by the plaintiffs who have been unsuccessful in both the lower Courts. The facts of the case which have given rise to this appeal are lengthy and complicated. We will state them so far as they are

necessary for the proper understanding and determination of the points which require decision in the appeal.

One Nawab Sultan Begum, the daughter of Muhammad Ali Shah, King of Oudh, owned some house property which she transferred by a sale deed dated 8th November 1865 in favour of her four sons Nawab Jafar Ali Khan, Quazim Ali Khan, Sadiq Ali Khan and Raza Ali Khan. She had also left two daughters one of whom, Zeenat Ara brought a suit impugning the sale deed and on 19th August 1895 obtained a decree against her four brothers for her one-tenth share. Nawab Jafar Ali Khan mortgaged his four annas share in the said property. The mortgagee obtained a decree for sale on foot of the mortgage deed and 1/5th of the materials of the houses was put to sale. The aforesaid 1/5th share of the materials was purchased by one Ali Jan Khan. On 16th April 1901 Raza Ali Khan made a mortgage of his 1/4th share in favour of Ahmad Husain. Four days later, on 20th April 1901, Raza Ali Khan purchased from Ali Jan Khan his rights in the 1/5th of the materials which had been purchased by him. Subsequently Raza Ali Khan made two mortgages one on 21st August 1901 in favour of his previous mortgagee Ahmad Husain for his 1/4th share and 1/5th of the materials purchased by him and the other on 28th September 1901 in favour of Wilayat Husain defendant 1 in respect of a 3/4th share in the house property. It is not easy to say how he abrogated to himself the ownership of the 3/4th share but it appears to have included his 1/4th share, the 1/4th share of Quazim Ali Khan which he said he was going to purchase and 1/5th share in the materials which he had acquired from Ali Jan. Raza Ali Khan died on 21st September 1907.

On the day following his death Wilayat Husain instituted a suit for sale on the basis of his mortgagee deed dated 28th September 1901, against the heirs of Raza Ali Khan. One of the heirs impleaded in the suit was Jafar Ali Khan the brother of Raza Ali Khan. Jafar Ali Khan did not appear to defend the suit and it was decided against him *ex parte*. The other heirs of Raza Ali Khan made a compromise with Wilayat

Husain and ultimately on 13th January 1908 a decree for sale was passed on the basis of the compromise as against the contesting defendants and ex parte against Jafar Ali Khan, in respect of a 27/40th share in the houses instead of the 3/4th share which was mortgaged. This share was evidently fixed at 3/4ths of 9/10th, this being the share left to the sons after excluding the 1/10th share for which Zeenat Ara had obtained a decree in her favour. On 28th September 1908 Jafar Ali Khan sold his 1/4th share in the site of the houses and 1/20th share in the materials which had remained unsold, to one Abdul Ali. The latter died on 13th February 1909 leaving three minor sons who are the plaintiffs-appellants before us. On 4th April 1910 one Hakim Fazal Ali the maternal uncle of the minor sons of Abdul Ali, acting as their next friend, made an application under O. 21, R. 58, Civil P. C., procedure objecting to the sale of Jafar Ali's 1/4th share in the site of the houses, in execution of Wilayat Husain's decree.

This application was rejected on 16th April 1910. It appears that subsequently the whole property which formed the subject of the decree in Wilayat Husain's favour was put to sale and purchased by Wilayat Husain himself who obtained a sale certificate in respect of it on 7th November 1910 and also obtained possession under a warrant for delivery of possession dated 6th February 1911. It may be mentioned that Wilayat Husain also purchased the 1/10th share for which Zeenat Ara had obtained a decree in her favour, under two sale deeds, one dated 25th November 1910 and the other dated 24th May 1911. Thereafter on 17th April 1914 Wilayat Husain also obtained a decree for partition of the share purchased by him, against Sirdar Mahal defendant 2, widow of Sadiq Ali Khan. On 13th June 1912 the Maharaja of Mahmudabad was appointed guardian of the person and property of the three minor sons of Abdul Ali Khan. Two of these sons attained majority before the institution of the present suit. On 20th December 1926 this suit was instituted by and on behalf of the three sons of Abdul Ali for possession by partition of a 1/4th share in the land forming the site of all the houses in question which

was sold by Jafar Ali Khan to their father.

Wilayat Husain, defendant 1, contested the suit on various grounds but the only defences which are material for the purposes of this appeal are those based on the grounds of res judicata, limitation and the plea about the extent of the plaintiffs' share.

Both the lower Courts have found that as the plaintiffs derive their title from Jafar Ali Khan they are bound by the decree obtained by Wilayat Husain against him and their claim is, therefore, barred by the principle of res judicata. On the question of limitation the finding of the lower appellate Court is that plaintiff 1 has failed to prove that he attained majority within three years of the institution of the present suit. It has, therefore, held that the claim of plaintiff 1 is barred by time. Lastly as regards the extent of the plaintiffs' share both the lower Courts have found that the plaintiffs could not as transferees of the interest of Jafar Ali be entitled to more than 1/4th of 9/10ths after excluding Zeenat Ara's share.

The learned counsel for the plaintiffs-appellants questioned the correctness of the findings of the lower appellate Court on all the three points set forth above. His first contention is as regards res judicata. The position with regard to this question is this: Wilayat Husain the mortgagee brought a suit on foot of his mortgage dated 28th September 1901 praying therein for sale of the 3/4ths share mortgaged by Raza Ali. As the mortgagor Raza Ali had died before the suit so it was instituted against his heirs. One of them was his brother Jafar Ali and he was accordingly impleaded as one of the heirs and legal representatives of Raza Ali. Jafar Ali did not appear to defend the suit and the claim was decreed against him in respect of 27/40th share in the property ex parte.

The learned Subordinate Judge has found that as Jafar Ali was a party to the suit he ought to have contested it on the ground that the share mortgaged by Raza Ali was more than his legitimate share and as he failed to do so, therefore, the claim set up by the plaintiffs who claimed through Jafar Ali is barred by the rule of constructive res judicata under Explan. 4, S. 11,

Civil P. C. The argument urged by the plaintiffs-appellants is that as it was a suit based on a mortgage and Jafar Ali was impleaded as a representative of the mortgagor, it was not incumbent on him in that suit to set up his paramount title and his failure to do so cannot attract the application of Explan. 4, S. 11, Civil P. C., to the case. In *Jaggaswar Dutt v. Bhuban Mohan Mitra* (1) it was held that the ordinary rule was that a plaintiff mortgagee could not be allowed so to frame his suit as to draw into controversy the title of a third party, who was in no way connected with the mortgage and who had set up a title paramount to that of the mortgagor and mortgagee. This case was referred to and followed by the Allahabad High Court in *Joti Prasad v. Aziz Khan* (2) In *Gobardhan v. Munna Lal* (3), a Bench consisting of Sir Pramada Charan Banerji and Abdul Raoof JJ., decided that in a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee was not a necessary party and the question of the paramount title could not be litigated in such a suit. The facts of this case were that two suits for sale on separate mortgages of the same property were filed and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit. The party impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon though he was not impleaded in that capacity. In one of these suits the puisne mortgagee did not appear and the suit was decreed against him ex parte. This puisne mortgagee then brought a suit for declaration of his title to part of the mortgaged property. Applying the principle set forth above their Lordships of the Allahabad High Court held that the suit was not barred by anything which had happened in the course of the previous litigation. In *Radha Kishun v. Khurshed Hossein* (4) the facts were these: Second mortgagees sued for a sale decree under the Transfer of Property Act 1882, joining

as a party the first mortgagee who did not appear. A decree was made and the property was bought by the second mortgagees. The first mortgagee afterwards sued for a sale decree. It did not appear that in the former suit the second mortgagees had attacked the first mortgage or sought to postpone it to their own. It was held that the decree in the former suit was not res judicata under S. 11, Civil P. C. 1908, against the first mortgagee and that he was entitled to a sale decree. In the course of their judgment their Lordships of the Judicial Committee remarked as follows:

"Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of res judicata it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority."

Lastly, in a case decided by a Bench of this Court, *Abdul Wahid Khan v. Ali Husain* (5) it was decided that if a prior mortgagee with a paramount title is impleaded in a subsequent suit brought by the puisne mortgagee and there is no contest in that suit regarding the prior mortgage the right of the prior mortgagee would not be lost to him.

The principles deducible from the above decisions are: Firstly, that the mortgagee plaintiff should not ordinarily be allowed, in his suit based on the mortgage to raise a controversy as regards the title of a third person who is not connected with the mortgage and claims a paramount title, and secondly as a corollary of the above, that the plea of res judicata in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it. But the matter might be considered from another stand point. The words of Explan. 4, S. 11 are:

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

(5) A. I. R. 1929 Oudh 463=4 Luck. 250.

(1) [1906] 33 Cal. 425=3 C. L. J. 805.

(2) [1909] 31 All. 11=1 I. C. 53=6 A. L. J. 5.

(3) [1918] 40 All. 584=46 I. C. 559=16 A. L. J. 639.

(4) A. I. R. 1920 P. C. 81=47 Cal. 662=47 I. A. 11 (P. C.).

It is true that Jafar Ali Khan might have set up his rights of ownership in respect of the 1/4th share in the land forming the site of the houses as a ground of defence in that suit but the further question is whether he ought to have raised that defence in the said suit. We have pointed out that in mortgage suits the ordinary rule is not to draw into controversy questions regarding a paramount title. It follows therefore that if Jafar Ali who had been impleaded only as a representative of the mortgagor had raised such a plea in defence it would have been entirely in the discretion of the Court to allow the question regarding his paramount title to be litigated in that suit or not. If the matter was one the adjudication in respect of which depended upon the discretion of the Court trying the suit, it can hardly be said to be a matter which "ought to have been made ground of defence." We are not in the circumstances prepared to hold that it was incumbent on Jafar Ali to raise a controversy as regards his title as owner in that suit. We are therefore of opinion that the present suit is not barred by the rule of *res judicata*.

The next contention is as regards limitation. It is admitted by the learned counsel for the appellants that there is no evidence as regards the age of plaintiff 1 except Ex. C-3., the certificate of guardianship. This document only shows that plaintiff 1 was to attain majority in December 1923. It does not mention the date on which he would become major. The present suit was instituted on 20th December 1926. It was the duty of the plaintiff to show that he attained majority on some date after 20th December. There can be no presumption that he attained majority after the 20th and not before that date. As he has failed to give any evidence to prove the date of his birth, we think the lower Court is correct in holding that his claim is beyond time. In this connexion we might also mention that the learned counsel for the defendants respondents impugned the finding of the lower appellate Court about the claim of plaintiffs 2 and 3 being within time. We think the defendant's contention also to be without force. The argument urged by the defendants respondents is that the entry in the certificate of guar-

dianship is not sufficient evidence to prove the age of plaintiffs 2 and 3. It has been held in *Mohan Lal v. Muhammad Adil* (6) and *Ameer Hasan v. Mohammad Ejaz Husain* (7) that a certificate of guardianship issued in Oudh is a record made by a public servant in the discharge of his official duties and an entry in such a certificate is relevant and admissible in proof of the age of a particular person. The lower appellate Court having accepted the said entry as sufficient evidence regarding the ages of these two plaintiffs, it is not open to us in second appeal to question the finding of the lower appellate Court.

Lastly, it was contended by the plaintiff-appellants that the share of the plaintiffs is 1/4th and not 1/4th of 9/10th as found by the lower appellate Court. The argument is that although Zeenat Ara had obtained a decree for her 1/10th share yet there is no evidence to show that she ever put the decree into execution or obtained possession of that share. We do not think that the absence of positive evidence regarding the execution of Zeenat Ara's decree is of any consequence. There can be no doubt that her legal share in the inheritance of her mother Sultan Begum was 1/10th and that she had got a decree for that share. It was never pleaded that she did not get possession of the share or that she lost it by adverse possession. Further we have the fact that the share decreed in her favour was purchased by Wilayat Husain under two sale deeds to which reference has been made before. We therefore agree with the lower appellate Court that the share available for distribution among the four sons of Sultan Begum was only 9/10th and that the share of Jafar Ali could only be 1/4th of 9/10th.

The result therefore is that we allow the appeal, set aside the decision of the lower appellate Court and give plaintiffs 2 and 3, Syed Hadi Ali and Syad Ibad Ali a decree for possession by partition of 2/3rds of 9/40ths of the land forming the site of the three houses in suit together with proportionate costs in all three Courts. A preliminary decree for partition will be prepared accordingly.

V.S./R.K.

Appeal allowed.

(6) A. I. R. 1926 Oudh 88.

(7) A. I. R. 1929 Oudh 134.

A. I. R. 1930 Oudh 101

MISRA, J.

Mardan Khan—Defendant — Appellant.

v.

Mahmoodi Khan and others—Plaintiffs—Respondents.

Second Appeal No. 184 of 1928, Decided on 6th December 1928, from decree of Sub-Judge, Sultanpur, D/- 15th February 1928.

(a) Pre-emption—Pre-emptor challenging bona fides of price entered in sale deed—Slight evidence is sufficient to shift onus on vendee to prove that price is not fictitious—But proof offered by pre-emptor must be relevant and admissible.

Very slight evidence would, in a pre-emption suit, where the pre-emptor challenges the bona fides of the price entered in the sale deed, shift the burden of proof upon the defendant vendee to prove that the price entered in the deed is correct and that the consideration stated therein has actually passed. But such slight proof as is offered by the pre-emptor as a prima facie proof of his case must consist of relevant and admissible evidence and must be such that if believed by the Court asked to arrive at the finding would justify it in arriving at a finding as to the fictitious nature of the consideration : 5 All. 181 ; 9 All. 225 ; 29 All. 618 ; 4 O. C. 247 and 14 O. C. 1, Rel. on. [P 102 C 1]

(b) Pre-emption — Price entered in sale deed higher than market value — Presumption is that it is fictitious.

In a suit brought by a pre-emptor challenging the bona fides of the price entered in sale deed, the fact that the price entered in the deed is higher than the market value would be a very strong piece of circumstantial evidence going to show the fictitious nature of the price entered in the deed. But it, in no case, should be considered as conclusive : 3 O. L. J. 543 and A. I. R. 1927 Oudh 361, Rel. on. [P 102 C 2]

Mohammad Hafeez—for Appellant.

Ali Zaheer and S. N. Srivastava—for Respondents.

Judgment.—This is an appeal arising out of a pre-emption suit. The facts of the case are that one Mt. Sakina was the owner of a certain share in village Kansa Patti, district Sultanpur. She sold that share to Mardan Khan, the defendant-appellant, by a sale deed dated 28th June 1926. The consideration stated in the sale deed was Rs. 2,200. The plaintiffs who are cosharers in this village have brought the present suit for pre-emption in respect of the said share on payment of Rs. 1,752 only, their allegation being that the price stated in the sale deed is fictitious to the extent of Rs. 448 which was alleged to be due on account of a pro-note said to have been

executed by Mt. Sakina in favour of the defendant.

The defendant admitted the plaintiffs' right to pre-empt but contended that the price entered in the sale deed was not fictitious and that the plaintiffs could not obtain a decree for pre-emption without the payment of the price stated in the sale deed, namely, Rs. 2 200.

The learned Munsif of Sultanpur who tried the suit came to the conclusion that the price entered in the sale deed had not been proved to have been fictitious and that the pro-note on account of which the sum of Rs. 448 had been paid out of the consideration of the sale deed was genuine and for consideration. On this finding he decreed the suit of the plaintiffs-respondents on payment of Rs. 2,200.

The plaintiffs appealed against this decision of the learned Munsif and the learned Subordinate Judge has held in appeal that the price stated in the sale deed is fictitious and has decreed pre-emption on the payment of Rs. 1,752 only.

The defendant-appellant has now come to this Court in second appeal and the main point which has been argued before me is that the learned Subordinate Judge has erred in holding that the price stated in the sale deed had not been fixed in good faith. The argument is to the effect that there was no evidence on the record to justify the said finding.

I have heard the arguments of the counsel on behalf of the parties at great length and have taken time to consider my judgment. I am of opinion that the finding of the learned Subordinate Judge cannot be sustained and that this appeal must be allowed.

I now proceed to give my reasons for having arrived at this conclusion. Ordinarily a finding that the price stated in the sale deed is fictitious would be a finding of fact and it would not be open to a Court of second appeal to interfere with that finding unless it could be shown that there is no evidence to support the finding or that the evidence relied upon in support of the said finding is not relevant or legally admissible to prove the said point. Apart from this, one other principle has been relied upon by the learned Subordinate Judge in arriving at this finding it being to the

effect that very slight evidence would in a pre-emption suit, where the pre-emptor challenges the bona fides of the price entered in the sale deed, shift the burden of proof upon the defendant vendee to prove that the price entered in the deed is correct and that the consideration stated therein has actually passed. As to this principle there can be no doubt that it has been laid down in several cases both of the Allahabad High Court as well as of the late Court of the Judicial Commissioner of Oudh. As to the cases of the Allahabad High Court reference may be made to the cases reported in *Bhagwan Singh v. Mahabir Singh* (1), *Sheopargash Dube v. Dhanraj Dube* (2) and *Abdul Majid v. Amolak* (3). As to the cases decided by the late Court of the Judicial Commissioner of Oudh I would refer to *Dwarka v. Ludar* (4) and to *Murlidhar v. Kalka Singh* (5).

One point I would like, however, to indicate in connexion with these cases is that, in all such cases where the rule as to slight evidence being sufficient has been laid down and where it has been held that a prima facie case alone has to be made out, it has always been insisted upon that such slight proof as is offered by the pre-emptor as a prima facie proof of his case must consist of relevant and admissible evidence and must be such that if believed by the Court asked to arrive at the finding would justify it in arriving at a finding as to the fictitious nature of the consideration. It has nowhere been laid down that in every case where such slight evidence is given must be considered to be sufficient to establish a prima facie case. It is laid down in *Bhagwan Din v. Mahabir Singh* (1) (on p. 185) that it would be upon the plaintiff pre-emptor in the first instance to substantiate by some prima facie evidence that the price entered in the deed is fictitious and more than the actual consideration paid, and it would depend upon the particular circumstances of each case to determine how much evidence would be sufficient to establish such a prima facie case in favour of the plaintiff.

In *Sheopargash Dube v. Dhanraj Du-*

(1) [1882] 5 All. 186=(1882) A.W.N. 213.

(2) [1887] 9 All. 225=(1887) A.W.N. 39.

(3) [1907] 29 All. 618=4 A.L.J. 531=(1907) A.W.N. 202.

(4) [1901] 4 O.C. 247.

(5) [1911] 14 O.C. 1=9 I.C. 393.

be (2), Edge, C. J., states the rule as follows :

"That rule is that, in the first instance, the plaintiff who alleges the price to be fictitious, must give some prima facie evidence which would lead to the presumption that the price mentioned in the sale deed was not the real or true price. Having done that, it lies upon the vendor and vendee, who set up the price as true and genuine, to give such explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. As a general rule how can that be done? The plaintiff in a case of this kind would not be a party to the transaction out of which the sale to the stranger arose. He would not, as a rule, have any actual knowledge of what the real price was. In the majority of cases, the only prima facie evidence which the plaintiff pre-emptor can produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious and this could only happen in rare cases, or evidence showing that the market value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged contract price was not the real price."

I would like to add to the rule enunciated by their Lordships of the Allahabad High Court which is quoted above that the prima facie proof can also be discharged by giving evidence as to what the real contract between the vendor and the vendee was. I must also point out that it has been held in some cases both in the late Court of the Judicial Commissioner of Oudh as well as in this Court that the mere fact that a price higher than the market value has been entered in the deed would not by itself raise a presumption, unless accompanied by other circumstances, that the price entered is fictitious. It has been pointed out in those cases that in many instances it happens that a vendee for good reasons may pay more than what was the actual market value; he may even pay a fancy price yet the transaction may be a genuine one. To prove a prima facie case I would therefore state as my opinion that it would be necessary for the trial Court, in every instance to decide the case on the evidence both circumstantial and otherwise, whether the price entered is fictitious. I must, however, state that the fact that the price entered in the deed is higher than the market value would be a very strong piece of circumstantial evidence going to show the fictitious nature of the price entered in the deed. But it must be remembered that in no case should it be considered as conclusive. It is only a

piece, though a very strong piece of evidence and has to be considered along with the circumstances and facts of each case. This rule will be found to be enunciated in *Shambhu Dat v. Jagannath* (6) and *Asafuddaula Khan v. Abdul Ghaffar* (7).

Having stated the rule I have to consider as to whether there is evidence on the record to satisfy the rule laid down above. As to the market value the learned Subordinate Judge finds in his judgment that there is no satisfactory proof showing what the market value of the property is and I am in entire agreement with his finding. Apart from this, however, there is only one solitary statement in the evidence of Alam Khan P. W. 4, upon which the learned Subordinate Judge has relied for proof of the fact that the consideration entered in the sale deed is fictitious. The sentence is :

"The consideration was entered with the object of preventing pre-emption."

To my mind this evidence is quite insufficient to discharge the onus which lay on the plaintiffs-respondents to prove a prima facie case. The witness has not stated the grounds upon which he made this statement. It was the bounden duty of the plaintiffs to elicit those grounds from the witness himself. It is impossible to accept the mere ipse dixit of the witness on the point. I am inclined to hold that this statement is insufficient to prove the allegation made by the plaintiff as to the fictitious nature of the price. Indeed I am inclined to hold that the evidence is not admissible to prove the said fact unless reasons were elicited from the witness as to the grounds for his making this statement. It was pointed out on behalf of the plaintiffs-respondents that no cross-examination was directed on behalf of the defendant-appellant against the witness on this point. I do not see any force in this contention because in my opinion it was the duty of the plaintiffs themselves who had produced this witness to elicit from him the grounds which would make his evidence admissible. It was not the duty of the defendant-appellant to have brought out those grounds in cross-examination. I am therefore of opinion that the plaintiffs

respondents have failed to discharge the onus which lay upon them of making out a prima facie case.

Under those circumstances it is not necessary for me to go into the question as to whether the pro-note dated 1st January 1926 executed by Mt. Sakina in favour of Mardan Khan the appellant was a genuine transaction. I may, however, state that the trial Court which heard the evidence came to the conclusion that the said pro-note was a genuine transaction. The defendant-appellant examined the scribe of the note of one other person who was the witness of the receipt at the time when the pro-note was executed. Both these witnesses deposed to the genuineness of the pro-note and the receipt and stated that money had been paid by the appellant to Mt. Sakina in their presence. The learned counsel for the respondents has not been able to convince me by any good reason that that finding is bad and not justified by evidence. Even the learned Subordinate Judge has not chosen to criticize that evidence. I am unable to follow the learned Subordinate Judge when he says in his judgment that because the vendee was a stranger to the village the pro-note must be considered to have been executed for a fictitious consideration. Nor am I in a position to follow the learned Subordinate Judge when he says that the fact of no notice having been given by the vendee of his purchase showed that the consideration entered in the sale deed was fictitious. I am of opinion that these are irrelevant matters and should not have been imported in deciding the point in issue, namely, whether the consideration had actually been paid. That depended upon the evidence of the two witnesses examined on behalf of the defendant-appellant to which reference has been made above.

I am therefore inclined to agree with the finding of the trial Court that the pro-note referred to above which formed part of the consideration of the sale deed was a genuine transaction and for consideration. I am therefore of opinion that the decision of the learned Subordinate Judge in this case cannot be maintained and that the plaintiffs-respondents must be directed to pay the full price entered in the deed, namely, Rs. 2,200. I therefore accept the appeal, set

(6) [1916] 3 O.L.J. 543=57 I.C. 173.

(7) A.I.R. 1927 Oudh 361.

aside the decree of the learned Subordinate Judge and restore that of the Munsif with costs in this and the lower appellate Court. I maintain the order of the first Court regarding costs, viz., that the parties shall bear their own costs of that Court.

V.S./R.K.

Appeal allowed.

*** A. I. R. 1930 Oudh 104**

STUART, C. J., AND SRIVASTAVA, J.

Deoraj - Plaintiff - Appellant.

v.

Kunj Behari and *others* - Defendants - Respondents.

Second Appeal No. 89 of 1929, Decided on 5th November 1929, from decree of Dist. Judge, Rae Bareilly, D/- 22nd December 1928.

***(a) Court-fees Act, S. 7 (5)**—When relief for possession is consequential relief and principal relief is declaration, court-fee is to be paid on valuation put in plaint.

The principles governing suits when possession as well as a declaration is asked for, are clear. If the principal relief claimed is one for possession and the relief for declaration is merely ancillary to it, it is enough to pay court-fee on the relief for possession. But if the principal relief is for declaration and the right to possession depends upon plaintiff being entitled to declaration, then the relief for possession is to be regarded as consequential relief and the court-fee is to be payable according to the amount at which the relief sought is valued in plaint or memorandum of appeal. The order in which the relief is sought for cannot be decisive of the question. [P 104, C 2]

D, a member of joint Hindu family, instituted a suit for possession of a share in the property as well as for questioning the validity of certain mortgages executed by his father about which decrees for foreclosure and sale had been passed.

Held : that it was necessary for *D* to get a declaration about the decrees not being binding on him before he could be entitled to a decree for possession. The relief for possession therefore was undoubtedly a consequential relief. Therefore, court-fee in the case was to be paid on the valuation put by *D* in the plaint, or memorandum of appeal: *A. I. R. 1929 Oudh*, 419 and *A. I. R. 1926 Oudh* 380, *Ref.*

[P 105 C 1]

(b) Civil P. C., O. 7, R. 11—Reasonable time should be allowed for making up deficiency.

The Court deciding that the court-fee paid is insufficient ought to allow the party reasonable time within which the deficiency can be made up. The suit or appeal should not be dismissed without such opportunity being given.

[P 105 C 2]

Ali Jawad—for Appellant.

Haider Hussain—for Respondents 1 to 7.

Judgment.—This is an appeal against an order passed by the District Judge of Rae Bareilly dismissing an appeal before him under O. 7, R. 11, Cl. (c), Civil P. C. by reason of the appellant's failure to make good certain deficiency in the court-fee.

The facts material for the purposes of this appeal are that *Deoraj*, plaintiff, who is a member of a joint Hindu family consisting of himself and his father *Har Gopal*, defendant 11, instituted the present suit questioning the validity of certain usufructuary mortgages executed by his father and of certain decrees for foreclosure and sale passed against the father. His case was that subsequent to the making of the mortgages in dispute there had been a separation in the family which at that time consisted of his father *Har Gopal*, his brother *Ram Raj* who is now dead and is represented by his widow defendant 10 and himself; that he had a one third share in the family property and that the said share was not affected by the mortgages or the decrees for foreclosure and sale passed on foot of some of them. He therefore claimed a decree for possession of his one-third share and a declaration that his father had no right to make the mortgages in question and that his share was not liable under the decree for foreclosure and sale passed against him. The learned District Judge was of opinion that the suit was one for a declaration with consequential relief and not merely one for possession and that therefore the court-fee was payable on the value of the relief sought and not merely on five times the Government revenue. It seems to us that the principle governing suits of this nature is perfectly clear. If the principal relief claimed is one for possession and the relief for declaration is merely ancillary to it, in that case it is enough to pay the court-fee on the relief for possession. On the other hand if the principal relief is for declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the court-fee would be payable according to the amount at which the relief sought is valued in the plaint or the memorandum of appeal. If the present case falls under the first class,

in that case the court-fee paid on five times the Government revenue would be enough. If on the other hand the suit falls under the second description, then the plaintiff must pay a court-fee on Rs. 4,000 which is the valuation put by him on the property in dispute for the purposes of jurisdiction. The learned counsel for the plaintiff appellant has relied upon the decision of a Bench of this Court in *Awadhraj Singh v. Dharamraji Kuar* (1). In this case it is held that the suit was not one for declaration with consequential relief but was principally a suit for possession and therefore the court-fee calculated on five times the Government revenue was sufficient. A similar view was taken in *Sarju v. Sheoraj* (2) which has been referred to with approval in this case. The learned counsel for the respondents has on the other hand relied upon the decision in *Tula Ram v. Dwarka Das* (3). Reliance has been placed upon the remarks contained in the judgment to the effect that

"when the plaintiff asks for a declaration as his first relief and possession as a second relief it must be taken that in the opinion of the plaintiff or at least of his legal adviser, the declaration is a necessary relief."

We do not think that the order in which the plaintiff or his legal adviser seeks the reliefs can in any way be decisive of the question. We must look to the substance of the reliefs claimed irrespective of the order in which they are mentioned. It is clear in the present case that the plaintiff could not ignore the decree for foreclosure and sale which had been obtained against his father. It was necessary for him to get a declaration about the said decrees not being binding on him before he could be entitled to a decree for possession. The relief for possession therefore was undoubtedly a consequential relief. We are therefore of opinion that the learned Judge was right in requiring the plaintiff to pay the court-fee on the valuation put by him in the plaint and in the memorandum of appeal.

Another point which requires determination is whether the learned Judge was right in dismissing the appeal under O. 7, R. 11 (c), Civil P. C. It appears that the munsarim made a

report to the District Judge pointing out the deficiency in the court-fee paid on the memorandum of appeal and the plaint. The office report was put up before the District Judge on 15th October 1928. At the request of the appellant's pleader the case was adjourned to 14th December and the appellant was ordered to come prepared to pay the deficiency if the point was decided against him on that date. When the case was heard on 14th December 1928 the learned District Judge was of opinion that the office report was correct and that the appellant was liable to make good the deficiency pointed out by the office. As the appellant was not in a position to make it good at once, the learned District Judge dismissed the appeal under O. 7, R. 11, Cl. (c), Civil P. C. We are of opinion that the learned District Judge before he dismissed the appeal ought to have allowed the appellant reasonable time, after he had decided that the court-fee paid was insufficient within which the deficiency was to be made good. Under the circumstances we allow the appellant six weeks' time within which he must make good the deficiency in the court-fee in the two Courts below and on the memorandum of appeal filed in this Court. If the deficiency is made good within the time allowed, the case will go back to the lower appellate Court for decision on the merits. In this case the costs will abide the result. If the appellant fails to make good the deficiency within the time allowed, the appeal will stand dismissed with costs.

R.M./R.K.

Order accordingly.

* A. I. R. 1930 Oudh 105

STUART, C. J., AND WAZIR HASAN, J.

Lucknow Improvement Trust—Defendant—Appellant.

v.

P. L. Jaitly & Co.—Plaintiff—Respondent.

Second Appeal No. 209 of 1929, Decided on 30th October 1929, from decree of Sub-Judge, Mohanlalganj, D/- 28th February 1929.

(a) U. P. Town Improvement Act (1919), S. 97 (1) and (3)—Entering into agreement to carry out electric installation is not act done under this Act and sub-S. (3) does not apply.

(1) A. I. R. 1929 Oudh 419.

(2) A. I. R. 1926 Oudh 380.

(3) A. I. R. 1928 All. 248=50 All. 610.

Entering into agreement with an Improvement Trust to carry out work of electric installation and fittings in a building is not an act done under this Act. There is no provision in the Act authorizing the Trust to enter into contract, in their character as such, of the nature of the said contract. Subsection (3) therefore does not apply to such a case and the case is governed by the general law of limitation. [P 107 C 1]

* (b) Evidence Act, S. 23—S. 23 does not cover case of letters merely because of the inscription "without prejudice."

Letters having the inscription "without prejudice," were accepted in evidence in lower Court. It was argued that they were inadmissible in evidence.

Held: that the provisions of S. 23 under which the privilege was claimed did not cover the case. The provisions excluded from category of relevant evidence, such admissions as are made, either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. [P 107 C 1, 2]

Moreover, where the defendant's counsel admits the letters in the trial Court, the privilege is withdrawn and the letters are free to be used in as evidence in a judicial proceeding. [P 107 C 1]

(c) Contract — Final terms of contract should be looked into and not correspondence preceding it.

For the final terms of the contract between the parties the formal and last agreement should be looked into and not the correspondence which precedes it. When the parties have entered into a formal contract that contract must be construed according to its own terms and should not be explained or interpreted by antecedent communings which lead up to it: *A.I.R. 1929 P.C. 34, Foll.* [P 107 C 2]

Shankar Sahai—for Appellant.

J. K. Tandon—for Respondent.

Judgment—This is the defendant's appeal from the decree of the Subordinate Judge of Mohanlalganj dated 28th February 1929, reversing the decree of the Second Munsif, Lucknow, dated 24th February 1928.

The case of the plaintiffs, P. L. Jaitly & Co., is that under an agreement entered into between them and the defendant, the Lucknow Improvement Trust, in March 1924 they carried out the work of electrical installation and fittings at a building called the Prince of Wales Theatre situate in Hazratganj, Lucknow, which building belongs to the defendant. A decree for a sum of Rs. 825 was prayed for for the work done under the agreement mentioned above. To this claim of the plaintiffs a large number of pleas in defence were raised.

The Court of first instance rejected almost every plea of the defendant on

the merits but accepted the defence as to the bar of limitation and consequently dismissed the suit. The plaintiffs preferred an appeal to the Court of the Subordinate Judge mentioned above. The learned Subordinate Judge considered the whole case in a well reasoned judgment, accepted the appeal, reversed the decree of the Court of first instance and granted a decree to the plaintiffs for a sum of Rs. 510 with proportionate costs, as already stated. The Lucknow Improvement Trust has now preferred this second appeal against the decision of the learned Subordinate Judge.

In support of the appeal three points were urged:

1. That the suit is barred by limitation.

2. That there is no admissible evidence on the record to support the finding of the lower appellate Court; that the Trust had agreed to give Rs. 147 to the plaintiffs as compensation for their work at the plaintiffs' building.

3. That the plaintiffs were not entitled on the terms of the contract between the parties to the return of the security money which they had deposited with the defendant in relation to contract of the work to be done by them.

As regards the plea of limitation, reliance is placed upon the provisions of S. 97, U. P. Town Improvement Act, 1919, and it is argued that the provisions of that section prescribe a limitation of six months for suits of the nature of the present suit. Sub-section (3), S. 97, mentioned above is as follows:

"No action such as is described in sub-S. (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action."

There is no question in this case that the cause of action accrued when the plaintiffs finished the work with which they were entrusted under the agreement and this happened on 15th August 1924. If, therefore, sub-S. (3) quoted above applies to this case plaintiffs' suit is clearly barred by time, but with a view to determine whether the said subsection does apply or not we must look to the provisions of sub-S. (1), S. 97 because sub-S. (3) prescribes the limitation of six months only for such suits as are described in sub-S. (1). The re-

levant portion of sub-S. (1) may be rendered as follows :

"No suit shall be instituted against the Trust in respect of an act purporting to be done under this Act."

The question for decision therefore is as to whether the agreement entered into by the Lucknow Improvement Trust and on which the present suit is founded was an act purporting to be done under the Town Improvement Act. Clearly it would be such an act if we could discover any provision in the Act authorizing the Trust to enter into contracts in their character as such and of the nature of the present contract. The learned counsel on both sides and we endeavoured in vain to find any such provision within the four corners of this Act ; whether the omission is deliberate or accidental is a matter with which we as a Court of law are not concerned. The result is that it cannot be held that the entering into the agreement which constitutes the main element of the plaintiffs' cause of action was an act which was "done under this Act." This being so, the general law of limitation applies and it is agreed that the suit is in time within that law.

As to the second point addressed to us in support of this appeal, little need be said. The argument is that the lower appellate Court has accepted in evidence in support of its finding mentioned above two letters which the defendant had addressed to the plaintiffs. It is agreed that if these letters were rightly accepted in evidence the admission contained therein justifies the finding. It is contended that these letters were not admissible in evidence for the reason that they bore the inscription 'without prejudice' in both cases. We agree with the learned Subordinate Judge that the privilege if it was ever intended to be annexed to these letters was waived in the course of the proceedings before the trial Court. These letters were in the ordinary course tendered by the plaintiffs in evidence. The defendant's counsel admitted them. This admission on the part of the counsel clearly implies that the privilege was withdrawn and the letters were free to be used as evidence in a judicial proceeding. Further we are of opinion that the provisions of S. 23, Evidence Act, 1872, under which the privilege is

claimed, do not cover the case before us. Those provisions exclude from the category of relevant evidence such admissions as are made:

"either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

At the best the defendant has succeeded only in showing its own desire as at the privilege to be attached to these letters but we are unable to discover either by implication or otherwise any circumstance from which we can infer that the plaintiffs also agreed to respect the privilege. We, therefore, overrule the second point also.

The third point is that though it is true that the final agreement entered into between the parties laid an obligation on the plaintiffs to do service in relation to the work which they had done in the defendant's building for a period of six months but it is contended that having regard to a letter of the plaintiffs preceding the agreement in which they had agreed to render service for a period of 12 months but they did not do so the security money deposited by them is liable to be forfeited under the terms of the agreement. The view which the learned Subordinate Judge has taken in this behalf is that for the final terms of the contract between the parties the formal and the last agreement should be looked into and not the correspondence which preceded it. This view we are of opinion is perfectly sound both in common sense and in law. To quote the language of Viscount Dunedin in a recent judgment of their Lordships of the Judicial Committee in the case of *Bomanji Ardeshir Wadia v. Secy. of State* (1).

"Nothing is better settled than that when parties have entered into a formal contract that contract must be construed according to its own terms and not to be explained or interpreted by the antecedent communications which led up to it. This is especially true of a conveyance. There even, if there has been a formal antecedent contract, that contract cannot be looked at to control the terms of the conveyance ; much less can mere communications, which could only show what parties meant to do but cannot show what they did. It would be otiose to set forth at length the authorities, but reference may be made to the dictum of Baron Parke in *Shore v. Wilson* (2);

(1) A.I.R. 1929 P.C. 34=53 Bom. 230=56 I.A. 51 (P.C.).

(2) [1842] 9 Cl. & F. 355.

Smith v. Lord. Jersey (3); *Prison Commissioners v. Clerk of the Peace for Middlesex* (4); per Sir C. Jessel and *Lee v. Alexander* (5) in which . . . Lord Selborne states the proposition as a general one. '

We, therefore, reject the third point also.

The result is that the appeal fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

(3) [1821] 2 Br. & B. 47 = 7 Price 281 = 3 Moore 331 = 3 Bligh 290.

(4) [1837] Q.B.D. 506 = 51 L.J.Q.B. 433 = 30 W.R. 881 = 6 L.T. 864.

(5) [1858] 8 A.C. 853.

A. I. R. 1930 Oudh 108

STUART, C. J., AND RAZA, J.

Jawahir Lal—Plaintiff—Appellant.

v.

Manna Lal — Defendant — Respondent.

First Appeal No. 143 of 1928, Decided on 30th September 1929, from decree of Sub-Judge, Malihabad, D/- 29th September 1928.

(a) Practice — Appeal — Findings of fact where issue simple and depending upon credit of witness should not be disturbed by appellate Court.

Generally speaking it is undesirable for an appellate Court to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses. Therefore, the view of the trial Judge should not be put aside on a mere contention of probabilities by the appellate Court and in order to succeed the appellant must prove that the judgment appealed from is wrong and if all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he cannot succeed: *A. I. R. 1915 P. C. 1* and *A. I. R. 1922 P. C. 30, Foll.* [P 110 C 1]

(b) Negotiable Instruments Act, S. 118 — Suit on promissory notes executed for big sum met with plea of execution during minority — Creditor, when possible to advance loan on good security, preferred bad one — Further creditor unable to explain why loan was not entered in accounts properly kept — Court is justified in holding against presumption laid down in S. 118.

In a suit on promissory notes executed for a big sum the plea in defence was that the documents were executed during the minority of the executant and were post-dated. The trial Court gave a finding that they were executed long before executant attained majority. When called upon to explain why, when it was possible to advance the loan on good security, he preferred a bad one, he could not explain it nor could he explain why he departed from ordinary rules of business, by not entering the transaction in his ordinary accounts, and

entered the same in accounts defective and suspicious.

Held: that the Court was justified in determining against the presumption laid down by S. 118. [P 109 C 2]

H. Husain, Bhagwati Nath, Makund Behari Lal and *P. D. Rastoji* — for Appellant.

P. L. Banerji, Anant Prasad Nigam, Anant Bihari Nigam and *Ali Zaheer* — for Respondent.

Judgment.—This is a plaintiff's appeal against a decree of the learned Subordinate Judge of Malihabad dated 29th September 1928, by which he dismissed the plaintiff's suit. The plaintiff's suit was founded upon the allegations that the defendant had executed two promissory notes in his favour, one dated 20th March 1927, for Rs. 3,500 and the other dated 5th July 1927, for Rs. 7,000. According to the plaintiff these promissory notes came to be executed in this manner. On 26th December 1926, the defendant had borrowed Rs. 1,000 from him in cash and agreed to pay 24 per cent simple interest. He then executed promissory note Ex. 5. On 4th February 1927, the defendant is alleged to have borrowed Rs. 1,475 more in cash and to have executed a promissory note Ex. 8 for Rs. 2,500 also at 24 per cent simple interest, Rs. 1,025 of which represented the liability on Ex. 5. On 20th March 1927, the defendant is alleged to have borrowed Rs. 925 more in cash and to have executed the promissory note in suit Ex. 1 for Rs. 3,500, Rs. 2,775 representing the amount due on Ex. 8. This is how the first promissory note Ex. 1 is stated to have come into being. He further stated that on 4th April 1927, the defendant borrowed Rs. 800 from him in cash and executed the promissory note Ex. 10 agreeing to pay 24 per cent simple interest. He added that on 12th June 1927, the defendant borrowed from him Rs. 3,000 in cash, and executed promissory note Ex. 9 agreeing to pay Rs. 24 per cent simple interest. He says that on 5th July 1927, the defendant borrowed from him Rs. 3,102 in cash and executed the promissory note Ex. 2 which is the second promissory note in suit. The promissory note was executed for Rs. 7,000; Rs. 848 were stated to be due on the promissory note Ex. 10, and Rs. 3,060 were stated to be due on the promissory note Ex. 9. The total comes to

Rs. 7,010, Rs. 10 are stated to have been excluded. The learned trial Judge found that the defendant had signed the promissory notes Ex. 1 and Ex. 2 but that he had not received the amount of consideration alleged. He further found that these promissory notes had not been executed on the dates when they purported to have been executed but had been executed on prior dates when the defendant was a minor. He dismissed the suit. The plaintiff appeals.

The case has been complicated by the action of the parties. We have no hesitation in finding that neither the plaintiff nor the defendant has told the whole truth. Their statements appear to us to be either entirely or in the main false. The defendant further complicated matters by setting up an absolutely false plea to the effect that he had never signed the promissory notes in question. This is now admitted by his learned counsel to be a false plea. In fact it was abandoned shortly after the opening of the case. Although the defendant in his written statement has distinctly denied having to his knowledge signed Ex. 1 and Ex. 2, he soon resiled from this position. When he was called upon as defendant to make certain admissions or denial he refused to attend. He had filed his written statement on 10th May 1928. On 17th August 1928, he was represented for the first time by a leading counsel, Mr. Niamatullah (now Niamatullah, J., of Allahabad High Court) and Mr. Niamatullah at once stated frankly that the promissory notes in suit were executed by his client. But he added that they were executed during his minority, sometime before 20th September 1925 and post-dated. He further stated that the amount of consideration stated in the promissory notes had not been received.

Exception was taken in the grounds of appeal to permission having been granted to the defendant to raise these pleas, especially as the written statement had not been amended. But the learned counsel who represented the plaintiff-appellant has abandoned these pleas as they stand. He withdrew the suggestion that the trial Court had acted wrongly in allowing the defendant to change his defence without an amendment of the written statement, and he withdrew the suggestion that the plain-

tiff had not had sufficient notice of the case set up by the defendant, and the suggestion that the plaintiff had been taken by surprise. But he has urged that the manner in which the defence was put up throws, even more strongly than would be the case otherwise, the burden of proof on the defendant to substantiate his allegations. If, as should have been the case, the defendant had taken his present defence at the beginning and embodied it in his written statement he should have given particulars of fraud or undue influence as the provisions of O. 6, R. 4 direct. But we do not consider that the manner in which the defence case was put forward has materially affected the result. The sole case argued on behalf of the defendant-respondent by the learned counsel who has appeared for him has been that the promissory notes Ex. 1 and Ex. 2 were actually executed when the defendant was a minor and that thus in any circumstances the suit must be dismissed.

Now even if the plea had not been taken as explicitly as it was taken in the Court below, it is the duty of a Court, if it discovers that a transaction is void owing to minority, to declare the transaction void, and even as the case was put by the defendant in the lower Court the plaintiff was in no way prejudiced. If it is established that the promissory notes in question were executed during the defendant's minority the plaintiff's suit must fail. The burden of proof is of course on the defendant. The learned counsel for the plaintiff rightly relies on the provisions of S. 118, Negotiable Instruments Act. The presumptions are that they were made for consideration and that they were made on the dates which they bear, and it was for the defendant to establish the contrary. (Their Lordships here discussed the evidence and proceeded.) We consider that there was ample evidence before the learned trial Judge which justified him in determining against the presumption laid down by S. 118, Negotiable Instruments Act, that Ex. 1 and Ex. 2 were executed before 20th September 1925. We have read the judgment of the learned trial Judge. He has taken great care over the decision of the case and has applied his mind as closely as he could apply his mind to the dis-

cussion of the evidence. It is possible to criticise some of his reasons but there can be no doubt as to the fact that he has applied his mind very intelligently and very carefully. He had the plaintiff and the defendant before him. Neither of them was telling the truth. We consider that the plaintiff's evidence was wholly false on all material questions. We find that the defendant's evidence was mainly false but that it contained a certain amount of truth and that the learned Judge, when he believes the defendant, had reason to believe him. This is a case in which it appears to us that rules of decisions laid down by their Lordships of the Judicial Committee in two appeals before them have particular force. The first of these is *Bombay Cotton Manufacturing Co. Ltd., v. Motilal Shir Lal* (1). There their Lordships laid down. (We quote from the head note):

"Generally speaking it is undesirable for an appellate Court to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses. The view of the trial Judge as to the credibility of the witnesses should not be put aside on a mere calculation of probabilities by the appellate Court."

In *Naba Kishore Mandal v. Upendra Kishore Mandal* (2), which is not reported in the *Indian Appeals* but which is reported in 20 *A. L. J.* 22, (*A. I. R.* 1922 *P. C.* 39), the head note shows:

"In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right he has not succeeded."

Now, here we have it that the learned trial Judge, who heard the plaintiff's statement, discarded it as untrue. He heard the defendant's statement and accepted it as sufficient with the other evidence to show that Ex. 1 and Ex. 2 were executed before the defendant attained majority in 1925. We consider that his finding is strongly supported by the fact that the plaintiff-appellant has been unable to explain in any way why when according to his own statement he could have advanced the money on good security, he preferred

to advance it on bad security, by the fact that if the promissory notes were executed before 20th September 1925, the plaintiff was precluded from obtaining any security at all, and by the facts that in making the alleged loans the plaintiff asserts that he departed from the ordinary rules of his business, did not enter the transactions in his ordinary accounts and entered them in accounts which are defective and suspicious. For the above reasons we uphold the decision of the learned trial Judge and dismiss this appeal with costs

V.B./R.K.

Appeal dismissed.

* **A. I. R. 1930 Oudh 110**

PULLAN, J.

Mohammad Ismail Khan—Defendant
—Appellant.

v.

Abdul Ghaffar Beg and others—Plaintiff and Defendants—Respondents.

Second Rent Appeal No. 56 of 1928, Decided on 17th October 1929, from decree of Dist. Judge, Gonda, D/- 31st July 1928.

(a) **Oudh Rent Act, S. 70—S. 70 applies to those tenants who have received "patta."**

Section 70 applies to those tenants who have already received a "patta." In a suit for arrears of rent where it is not shown that the tenant has been granted a patta, it is possible to admit oral evidence. [P 111 C 1]

(b) **Civil P. C., O. 41, R. 27—Additional evidence should be admitted only for doing justice.**

Although the Court is not bound by the specific provisions of R. 27 and is allowed to admit additional evidence also under the general principles of law, it is assumed that before admitting such evidence an appellate Court must ascertain that it is necessary in order that justice may be done. It is specifically laid down in R. 27 that when such evidence is admitted the Court should record the reasons for so doing. [P 111 C 2]

* (c) **Civil P. C., O. 22, R. 3—Court officials should not be appointed as guardians.**

The appointment of a Court Nazir as the guardian of a minor is objectionable. Court officials have neither the time nor the opportunity to do justice to the cause of minors and they should not be required to risk their own good name and the minors' interest by receiving these appointments. [P 112 C 1]

H. Husain—for Appellant.

M. Wasim and Khaliquzzaman—for Respondents.

Judgment. — This second appeal arises from a suit brought by a thekadar, holding under the Court of Wards representing the Nanpara estate, against

(1) *A. I. R.* 1915 *P. C.* 1=39 *Bom.* 336=12 *I. A.* 110 (*P. C.*).

(2) *A. I. R.* 1922 *P. C.* 30.

two persons who are alleged to be joint tenants of a certain holding. The tenancy of defendant 1 Mohammad Ismail is admitted by him and he denies the tenancy of defendant 2 Faruq Ahmad who is a minor. He also denies that the rent assessed on the holding is Rs. 102-8-3 in cash but states the rent of this holding is paid in kind and has already been paid in full. The first Court, the Assistant Collector, dismissed the plaintiff's suit, finding that Faruq Ahmad had no share in the holding and that no cash rent had been assessed as against Mohammad Ismail who had paid off the sum due for the grain rent in the years in dispute. The lower appellate Court, the learned District Judge of Gonda, allowed the appeal and decreed the plaintiff's suit jointly against both defendants. It was admitted that up to the year 1329 F. inclusive rent of this holding was payable in kind under the batai system but it is stated that from the year 1330 the system was changed in respect of this village and cash rent assessed on almost all the holdings including the one in dispute.

Ground 1 of appeal is that the lower Court admitted certain evidence which was inadmissible under S. 70, Oudh Rent Act. Now this objection cannot be sustained because S. 70 applies to those tenants who have already received a "patta". It is not alleged that any "patta" had been granted previously to the appellant, and it must be presumed that there was no such patta because he admittedly paid rent on appraisement. It was, therefore, possible to admit oral evidence and oral evidence has been admitted and apparently believed by the Court below showing that the appellant accepted the new rent. Unfortunately the lower appellate Court admitted in evidence an application made by the appellant to the Court of Wards after a decree in his favour had been passed by the Court of first instance, and a very proper objection is taken in appeal that this application was not admissible in evidence. No doubt a wide discretion is given to the appellate Court by the judgment of their Lordships of the Privy Council in the case of *Indrajit Pratap Sahi v. Amar Singh* (1) and the Court is no

longer bound by the specific provisions of R. 27, O. 41, Civil P. C., but is allowed to admit additional evidence also under the general principles of law. As their Lordships observe "rules of procedure are not made for the purpose of hindering justice." But it is assumed that before admitting such evidence an appellate Court must ascertain that it is necessary in order that justice may be done, and it is specifically laid down in O. 41, R. 27, that when such evidence is admitted the Court should record the reasons for so doing. In the present case it is difficult to see how an application made by the appellant after the decree was passed can have any bearing on the case under appeal, and I ought certainly to have had the advantage of seeing the reasons why the Judge admitted it. I have read the application in order to ascertain whether I could myself supply the reasons which the learned Judge did not think fit to give, and I have failed to do so. Apparently the appellant was satisfied with the decree of the first Court and decided that it would be for his own interest to pay cash rents from the year 1335. Even so, he did not say that he agreed to a cash rent of Rs. 102-8-3 but only that he would agree to rent assessed at the village rates whatever they might be. This document therefore does not amount to an admission and in any case, in my opinion, should not have been admitted in evidence. But it appears that there is sufficient evidence on the record apart from this to justify the decision of the lower appellate Court, and I cannot say that the finding of fact as to the acceptance of this rent depends upon the erroneous admission of this piece of evidence. I am also bound by the lower Court's finding as to the payments which have been made and I am, therefore, unable to disturb the decision against the appellant on this point.

A second question has been raised relating to the joint tenancy of Faruq Ahmad. It has been urged that in this matter also the learned Court below has relied upon inadmissible evidence. I find that when the mother of the minor refused to act, the plaintiff's nephew Ifthikhar Husain was appointed as guardian ad litem and confessed judgment. He was subsequently removed from the guardianship and the Nazir of the Court

(1) A. I. R. 1923 P. C. 128=2 Pat. 676=50 I. A. 183 (P.C.).

was appointed, who denied that the minor had any share in the tenancy. Clearly the admission of Iftikhar Husain was inadmissible in evidence and should have been totally disregarded and the objection raised by the Nazir should have been considered. But when I turn to the conclusion of the judgment of the Court below I find that, in spite of the remarks made earlier in his judgment, he states himself that he has decided the question on the evidence of the Patwari and the plaintiff's agent Muntaz Ahmad who are, in his opinion, absolutely truthful witnesses. He expressly states that he is passing a decree against the minor on their statements apart from the statement of Iftikhar Husain. Thus, this also is a finding of fact based upon admissible evidence which has been believed by the Court below. I cannot say that the evidence has been wrongly believed. The main point for disbelieving it is alleged to be an entry in one khatauni showing that the joint tenant was named Shuja-at. The Patwari knows Hindi but not Urdu and consequently he did not write this entry, and it appears to be a manifest mistake probably caused through the Patwari's ignorance of Urdu. There is no evidence that there is any person named Shuja-at and the name Sajjad is shown in all the earlier papers. In this connexion, however, I should like to remark that the appointment of a Court Nazir as the guardian of a minor is objectionable. Court officials have neither the time nor the opportunity to do justice to the cause of minors and they should not be required to risk their own good name and the minors' interests by receiving these appointments.

Thus, although the procedure of the lower appellate Court laid the judgment open to criticism, I am not prepared to interfere with the decision and I dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 112

PULLAN, J.

Ram Kirat and another—Plaintiffs—Appellants.

v.

Gajadhar Shukla—Defendant—Respondent.

Second Appeal No. 125 of 1929, Decided on 22nd November 1919.

(a) Civil P. C., S. 11—Application for review is not suit so as to bar fresh suit.

An application in review is not a suit and the rejection does not amount to a decision which bars a fresh suit. [P 112 C 2]

(b) Civil P. C., S. 2 (15)—“Vakalatnama” empowering filing of compromise does not empower to enter into compromise or sign it.—Civil P. C. O. 3, R. 1.

A vakalatnama which empowers a pleader to file a compromise cannot be held to empower him to enter into a compromise and sign it, for the party: *A.I.R. 1928 Oudh 386 Ref.* [P 113 C 1]

S. C. Das for Radha Krishna—for Appellant.

G. Hasan—for Respondent.

Judgment.—The case out of which this second appeal arises was one brought by two persons who claim that they have a share amounting to 18 biswas in a certain No. 379, and that in a previous litigation a compromise which was arrived at between themselves and the defendant did not correctly express the terms of the agreement at which they had arrived. The lower Courts have been at great pains to come to a correct decision in this matter. The first Court, namely, the Munsif of Fyzabad, found that the compromise was arrived at under a bona fide mistake and he gave a decree cancelling the compromise. In appeal the learned Subordinate Judge was in error on a point of law. He believed that because an application for review of the order of the Court granting the decree in the terms of the compromise had been rejected, the present suit was barred on the principle of *res judicata*. It appears that the learned Subordinate Judge was shown a ruling of the Calcutta High Court reported in *Ram Gopal Mazumdar v. Prasanna Kumar* (1), in support of this view. Unfortunately he was not aware that that ruling has been overruled by the same High Court in a ruling reported in *Mt. Gulab Koer v. Badsha'h Bahadur* (2), and this ruling has been re-affirmed in *Srish Chandra Pal v. Triguna Prasad Pal* (3). An application in review is not a suit and its rejection does not amount to a decision which bars a fresh suit. On a second point also the learned Subordinate Judge is in error. The compromise was entered into on behalf of two brothers. One of them signed the compromise but a pleader signed for the other. The only au-

(1) [1906] 10 C. W. N. 521=2 C. L. J. 503.

(2) [1901] 10 C. L. J. 420=2 I. C. 129=13 C. W. N. 1197.

(3) [1913] 40 Cal. 541=15 I. C. 444.

thority which the pleader had for signing the compromise was a vakalatnama which empowered him to file a compromise. The vakalatnama did not authorize him to enter into a compromise and in my opinion it would be most improper to hold that this ordinary form of vakalatnama enables a pleader to enter into a compromise on behalf of his client without obtaining the signature of the latter. This has been held in the case of pardahnashin ladies by a Bench of this Court in a case reported in *Hubraji v. Chandra Bali* (4), but I see no reason to confine that judgment to cases of pardahnashin ladies. Thus one at any rate of the appellants can properly apply to have that compromise set aside. As to the principal appellant, he rests his case on the allegation that the compromise was entered into in error. This view was accepted by the Munsif but not, it would appear, by the learned Subordinate Judge, who believes that he himself understands the compromise. I admit that I do not share his confidence. The first case was referred to a commissioner who prepared a report and a map.

In his report he said that he marked in red an area of 8 biswas and the left uncoloured an area of 18 biswas. The natural conclusion to be drawn from this is that the uncoloured portion was the 8 biswas over which the defendant admittedly possessed a right as birt, and that the 18 biswas was the area claimed by the plaintiff as zamindar. When the compromise was drawn up, the pleader for the plaintiff said that his claim was confined to the area marked in red, and this appears to have been taken to mean that he had no objection to giving up some portion of that area. To my mind it is more natural to suppose that he intended by this that his client claimed the 18 biswas marked red. The compromise disregarded the rest of the field. It took the area marked red and allotted to the defendant a small portion of it which is said to lie between the letters "K" and "L". There is no letter "L" in the amin's map and the letter "K" is not at a corner but in the middle of the side of a portion of the property. How its exact division was to be ascertained I am unaware and what the area that was being granted to the defendant out of

the red portion of the number is equally obscure. As far as I can understand the amin's report, on which the parties came to the agreement, it was to the effect that the red area should go to the plaintiff, the uncoloured area to the defendant, and that the latter was also to have rights over his own well and certain trees standing on the red area. I believe that this is the agreement which the parties made or which they understood to have been made. I cannot believe that they agreed to a compromise such as that which is now set up by the defendant. It appears to be unintelligible and quite contrary to the pleadings of both sides. As I have stated above the lower Court allowed this appeal on two incorrect findings in law. On facts I consider that he was mistaken and that the view taken by the Munsif was a more proper view and one which gave a better chance of justice to the parties.

I, therefore, allow this appeal and restore the order of the Munsif, which means that the parties will return to the position which they occupied in the first case before the compromise was entered into, that is to say, the compromise will be held to be set aside and the first case will be restored to its original number and tried according to law by the Court in which it was instituted. I think it would be proper in this case to pass no immediate order as to costs. They will abide by the result.

V.B./R.K.

Order accordingly.

* A. I. R. 1930 Oudh 113

STUART, C. J., AND RAZA, J.

Mata Din—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 256 of 1929, Decided on 21st August 1929, against the order of Second Addl. Sess. Judge, Lucknow, D/- 25th April 1929.

* (a) Evidence Act, S. 24 — Confession not full—Court can reject portions that are false and deduce guilt.

Where the confession is anything but a full confession the Court is at liberty to use the confession as it stands and derive a deduction of the guilt of the man who made it even while rejecting portions of it which are false.

[P 116 C 2; P 117 C 1]

(4) A. I. R. 1928 Oudh. 386.

(b) Penal Code, S. 201—**Removing corpse of murdered man is causing disappearance of evidence of offence.**

The ordinary inference to be drawn from the conduct of persons who have been concerned in a murder in a house, and who have removed the body to another place, is that they do so with the intention of causing, at any rate, the true evidence about the locality, in which the murder took place, to disappear. Whether such evidence was caused to disappear with the intention of screening the offender from legal punishment is a question to be decided from the circumstances of the case: 47 *All.* 306, *Rel. on.* [P 119 C 2; P 120 C 1]

Three men were sleeping close to the deceased man. Some one came in the night and struck the man with a violent blow severing the neck from body. Subsequently these persons removed the corpse to another room, broke bars of the windows and obliterated blood marks in original place, thereby causing evidence of locality of murder to disappear and putting police on wrong scent as to murderer.

Held: that the fact that none of them was disturbed was improbable and it must be held that those persons must have had an intention of screening the murderer or murderers

[P 120 C 1]

* (c) Criminal P. C., S. 237—**Person tried for offence known and believed to have been committed by him—No evidence to prove his having taken part—Conviction under S. 201 is not illegal.**

Conviction of an accused under S. 201 as accessory to an offence known and believed to have been committed by him, although evidence does not sufficiently or definitely prove that he was present at and had taken part in the offence is not illegal: 22 *Cal.* 638; 8 *All.* 257; 2 *All.* 713 and 6 *Cal.* 789; *Diss. from, A. I. R.* 1925 P. C. 130, *Rel. on.* [P 121 C 1]

H. N. Misra—for Appellant.

G. H. Thomas and *J. N. Mulla*—for the Crown.

Judgment.—Debi Dayal and Sheonandan Singh have been convicted by the learned Second Additional Sessions Judge of Lucknow, sitting at Unao of an offence of murder under S. 302, I. P. C. and sentenced to transportation for life. In the same trial the same two persons Debi Dayal and Sheonandan Singh and Salik Ram and Mata Din were sentenced under the provisions of S. 201, I. P. C. for causing the evidence of the same murder to disappear with the intention of screening the offender from legal punishment and sentenced to three years rigorous imprisonment each. All these four persons appeal. The Government Advocate has on behalf of the Local Government filed a revision that the sentence on Debi Dayal and Sheonandan Singh should be enhanced to sentences of death. At the town of Bihar in the Unao District there is a Fort belonging to

Raja Sham Sundar Nath Kaul, a Kashmiri Brahman, Taluqdar of Bithar, The Raja (P. W. 15) resides in Lucknow. His agent Pandit Bishambhar Nath deceased, also a Kashmiri Brahman, resided in the Fort at Bithar and managed the business of the estate there. On the night of 4th September 1928, or the early morning of 5th September Pandit Bishambhar Nath received injuries while in the Fort which caused his death. The first information which was received as to his death was contained in a report made at the police station at Achalganj two miles distant from Bithar at 7 a. m. on 5th September 1928. This report was made by Salik Ram appellant. Salik Ram was an agent of the estate who worked under Pandit Bishambhar Nath. Sheonandan Singh appellant accompanied Salik Ram. The report was recorded by Sub-Inspector Raghunandan Prasad who was then officer-in-charge of the Achalganj police station. The report is as follows:

"Pandit Bishambhar Nath, the general agent of Pandit Sham Sundar Nath Kaul, the zamindar of Bithar, used to reside at Bithar in the Fort. He used to sleep at night in the Court room of the Fort. Last night too, having taken his meal he as usual, went to Mt. Keola Bhatin's place. She lives at the door of the Fort. It is not known at what time he returned in the night. This morning when I and others awoke from sleep Sheonandan Sipahi told me that Panditji was lying dead. I saw that Pandit Bishambhar Nath was lying on the charpoy with his throat and face cut. His dhoti was unfastened and a little blood also lay on the charpoy. Two or three wooden bars of the window which is to the west on the back of the Court room, are also broken, from which it appears that someone having come from that very side has killed him. At night, upto 12 o'clock, the sipahis had remained awake in the Fort. It is thought that this event happened after that hour. I have not at all questioned the sipahis and gorais and have at once come away to make the report. The rest, whatever it may be, will be told by these people."

"Mt. Keola Bhatin (P.W.10) is a widow who was the mistress of the deceased man. The "Sheonandan Sipahi" mentioned is Sheonandan Singh appellant who accompanied Salik Ram. Sub-Inspector Raghunandan Prasad (P. W. 26) had to proceed that day to Unao which is nine miles distant from Achalganj to attend a sessions case. As he was unable to proceed himself to Bithar he deputed Sub-Inspector Sheo Parkash (P. W. 25) to Bithar. Sub-Inspector Sheo Parkash reached Bithar at 9 a. m.

He at once proceeded to the Fort where he found on a charpoy in the outer room of the kachehri (Court room) the dead body of Bishambhar Nath. He held an inquest upon the body the result of which was recorded in the inquest report Ex. 7. From this report it appears that the body was lying face upwards on two daris which were placed on a charpoy. Two pillows were at the head of the corpse. The whole of the corpse was covered with a white sheet. At the portion of the sheet over the neck of the deceased there was a large cut. The sheet was soaked with blood. The upper dari and the pillows were also soaked with blood. The post-mortem examination of the corpse disclosed that death had been caused by a cut from a cutting instrument which had cut through the whole of the throat and had cut through the branches of the carotid artery. There were no other injuries except a slight bruising on the right arm and a slight bruising on the left temple. From the injuries and the circumstances attending the discovery of the corpse the conclusion can be drawn that the deceased met his death by receiving a blow with a sharp edged heavy weapon delivered through the cloth which was covering his face. The blow must have been delivered with great force. There must have been a large amount of blood shed. A portion of the blood had remained on the sheet, the pillows and the top dari, but it would have been easy for a considerable amount more to have fallen on the ground and to have splashed over surrounding objects. Sub-Inspector Sheo Parkash appears to have done little investigation. He appears to have satisfied himself with conducting the inquest and despatching the corpse to headquarters. He was clearly waiting for the arrival of his superior officer Sub-Inspector Raghunandan Prasad.

Raja Sham Sundar Nath Kaul (P. W. 15) had been in Unao on 4th September 1928, and had seen the deceased there. On 5th September 1928, he received a telegram to the following effect:

"Pandit Bishambhar Nath killed last night come immediately. Salik Ram."

The telegram has been lost but a copy Ex. 6 has been filed which shows that the telegram was despatched on 5th September 1928, from the railway telegraph office at the Achalganj rail-

way station. It was sent urgent a fee of Rs. 2 being prepaid. The Court has been unable to discover with certainty from the copy the time when it was despatched but it apparently was despatched at 9 a. m. and it would appear to have been despatched by Salik Ram from Achalganj after he had made the first report. There is no evidence as to the exact time when the Raja received this telegram. As soon as he received it he obtained a motor car and motored at once to Bithar. He had first motored to Unao which is over 30 miles from Lucknow and then 11 miles on to Bithar. Three miles from Unao he met the dead body being brought in. Near Achalganj he passed Sub-Inspector Raghunandan Prasad who was riding in. They both arrived at Bithar at about 5 p. m. the Raja getting in before the Sub-Inspector. We thus have it that at 5 p. m. on 5th September 1928, Sub-Inspector Raghunandan Prasad and the Raja had arrived at Bithar. The Fort at Bithar contains a large collection of scattered buildings. The prosecution has prepared a plan of the Fort (Ex. 1) drawn to scale. The Fort covers a large area. It is enclosed with walls six to seven feet high. The walls can in many places be climbed. There is an outer gate which is secured at night. The suggestion for the prosecution is that on the night when the deceased met his death the following persons were in the fort.

(1) Bishambhar Nath deceased manager of the Raj; (2) Salik Ram appellant, under-manager; (3) Mata Din appellant, a superior chaprasi, who also did work of a clerical nature; (4) Sheonandan Singh appellant, a sepoy; (5) Debi Dayal appellant, also a sepoy; (6) Fateh Singh sepoy P. W. 12; (7) Kalka Gorait (P. W. 23); (8) Manewa Gorait (P. W. 20); (9) Nanhua Gorait, who has not been called as a witness. These are all the persons who according to the prosecution were on the premises that night. The time was near the end of the rains and according to the prosecution all these persons were sleeping out of doors. According to the prosecution the deceased was sleeping in a space between the kachehri or office and a building called the zenana which had formerly been occupied by women, and round him

were sleeping on charpoys the appellants Sheonandan, Debi Dayal and Mata Din. It has been noted that the dead body of the deceased was found inside the Court room. But the case for the prosecution is that he was actually sleeping outside, that he was murdered outside and that the body was then carried inside the Court room. According to the prosecution Salik Ram, Fateh Singh and Kalka were sleeping near the gate. Manewa was sleeping to the north of the Court room and Nanhua was sleeping on the zenana premises. The first report, as has been seen, refers to the breaking of the bars of a window of the Court room on the west. The prosecution case is that no one had entered through that window, and that the bars had been broken with the intention of leading the police to believe that the murderer of the deceased had obtained ingress by breaking through that window. There was a broken lamp also in the Court room. It is suggested that this lamp was broken accidentally, as the body was being carried in.

The evidence as to the conduct of the inquiry raises questions to which no answer was given. It would have seemed necessary, considering the facts that the deceased was the manager of the estate and that there were only eight other persons who were residing in the Fort with him on the night of his death, to have examined closely and in detail every one of those persons, in order to discover where each person was, and whether he had heard or had seen anything. It was further necessary to obtain some information as to when it was first discovered that the deceased was dead. But the record does not show that a close investigation took place on these lines. It may have taken place on those lines, but there is no evidence upon the point. The woman Keola was sent for and was examined. The case was considered of great importance and on the evening of 5th September 1928, both the Deputy Commissioner and the Superintendent of Police arrived on the spot and stayed there for about two hours.

On 6th September 1928, Mata Din and Salik Ram are said to have made disclosures to the Raja (P. W. 15). (Their Lordships then considered the

evidence of Raja (P. W. 15) and Sheonandan Shukul (P. W. 14) and disclosures made to them in extenso and proceeded.) We can now come to the actual trial. In this Suraj Narain, Madho and Hari Shankar were acquitted. The evidence of Kashi Ahir and Borey Lodh was disbelieved, against them. As there is no appeal against their acquittal, it is not necessary for us to go at length into the evidence against them. This much we may say that we agree with the learned Sessions Judge that the evidence of Kashi and Borey is completely unreliable. We shall deal later with the evidence of Fateh Singh. The evidence produced by Suraj Narain to establish that at the time of the murder he was in the Central Provinces working as a labourer on railway construction was believed by the learned Sessions Judge and we see no reason to disbelieve it. The evidence of Fateh Singh was disbelieved by the learned Sessions Judge. He has given excellent reasons for disbelieving it. Apart from anything else the evidence of this man to the effect that Suraj Narain was the man who actually struck the blow that severed the neck of the deceased must be absolutely inaccurate, if Suraj Narain was at that time in the Central Provinces. There are, however, many other reasons for discrediting the evidence of Fateh Singh.

The case in support of the convictions of Sheonandan Singh and Debi Dayal for abetment of murder therefore rests entirely as against Sheonandan Singh himself upon the statement which he is said to have made to Sheonandan Shukul on 7th September. There is one portion of the statement which is palpably inaccurate on the finding that Suraj Narain was in the Central Provinces at the time that the murder was committed. This is not, however, the only point to which criticism can be directed. It is very noticeable that according to Sheonandan Shukul, Sheonandan Singh insisted that Mata Din, Debi Dayal, Salik Ram, and himself had had nothing to do with the murder. Thus the confession was anything but a full confession. The learned Sessions Judge is, however, correct in his view that the Court is at liberty to use the confession as it stands, and derive a

deduction of the guilt of the man who made it even while rejecting portions of the confession which are false. The learned Judge regarded the confession in this manner. He found that Sheonandan Singh was in the Fort at the time of the murder. He found that Sheonandan Singh admitted that he was standing near the bed of the deceased man while the deceased man was murdered. Although Sheonandan Singh had clearly indicated as the actual murderer a man who was at that time in the Central Provinces, he considered that this statement was sufficient to show that Sheonandan Singh was present at the time of the murder and he was unable to draw any other inference from his presence other than that he was an active abettor of the murder. Such a conclusion is a legal conclusion. But we are unable to accept the statement of Sheonandan Shukul as of sufficient value to justify a conviction. There are many peculiar points about the evidence of Sheonandan Shukul. He had been engaged on 5th September 1928, as officiating manager of the estate. There was no reason established why Sheonandan Singh should wish to confide in him. We have it from the evidence of the Raja that on 6th January 1928, Sheonandan Singh had told him that he knew nothing about the murder, that he had been sleeping close to the charpoy on which deceased was lying, but that he had heard and seen nothing. That is the only implication that is to be drawn from the story that he told. He continued that next morning being afraid that suspicion might fall upon him he had joined Salik Ram and others in removing the bed to another place. He had been privy to the removal of the body to another place and the breaking of the bars of the window.

It is thus clear that on 6th September 1928, he had no apparent intention of admitting that he had seen the murder committed. There is no apparent reason, why Sheonandan Shukul should have gained the confidence of Sheonandan Singh. The former had taken charge only on 5th September 1928. Yet we have it from Sheonandan Shukul that on the morning of 7th at 8 a.m. Sheonandan Singh came and sat by him and Sheonandan Shukul pressed

him again asking what did he know about the murder. Everybody knew that Sheonandan Singh had stated that he knew nothing about the murder, but Sheonandan Shukul returned to the subject, and pressed him saying that as he was sleeping close by he must have known something about it. Then according to the witness Sheonandan Singh made this incriminating statement.

It is quite clear that the police officials in charge and the Raja were very anxious to obtain evidence as to the murder. They had according to their account been unable to obtain any information of any value but where they had failed it is said that Sheonandan Shukul succeeded. This story is not convincing. If otherwise, Sheonandan Shukul would have been of importance. Yet we find that in the police charge sheet of 21st September 1928 the name of Sheonandan Shukul is not entered as a witness. His name was not mentioned until a subsequent date. When the Sub-Inspector Raghunandan Prasad was asked in cross-examination why he had not put up the name of Sheonandan Shukul at the beginning he replied that he only learnt late in the proceedings that a statement made by an accused person before people other than police men could be proved in Court. This, however, is hardly a sufficient explanation, for the Raja is put up in the police charge sheet as a witness who can give evidence as to the statements made to him by Mata Din and Salik Ram and Ram Kishen Tewari who was never called as a witness, was put up to give evidence as to statements made to him by Debi Dayal and Salik Ram.

It is true that the Sub-Inspector said in his deposition that proceedings under S. 201, I. P. C., had never occurred to him as possible during the investigation. But if those proceedings did not strike him as possible during the investigation it is difficult to see why he mentioned the Raja as a person who would give evidence as to the statements made by Mata Din and Salik Ram. After giving close consideration to the evidence of Sheonandan Shukul we are of opinion that we are not justified in accepting that evidence as establishing that Sheonandan Singh had been standing near the bed of the deceased at the time of the murder. Upon that finding his con-

viction of abetment of murder cannot stand. The case as against Debi Dayal in reference to abetment of murder is based by the learned Sessions Judge upon the following findings. He finds that Debi Dayal was in the Fort at the time that the murder was committed. This in itself establishes little. Salik Ram, Mata Din, Fateh Singh, Manewa, Nanhua and Kalka were also in the Fort at the time of the murder. To connect Debi Dayal with the murder the learned Judge relies upon the evidence connected with the dhoti. This much is clear. In the house which Debi Dayal occupied in Bithar a dhoti was found hanging up to dry. There were nearly obliterated stains upon it and those stains have been found by the Imperial Serologist to be stains of human blood. Debi Dayal has stated from the beginning that the dhoti was a dhoti worn by one of his women folk, and explained the stains as being the stains of blood passed in the monthly courses. The learned Judge was under the impression that he had said that the dhoti was worn by his wife. He did not say that. He said it was worn by one of his women folk. As his wife was at the time pregnant, if he had said that the dhoti was worn by his wife, there would have been force in the criticism. But he did not say so.

There is a witness Puran Pasi (P. W. 11) who deposed that at first in the morning on 5th September 1928, he was on his way in the fields when he saw Debi Dayal washing a dhoti in a river. There would be nothing necessarily to connect the dhoti which Debi Dayal was then washing with the dhoti which was found in his house on 6th September. But apart from that we find the evidence of Puran Pasi valueless. We do not agree with the learned Judge that the explanation given by Debi Dayal is incompatible with the stains on the dhoti and we see no reason necessarily to suppose that the witness Rup Rani (D.W. 2) is not telling the truth. We find that the evidence afforded by the discovery of the blood stains on the dhoti is quite insufficient to bring the charge of abetment of murder home to Debi Dayal. We accept the appeals of Debi Dayal and Sheonandan Singh against their convictions of abetment of murder and set their convictions and

sentences on that charge aside. In these circumstances the applications for enhancement of sentence fail automatically.

We now come to the second part of the case.

Have the four appellants been convicted rightly on a charge under S. 201? We see no reason to doubt the evidence of Raja Sham Sundar Nath Kaul (P.W. 15) when he deposed that on 6th September 1928, Mata Din, Salik Ram, Debi Dayal and Sheonandan Singh all admitted to him that the charpoy, on which was the dead body of the deceased, was carried from the place where it lay between the zenana and the Court room and placed in the Court room, in order to create the impression that the murder had been committed in the Court room and not in the space outside and that the bars of the window had been broken to create the impression that the murderer of the deceased had obtained ingress by breaking those bars. There is further evidence that on 6th September 1928 it was noted that in the space between the Court room and the zenana there were obliterated marks of blood. Sub-Inspector Raghunandan Prasad has deposed as follows:

"I then examined the open space carefully and noticed obliterated marks of blood. The attempt was made by throwing dry earth on the blood and then rubbing it off."

The evidence that marks of blood in this case had been removed has been criticised strongly by the learned counsel for the appellants. They suggest that the evidence is untrue and that the idea was an afterthought. They say that if this had been the case the attempt to remove the marks of blood would certainly have been discovered on 5th September. We, however, accept the evidence that marks of blood were effected in the place in question. We are satisfied that the deceased was murdered in the open space between the Court room and the zenana and not inside the Court room itself, and we are partly drawn to this conclusion by the fact that there were no signs of blood on the floor in the Court room. Considering the fact that the deceased must have bled profusely from a cut which severed the branches of the carotid artery it would in our opinion have been surprising if there were no marks of blood upon the floor of the Court room, if the

murder had been committed in the Court room. There is evidence further that marks of blood were found on certain other charpoys, those charpoys being charpoys upon which other persons were sleeping near the charpoy of the deceased. The fact that blood was found on those other charpoys does not go to prove that the occupants of the charpoys were the murderers. But it goes far to show that blood must have fallen on the ground and in addition upon other places. Thus we consider that the evidence that the ground was found to have been scraped in the place in question is corroborated by the circumstances of the murder. It is not surprising in our opinion, if this fact was not discovered on 5th September. As we have already shown, Sub-Inspector Sheo Prakash did little or nothing towards investigation and waited till Sub-Inspector Raghunandan Prasad arrived late in the afternoon. It does not appear that the police officers discovered at first that the murder had not been committed in the Court room. They discovered this fact after Mata Din and Debi Dayal and the two other men had made their statements to the Raja.

The facts then stand that Salik Ram in his first report made what we find to be a deliberately misleading statement that the deceased had been killed inside the kothri and that he referred therein to the breaking of the bars of the window and suggested that the murderer had entered through the window. Upon the evidence of the Raja we are satisfied that all the four appellants admitted that they had taken part in the removal of the body from one place to the other and to the breaking of the bars. There is further evidence that the ground had been scraped to remove blood marks and there is also the evidence of the old Gorait Kalka who was in the Fort on the night of the murder. It is true that this old man has very bad eyesight but there was much moon light that night the occurrence having taken place three nights after the full moon. This witness may not be correct as to the men who were carrying the charpoy from one place to another, but we see no reason to distrust his evidence as showing that some of the occupants of the Fort were removing the body from one place to another. This is our finding of fact.

Can it be found on this that all these persons or any of them knowing or having reason to believe that an offence had been committed caused any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment? It is argued on behalf of the appellants in the first place that on the facts no evidence of the commission of the offence disappeared. Their case is that evidence was created with the intention of putting the investigating officers on a false scent. They further argued that there was no intention of screening the offenders from legal punishment but the intention was rather to safeguard other persons from undeserved suspicion. The final argument which was based on the decision of certain Courts was that unless it could be shown affirmatively that the murderers were persons other than the appellants they could not be convicted under S. 201. We are of opinion that the removal of a corpse of a murdered man from one place to another place does cause evidence of the commission of the murder to disappear. It was decided by a Bench of the Allahabad High Court in *Emperor v. Autar* (1), at p. 308 (of 47 All.) :

"The ordinary inference to be drawn from the conduct of persons who have been concerned in a murder in a house, and who have removed the body to another place, is that they do so with the intention of causing at any rate the true evidence about the locality in which the murder took place to disappear."

By removing the body from the open space to the Court room a portion of the evidence which would have been afforded by the discovery of the body in the place where the man had been killed did disappear. It is true that in this case additional evidence has since been discovered to establish the scene of the murder. But undoubtedly certain evidence has disappeared. It can also be argued that, if the bars of the window had remained intact, the fact that they remained intact afforded evidence that the murderer had not entered through the window. The breaking of the bars destroyed that evidence by suggesting that the murderer had entered through the window. But apart from that we have the evidence which we have accepted that the portion of the ground had been interfered with in order to obli-

(1) A. I. R. 1925 All. 315=47 All. 306.

terate blood stains. We consider that there is no doubt that it is sufficiently established that evidence of the commission of the murder was caused to disappear. But it is necessary to go further. Can it be found that it was caused to disappear with the intention of screening the offender from legal punishment? Here we have to look at the circumstances of the case. It is not sufficient for the counsel for the appellants to say:

"They are innocent men. They did not know who committed the murder. They had no suspicion who had committed the murder. They did not intend to save the murderer from the consequences of his act. They only wished to save themselves from undeserved suspicion."

Having found, as we have found, that they were privy to removing the body, breaking down the bars and obliterating the blood stains, can we accept the reply that they did these acts only to shield themselves, and should we not find on the facts that they did these acts partly with the intention of shielding themselves and partly with the intention of screening the murderers. We have to look at the facts. We find that three of these men were sleeping close to the deceased man. Some one came in the night and struck him a blow which severed his neck. The blow was necessarily a violent blow. That in these circumstances not one of these three men was disturbed, and that not one of them was in some position to form a surmise as to the perpetrator is a conclusion which we cannot accept. We consider that when in those circumstances those men deliberately caused evidence to disappear they must be considered to have had an intention of screening the murderer or murderers. Their main intention may have been to save themselves. But there was also in our opinion an intention to shield the murderer or murderers and that is sufficient to justify the convictions. So much for the appellants Mata Din, Debi Dayal and Sheonandan Singh. In the case of Salik Ram, who was not present we have it that he was consulted by the other three. It was from his brain that the plan was formed. He must be considered to have had the same intentions as the others. We find therefore that the intention is made out sufficiently. In respect to the last argument the views enunciated by a Bench of the Calcutta

High Court in *Empress v. Beia'a Bibi* (2) :

"We think that S. 201, I. P. C., was not intended to apply to such a case. A case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculping another,"

by a single Judge of the Allahabad High Court in *Empress of India v. Kishna* (3) :

"Now S. 201, I. P. C., has been held to refer to persons other than the actual offenders,"

by a single Judge of the same Court in *Queen Empress v. Dugar* (4) and by the Bench decision of the Calcutta High Court in *Torap Ali v. Queen Empress* (5) cannot now be considered as effective. These views were dissented from in the recent Allahabad decisions *Emperor v. Autar* (1) and *Emperor v. Harpiari* (6). We do not propose to discuss these decisions in view of the fact that the law on the subject appears to us now to be settled by the decision of their Lordships of the Judicial Committee in *Begu v. Emperor* (7). In that case their Lordships found on the facts that five men had set on a sixth. The sixth man was killed. His dead body was placed on a horse and taken away by the five men. The Indian Courts had found that two of those men were actually guilty of the murder, that there was not sufficient evidence to convict the remaining three men of murder, but that it was established that those three men had assisted in making away with the body. Their Lordships refused to interfere with the convictions of the first two men under S. 302 and the remaining three men under S. 201, I. P. C. Those three men had been charged with murder. Their Lordships say at p. 195 (of 52 I. A.) :

"The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under S. 237."

There the appeal was mainly as to whether the conviction was justifiable as they had not been charged originally under S. 201. But the whole case was before their Lordships. Their Lordships followed their usual practice in

(2) [1881] 6 Cal. 789=8 C. L. R. 207.

(3) [1878] 2 All. 713.

(4) [1886] 8 All. 252=(1986) A. W. N. 71.

(5) [1895] 22 Cal. 638.

(6) A. I. R. 1926 All. 737=49 All. 57.

(7) A. I. R. 1925 P. C. 130=6 Lah. 226=52 I. A. 191 (P.C.).

criminal cases. As Lord Haldane said (p. 195) :

"The tribunal is not a Court of criminal appeal. When there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence, their Lordships will not disturb that conclusion, they will only interfere in such circumstances as are referred to in the well known case of *In re., Dillet* (8) where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process."

But it is to be noted that if the views taken in the previous decisions of the Indian Court had been accepted there would have been in that case a gross miscarriage of justice. If the opinion accepted in the Indian decisions to the effect that the conviction of accused, as accessories to an offence, known or believed to have been committed by themselves is illegal: *Torap Ali v. Queen Empress* (5), the three men in question should not have been convicted under S. 201. They had been charged with murder. According to the assessors two of them had taken part in the assault although they were not found guilty of murder. According to the Judge the evidence did not sufficiently or definitely prove that they were present at, and had taken part in the murder. They were found by their Lordships to have been rightly convicted under S. 201. The facts here are not dissimilar. Here the four appellants were charged with murder. Two of them were convicted of murder by the trial Judge. They have been acquitted here on that charge. The other two were not found to have taken part in the murder. Here as there, it can be said that the evidence does not sufficiently or definitely prove that they were present at and had taken part in the murder. They can here as there be convicted under S. 201. After a close examination of the case in all aspects we find that the convictions under S. 201 are correct. We see no reason to reduce the sentences. The result of these appeals then is as follows. The appeals of Mata Din and Salik Ram are dismissed. The appeals of Debi Dayal and Sheonandan Singh are partly allowed. Their convictions for abetment of murder and the sentences of transportation for life passed upon them are set aside. But their convictions under S. 201,

I. P. C., and the sentences of three years' rigorous imprisonment passed upon them are upheld. The Government revision is dismissed.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 121

STUART, C. J. AND RAZA, J.

In re, R, a pleader.

Civil Misc. Appln. No. 665 of 1929,
Decided on 15th November 1929.

(a) Bar Councils Act (1926), S. 9—Bar Council should treat application for admission as advocate on its merits—Bar Council must be convinced that certain member of profession does not deserve to be enrolled as advocate.

If the Bar Council can establish that as fair-minded men, who have treated the application for admission as advocate on its merits and in a reasonable manner, they are convinced that a certain member of the profession does not deserve to be enrolled as an advocate and that his enrolment will be prejudicial to the credit of the body of advocates their objections should prevail. It may not be that the conduct in question deserves suspension or removal. Such conduct may not be such as to debar the applicant from practising in the Courts subordinate to the Chief Court. It may well be said that a man is not good enough to be an advocate, although he may be allowed to practise in such Courts. [P 123 C 1]

(b) Bar Councils Act, Ss. 8 and 9 (d)—Applicant enrolled as first grade pleader in 1922—His application for re-admission as advocate of Chief Court—Bar Council objecting on ground of suspicious conduct of applicant—Applicant held to have right to apply for admission under Oudh Civil Rules, R. 285 (1) (c) and (d)—Bar Council held to have acted honestly—Application refused.

The applicant passed his law examination in 1919; he was enrolled as a pleader in 1920 and as a pleader of the first grade 1922. He applied for admission as an advocate of the Chief Court, which application was objected to by the Bar Council. It was found from record that in a suit wherein he had appeared, even though he had received a payment of sum which was due on a decree passed in favour of the decree-holder, the pleader had retained the money from August 1924 till April 1926, and had then paid to the decree-holder, under circumstances not free from suspicion.

Held : that the applicant had the right to apply for admission under Oudh Civil Rules, R. 285 (1) (c) and (d). [P 122 C 2]

Held also : that in this instance the Bar Council had not acted otherwise than honestly, fairly and without prejudice and therefore the applicant was refused admission as an advocate of the Chief Court. [P 124 C 1]

J. Jackson—for R.

G. H. Thomas—for Bar Council.

Order.—This is in the matter of accepting or refusing the application of Mr. R for admission as an advocate of

(8) [1887] 12 A. C. 459=16 Cox. C. C. 241=36 W. R. 81=56 L. T. 615.

the Chief Court. This is the first matter of this nature which has come before a Bench of this Court. It is, therefore, necessary to consider with care the principles that should be adopted in deciding questions of this nature. The practice of legal practitioners in Oudh was until 1925 under the rules framed by the Judicial Commissioner's Court. That Court laid down certain rules as to the admission of advocates, pleaders of the first grade and of the second grade and the question of admission was determined absolutely by the Judicial Commissioner's Court. After the creation of the Chief Court a similar practice prevailed until the 1st March 1928, when the Bar Councils Act (Act 38 of 1926) was declared to be applicable to the Chief Court of Oudh. From this period there have commenced a completely different system of enrolment and also a completely different system of classification of the members of the Bar. Formerly the only advocates of the Court were Barristers of the Inns of Courts in England and gentlemen holding similar qualifications in other parts of United Kingdom with the addition of certain first grade pleaders who were selected for outstanding merit. Next came pleaders of the first grade, and finally there were pleaders of the second grade.

Now under the present rules Barristers of England or Ireland and members of the Faculty of Advocates in Scotland who are possessed of special qualifications, former advocates in Oudh, advocates of other High Courts, persons who hold the degree of LL. B. of Universities established by the law of the United Provinces and who have practised for at least two years in Courts subordinate to the Chief Court of Oudh or who have worked in other capacities, those who as advocates, vakils or pleaders were entitled as of right to practise in the Chief Court immediately before 1st March 1928, and persons who had practised in Oudh for not less than twenty years as pleaders of the second grade under the old rules and who have been recommended by the Bar Council as persons fit to be enrolled as advocates, may apply to be so enrolled. The last class can only apply if they have been specially recommended by the Bar Council. In the other classes no special recommendation is necessary. Notice is given

of all applications to the Bar Council and the Bar Council can object to the enrolment of any applicant. When such an objection is lodged it is heard by a Bench of the Chief Court.

The applicant in this particular instance passed his LL. B. examination in 1919. He was enrolled as a pleader second grade in 1920. He was enrolled as a pleader of the first grade in 1922. He has since been practising at B. He has thus the right to apply for admission under Cl. 1 (c) and 1 (d), R. 285, Oudh Civil Rules. The Bar Council having objected to his enrolment the matter has been heard by this Bench.

It seems advisable to lay down certain principles which should be adopted in deciding this case and similar cases which may arise in future. All the persons who are permitted to apply must have certain qualifications. If they are pleaders of the second grade, in addition to those qualifications, they must obtain a special recommendation from the Bar Council. In all other cases they do not require recommendation from the Bar Council, but the Bar Council is allowed to object to their enrolment. What should be the principles of this Court in determining such objections? It is obvious that under present conditions this Court must give due weight to the views of the Bar Council. If it were taken that any man, who holds the necessary qualifications and who is not shown to be actually of bad character, is to be admitted as a matter of course, whether the Bar Council does or does not object to his inclusion as a member of the body of advocates, the opinion of the Bar Council would be a negligible factor. We consider that the opinion of the Bar Council should not be treated as a negligible factor but in justice to the applicant it is necessary for this Court to examine the objections of the Bar Council and see whether they are founded on reason and on fact. Objections based upon mere suspicion or prejudice (if unfortunately such objections should ever be made) would not be accepted. But at the same time where the Bar Council has formed the considered opinion that an applicant should not be admitted into their number it is not necessary, in order to support those objections, for them to show that the applicant has shown by his conduct

that he is not fit to be in the profession. If it is a case of unprofessional conduct of grave nature the penalty would not be non-admission but something much more serious. We think that if the Bar Council can establish to us that as fair minded men, who have treated the case on its merits and in a reasonable manner they are convinced that a certain member of the profession does not deserve to be enrolled as an advocate and that his enrolment will be prejudicial to the credit of the body of advocates, their objections should prevail. It may not be that the conduct in question deserves suspension or removal. Such conduct may not be such as to debar the applicant from practising in the Courts subordinate to the Chief Court. It may well be said that a man is not good enough to be an advocate, although he may be allowed to practise in such Courts. Having thus enunciated the principles which we think should govern these cases, we proceed to the facts of the present case.

On 1st April 1926, a certain *M* a grain dealer in B, submitted an application to the Chief Court in which he made four complaints against the present applicant *Mr. R*. The Chief Court referred these complaints to the District Judge of B for inquiry. As *Mr. R* was not an advocate action had to be taken in this manner. The District Judge found that none of these complaints were substantiated. He was not in the best position to determine the matter, as *M* refused to substantiate his complaints. It appears that *M* desired to have the enquiry conducted by an officer other than the District Judge of B. and when this Court refused to accede to his wishes he withdrew from the enquiry. In the end none of the charges were found to be substantiated. The District Judge reported accordingly and this Court on 30th April 1929, refused to take any action in the matter. It was thus found that no unprofessional conduct had been made out against *Mr. R* which deserved further action. It appears, however, that, further inquiry was made in respect of one of these charges. This is the only charge which we shall now consider. It was over the payment of a sum of Rs. 70 which was due on a decree passed in favour of a certain *S* against the E. I. Ry. Co. The applicant had appeared for *S* in

the suit in question. A certain *Mr. P* appeared for the company. The nature of this particular charge was as follows. The railway company had sent a pay order for Rs. 70 to *Mr. P* to pay the decree-holder. The pay order was cashed. The decree-holder at first never got the money. The District Judge of B. in his inquiry came to the conclusion that there was nothing to show that *Mr. R* had ever received the money. On his finding *Mr. P* had received it. *Mr. P* was Government Pleader and as a result of the District Judge's remarks, the Deputy Commissioner of B. made an enquiry into the conduct of *Mr. P*. The Bar Council had these facts before them. The Deputy Commissioner of B. took the statement of *Mr. R* and took the statement of *S*. He arrived at the following conclusion- He found that *Mr. P* had cashed the payment order and handed over the money to *Mr. R* in August 1924, and that *Mr. R* had retained that money until 9th April 1926, and had then paid it to *S*. Now it is noticeable that the complaint of *M* to the Chief Court of Oudh was dated 1st April 1926.

The learned counsel *Mr. John Jackson* who has appeared on behalf of *Mr. R* here has gone through the record of the Deputy Commissioner's inquiry and has criticized the evidence there with force. After considering those criticisms we find that the Deputy Commissioner was right and that *Mr. R* did receive this money in August 1924, and that he retained it for nearly two years before he paid it to his client. We do not propose to take up again the matter of unprofessional conduct and in view of the fact that the money was eventually paid we would not go so far as to say that the conduct deserves disciplinary action, but we consider that when the Bar Council had these facts before them they cannot be held to have acted unfairly or capriciously or with prejudice in saying that they do not consider *Mr. R* a desirable addition to the advocates of this Court. There appear to have been other matters which it would be difficult for a Court to comment upon. It is obvious that professional lawyers who have personal experience of the work done by other lawyers must know much of the suitability of the members of the lower Bar

for promotion to a higher position. But it would be very difficult to reduce impressions of this kind to evidence which can form the subject of a report. It would appear sufficient here if the Court is satisfied that the Bar Council have acted honestly, fairly and without prejudice. We have no reason to suppose that in this particular instance the Bar Council have acted otherwise than honestly, fairly and without prejudice and in these circumstances consider that we should not be justified in refusing to accept their objections.

We accordingly regret that we are unable to allow the enrolment of Mr. R as an advocate of this Court. We point out here that this fact will in no way interfere with his practice in the B. Courts where he is practising already.

V.S./R.K.

Application refused.

A. I. R. 1930 Oudh 124

WAZIR HASAN AND MISRA, JJ.

Chandrika Singh and others—Defendants 3 to 5—Appellants.

v.

Chokhe Singh and others — Plaintiffs 1 to 4 and Defendants 1 and 2 — Respondents.

First Appeal No. 56 of 1928, Decided on 2nd May 1929, from order of Sub-Judge, Sitapur, D/- 14th December 1927.

Civil P. C., S. 11—Decision on issue in previous suit, not necessary for decree, does not bar the issue in subsequent suit.

Where the issue in a previous suit, as to whether a part of the consideration of the mortgage was binding on the party who was seeking possession and not redemption of the mortgaged property, was not a necessary issue for the purposes either of the suit or of the appeal the finding in that suit on the question as to whether that part of the consideration was borrowed for legal necessity or not does not stand as a plea in bar to the question being retried in the subsequent suit: *A. I. R. 1922 P. C. 241* and *A. I. R. 1924 Mad. 469, Rel. on. A. I. R. 1924 P. C. 144, Expl. and Dist.; A. I. R. 1927 Oudh 625, Dist.* [P 125 C 2, P 128 C 1]

A. P. Sen and Md. Ayub—for Appellants.

Rajeshwari Prasad and Hyder Husain—for Respondents.

Judgment.—This is the appeal by the defendants 3 to 5 from the decree of the Subordinate Judge of Sitapur dated 14th December 1927. The suit out of which this appeal arises, was laid in the Court of the Subordinate Judge of Sitapur for redemption of a mortgage dated 15th

November 1896. This mortgage was executed in lieu of a sum of Rs. 20,000 by Hardeo Singh, father of plaintiff 1 Chokhey Singh and of defendant 1 Sheorana Singh, and by defendant 2, Ganga Bakhsh, father of the other three plaintiffs, Lakhpat Singh, Khushmagz Singh and Lalji Singh, in favour of Chandrika Singh defendant 3, Umed Singh defendant 4 and Chhotku Singh defendant 5. Chhotku Singh died during the pendency of the suit in the lower Court and his minor son, Raja Bakhsh, has been substituted in his place. The property mortgaged was a 12 annas share in village Dharan, hamlet of village Sakrara, Pargana Machhrehta, tahsil Misrikh, in the district of Sitapur. The usufruct of this zamindari share was to be appropriated by the mortgagees in lieu of interest accruing on the sum of Rs. 16,000 and the balance of Rs. 4,000 was to carry interest at the rate of 12 annas per cent per mensem with yearly rests.

It was agreed in the Court below and the agreement was repeated before us that the plaintiffs have a right to redeem the mortgage in question. The controversy between the parties relates to the amount of the mortgage money which the plaintiffs must pay as the price of redemption. As part of this controversy several issues were raised in the trial Court but except those which are stated in the memorandum of appeal to this Court no other issue remains in dispute.

At the hearing of the appeal today the first two grounds stated in the memorandum of appeal were only argued by the learned counsel for the appellants and as we have come to the conclusion that the argument in support of those grounds must be accepted, we have not deemed it just and proper to proceed with the discussion of the other grounds of appeal. Our decision is more particularly founded on the reason that the acceptance of the appeal in respect of the first two grounds has necessitated an inquiry into the question of fact which underlies those grounds and for that purpose we have decided to remand issue 4 (b) to the lower Court for trial on merits.

The first two grounds to which reference has been made in the preceding paragraph of this judgment relates to the question of the defendants' liability for the payment of the sum of Rs. 2,003

as part of the mortgage money. The issue which the Court below placed before it for decision in this behalf is an issue of law and it is as follows:

"4 (a) Is the question of the existence of legal necessity of Rs. 2003 barred by S. 11, Civil P.C.

The lower Court has decided this issue in the affirmative and these two grounds of appeal challenge the correctness of that decision.

The facts bearing on the question set forth above are few and simple. It appears that some time in the year 1919 the plaintiffs brought a suit for recovery of possession of the share which was the subject matter of the mortgage of 15th November 1896 on the ground that the mortgage being of the joint ancestral family property was not binding on them for various reasons. At one stage of that suit an attempt was made to amend the plaint so as to convert that suit into a suit for redemption. Except as to certain alterations in the heading of the suit no amendments were introduced in the averments on which the suit for possession was originally founded. Finally the learned Judge of the trial Court who was the Subordinate Judge of Sitapur, held that the suit was a suit for possession and not for redemption. There were several defences to that suit and one of them was a plea of limitation. The Subordinate Judge on that plea held that the suit as a suit for possession was barred by Art. 126, Sch. 2, Lim. Act. In giving his judgment he, among other things, also decided the question as to whether the sum of Rs. 2,003 was borrowed by the mortgagors for any legal necessity or not. His finding on that question was that it was not so borrowed. But having regard to the decision on the question of limitation the plaintiffs' suit was dismissed. The decree of the trial Court is dated 12th January 1920. From that decree an appeal was preferred by the plaintiffs to the late Court of the Judicial Commissioner of Oudh. The appeal was heard and finally dismissed on 5th April 1921 by a Bench of two Judges of the same Court. The Subordinate Judge's opinion that it was a suit for possession and not for redemption and that it could not be converted into a suit for redemption was upheld by the learned Judges of the Court of appeal. His finding that

the suit as one for possession was barred by limitation was also upheld. These two findings of the Court of appeal necessarily disposed of the entire appeal with the result that the decree of the trial Court was affirmed and the appeal was dismissed. In giving their judgment the learned Judges of the Court of appeal observed that

"as we are dismissing the suit on the question of limitation it will be sufficient to indicate briefly our views on the other question which has been argued."

The other question which was argued was one relating to several items of money which went to form the consideration for the mortgage. Amongst those items was this sum of Rs. 2,003 now in dispute. As regards that sum of money the learned Judges said:

"The remaining amount of Rs. 2,003 was paid in cash and the learned Subordinate Judge finds that legal necessity for this amount has not been established. The respondents challenge this finding but we agree with reasons which the learned Subordinate Judge has given in support of it and we have nothing to add to them."

In the present suit the learned Subordinate Judge is of opinion that the finding of the Court of appeal just now quoted in respect of the nature of this sum of Rs. 2,003 constitutes *res judicata* as against the defendants and they are thereby estopped from reopening the question that the said sum of money was not borrowed for legal necessity. The learned Judge bases his opinion on a decision of a Bench of this Court in *Gajodhar Lal v. Secretary, Husainabad Trust, Lucknow* (1). But the substance of the argument in support of that opinion is that a finding is conclusive between the parties because law makes a finding as much conclusive as a decree provided the other conditions laid down for the application of the bar of *res judicata* are fulfilled. As against this argument nothing can be said. But does it apply to the present case? We are of opinion that it does not. In the first place, we have shown by quoting some portions of the judgment of the Court of appeal that the issue as to whether any part of the consideration of the mortgage in question was binding on the plaintiffs who were seeking possession and not redemption of the mortgaged property was not a necessary issue for the purposes either of the suit

(1) A. I. R. 1927 Oudh 625.

or of the appeal. Both the Courts resolutely declined to treat that suit as a suit for redemption. They decided it on the exclusive ground that it was a suit for possession. Secondly, so far as the Court of appeal is concerned the question was not raised by the plaintiffs-appellants and it could not be so raised because that question was decided by the Court of first instance in their favour. In the Court of appeal it was raised by the defendants-respondents and decided adversely to them. Had it been decided even in their favour it would not have affected either the decree of the Court of first instance or the decision of the Court of appeal that the suit was barred by limitation and was therefore rightly dismissed by the Court of first instance. The result was that the defendants won all along in spite of the finding on that question being against them in both the Courts. This being the situation the defendants had no remedy by way of appeal to obtain a reversal of the finding either of the Court of first instance or of the Court of appeal.

It appears to us that when such a situation arises there can be no question of res judicata with respect to such a finding. The matter seems to be entirely covered by the decision of their Lordships of the Judicial Committee in the case of *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy* (2). In that case the plaintiff's suit for possession was dismissed by the Court of first instance on the ground that it was premature. But one of the defences in the suit had raised the question as to whether the defendants were entitled to occupancy rights in the land in question in that suit or not. On that question the trial Court had held that there was no occupancy right. The plaintiff preferred an appeal to the High Court at Calcutta. The High Court affirmed the decree of the Court of first instance and expressed concurrence with the view that the suit was premature. In that case as in the present case a cross objection was lodged by the defendants-respondents against the finding of the Court of first instance that the defendants had not a right of occupancy in the land. The High Court considered

the merits of the cross objection and decided it against the defendants agreeing with the Court of first instance that there was no right of occupancy. In the subsequent suit of which the appeal which was decided by their Lordships in the judgment mentioned above arose, a plea of res judicata based on the finding that the defendants had no right of occupancy was raised. In disposing of that plea their Lordships made the following observations:

"Their Lordships do not consider that this will found an actual plea of res judicata for the defendants, having succeeded on the other plea had no occasion to go further as to the finding against them."

Converse case is to be found in the decision of their Lordships of the Judicial Committee in the case of *Midnapur Zamindari Co. Ltd. v. Naresh Narain Roy* (3). A finding in that case to the effect that the defendants of that case had no jotedari rights in certain lands was given the effect of a bar of res judicata. The circumstances were as follows :

The Midnapur Zamindari Company Limited were the defendants in the first as in the second suit and the plaintiffs were the same in both the suits. The previous suit was a suit for possession. Amongst other defences to that suit one was that the plaintiffs were not entitled to khas possession of the lands for the reason that the defendants possessed jotedari rights in those lands. In respect of this defence the following issue was framed for trial:

"Are the plaintiffs entitled to recover khas possession of the land in suit? Have the defendants any jotedari right in the land?"

As to this issue the plaintiffs' pleader stated that the plaintiffs claimed only a right to the settlement of the disputed land and no other right and the defendant's pleader said that in any event khas possession could not be given because the defendants had jotedari right in the land. Having regard to these statements the trial Court did not decide the issue and said that the plaintiffs did not ask for khas possession; hence it was not necessary to inquire whether the defendants had any jotedari right in the land. The result in the end was that the plaintiff's suit was decreed. The defendants preferred an appeal and

(2) A. I. R. 1922 P. C. 241=48 Cal. 460=48 I. A. 49 (P. C.).

(3) A. I. R. 1924 P. C. 144 = 51 Cal. 631=51 I. A. 293 (P. C.).

raised the question that the Judge of the trial Court had left the issue which we have quoted above open and undecided. At the hearing of the appeal the question was pressed on the High Court for decision and the High Court decided it and gave its finding against the defendants. The result was that the decree of the Court of first instance was affirmed which decree, as we have seen before, was a decree for possession in favour of the plaintiffs and against the defendants. To the judgment of the High Court a further finding was added that the defendants had no jotedari right in the land in question. In these circumstances the High Court decided in the subsequent suit that the issue as to the jotedari right was *res judicata*. This decision was upheld by their Lordships of the Judicial Committee. In affirming the decision of the High Court their Lordships of the Judicial Committee accepted and quoted the reasoning on which the opinion of the High Court was based in their own judgment. We propose to quote here certain portions of the judgment of the learned Judges of the High Court :

"Now, had the matter rested where the Subordinate Judge left it, no such question as we have to discuss would have arisen. Whether the suit might and should have been properly determined without entering into the question of the tenancy right as the plaintiff apparently wished to do, we need not now inquire It was contended before us that whatever the appellants might have done in this respect, the issue in fact was not a necessary or proper one to be tried in that suit, and that it is open to us to say so. But we must see first whether this Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much *res judicata* as the final determination of the issue on the merits Now this is not a case, as not infrequently happens, where incidentally some point is decided which is not necessary, which was not of first rate importance or especially brought to the notice of the Court."

Now in the present case we have shown that the learned Judges in the Court of appeal expressly treated this question as one of no importance and founded the whole of their judgment on the question of limitation. But the point which is of serious consideration in this connexion is that the Privy Council case was decided in both the Courts against the party as against whom the finding as to the jotedari

right was given in the second Court and in the circumstances it was open to that party to challenge the correctness of the decree by taking an appeal to a higher tribunal and thereby also to challenge the correctness of the finding on the jotedari right. He did not do so. The finding was, therefore, held to constitute *res judicata* in the subsequent suit. This cannot be predicated of the present case. We have endeavoured to explain the decision of their Lordships of the Judicial Committee in the case of *Midnapur Zamindari Co. Ltd. v. Naresh Narain Roy* (3) at some length for the reason that within the experience of both of us the decision is quoted in support of a plea of *res judicata* in respect of a finding alone by overlooking the fact that the party against whom the finding was given had a right of appeal against the whole decree.

Relying on the decision of this Court in the case of *Gajodhar v. Secretary Husainabad Trust, Lucknow* (1), the learned Subordinate Judge and the learned advocate for the respondents have both fallen into the same error. They overlooked the fact that the party against whom the finding was subsequently pleaded to constitute *res judicata* had lost all along and the decree was against him. Obviously from that decree he could have appealed and also challenged the validity of the finding in the same appeal. He did not do so. In the subsequent litigation and in those circumstances the finding was held to constitute a bar of *res judicata*.

We rejoice to find that our opinion falls in line with the very able judgment, if we may respectfully say so, of a Bench of the High Court of Madras in the case of *Ramasami Reddi v. Marudai Reddi* (4). In this judgment the decision of their Lordships of the Judicial Committee in the case of *Midnapur Zamindari Co. Ltd. v. Naresh Narain Roy* (3) was relied upon in support of the view that in the circumstances of that case which were similar to the case before us the finding could not be given the effect of *res judicata*.

The result is that we reverse the finding of the learned Subordinate Judge on issue 4 (a) and hold that the previous finding on the question as to whether the sum of Rs. 2,003 was borrowed for

(4) A. I. R. 1924 Mad. 469=47 Mad. 453.

legal necessity or not does not stand as a plea in bar to the question being retried in the present suit.

Under the Code of Civil Procedure we have power to decide that issue ourselves had we enough materials before us but on an examination of the record we find that the plaintiffs-respondents were precluded by an order of the Subordinate Judge, which was an improper order in the circumstances of this case, from producing rebutting evidence for the purpose of showing that sum of money was not borrowed for legal necessity. We have therefore, no other alternative left but to remand issue 4 (b) to the lower Court for decision on merits. The defendants-appellants have already produced their evidence on that issue. They shall not be given any further opportunity to produce any more evidence. The plaintiffs-respondents will be entitled to produce any evidence, oral and documentary, which they may be advised to produce in support of their case. The documentary evidence which the plaintiffs-respondents will be entitled to produce will be restricted to the judgment of the Subordinate Judge in the previous case dated 12th January 1920. No other documents will be accepted. The finding should be returned to this Court within sixty days of today. The parties will be entitled to file objections within ten days of the date of the finding. (After receiving the finding the following judgment was delivered):

Judgment.—The facts of this appeal are given in our order of remand dated 17th December 1928. The issue which we remanded to the Subordinate Judge for a finding on the point of legal necessity was issue 4 (b). The subject matter embodied in that issue was whether the sum of Rs. 2,003 which was taken in cash at the time of the execution of the mortgage deed sought to be redeemed was borrowed for legal necessity. The evidence has now been recorded and the learned Subordinate Judge has recorded a finding to the effect that no legal necessity for this amount has been established. The appellants filed objections to this remand finding, but beyond time. We have, however, gone through the entire evidence recorded by the lower Court in order to find out whether the finding arrived at by it is correct and proper.

After having read the evidence of all the witnesses examined both on behalf of the appellants and of the respondents, we have come to the conclusion that the legal necessity for the sum advanced in cash at the time of the registration of the deed has not been established. The main reason which has induced us to come to this conclusion is the fact that there is no recitation to that effect in the deed itself. We think it highly improbable that if the money had been borrowed for the purpose of the marriage of Hardeo Singh's daughter, the matter would not have been mentioned in the deed itself. The other circumstance that has compelled us to accept the finding of the Subordinate Judge is the absence of any documentary evidence. If the appellants had called upon the respondents to produce their accounts and the accounts had shown that the money was spent on Hardeo Singh's daughter's marriage there would have been no difficulty in arriving at this conclusion.

Apart from this in the previous suit the same matter was considered by the late Court of the Judicial Commissioner of Oudh (vide Ex. 2) and there also the learned Judges observed as follows:

"The remaining amount of Rs. 2,003 was paid in cash and the learned Subordinate Judge finds that legal necessity has not been established. The respondents challenged this finding but we agree entirely with the reasons which the learned Subordinate Judge has given in support of it and we have to add nothing to them."

After a due consideration of all these circumstances in the case we are of opinion that the appellants have failed to establish that the sum of Rs. 2,003 was actually spent on the marriage of Hardeo Singh's daughter. The amount cannot, therefore, be considered to have been borrowed for legal necessity. The learned counsel for the appellants has not pressed the other grounds of appeal. The learned counsel for the respondent states that there are some clerical errors in the decree prepared by the learned Subordinate Judge. As we are going to dismiss the appeal we are not inclined to go into those errors. We direct the learned Subordinate Judge to correct them if there are any. We therefore, dismiss this appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 129

STUART, C. J. AND RAZA, J.

Mt. Murtazai Begam—Plaintiff—Appellant.

v.

Dildar Ali and others—Defendants—Respondents.

First Appeal No. 128 of 1928, Decided on 16th September 1929, from order of Sub-Judge, Rae Bareilly, D/- 16th August 1928.

Transfer of Property Act, S. 67—Conditional sale deed of share in X in favour of A—Mortgage by conditional sale containing condition that on happening certain events share in village Y could be foreclosed—Same share in village Y passed by another conditional sale deed in favour of G who foreclosed it—A bringing foreclosure suit on share in Y—Share in Y held to have vested in mortgagor but G's claim being prior, A had no right of foreclosure—Transfer of Property Act, S. 21.

On 6th November 1917 S executed a mortgage by conditional sale in favour of A passing one-third share in X. It contained a condition under which on the happening of certain eventualities a one-third share in Y could be also affected. On 26th August 1918, S mortgaged this share in Y with other properties to G. The share in Y was foreclosed by G under his mortgage. On 2nd May 1922 the share in X having passed to the females of S's family, A brought a suit for foreclosure of the share in Y.

Held : on facts that a portion of the share of X having passed out of the mortgagor's possession the contingent interest became a vested interest on 2nd May 1922, but the deed was executed in favour of G on 26th August 1918. Thus priority was with G and in those circumstances A had no right to obtain any relief by foreclosure or otherwise in respect of the share in the village Y. [P 131 C 2]

Ali Raza—for Appellant.

Ali Zaheer—for Respondents.

Judgment.—This is a plaintiff's appeal. The plaintiff has obtained a foreclosure decree against a share in the village of Bholamau based upon a deed of conditional sale executed in favour of her husband, from whom she is a transferee, by a certain Syed Zafar Mehdi. The trial Court refused to grant her relief against a share in a village called Behta Murtaza. She appeals in respect of the refusal to grant her relief against the share in Behta Murtaza. Although the questions for decision in this appeal require a comparatively short decision, it is necessary to state certain preliminary facts before we arrive at those questions.

Moulvi Dildar Ali was a Syed who attained a position of eminence in the 1930 O/17 & 18

reign of King Asafuddaula. In recognition of his learning he received a diploma of Ijtihad from Karbala and was afterwards made Pesha Namaz by King Asafuddaula who gave him the title of Mujtahidulassr or priest of the Shias. He was succeeded by son Syed Moham-mad who was succeeded by his son Bande Husain who was succeeded by his son Mohammad Husain. On his death Mohammad Hussain was succeeded by his son Syed Mohammed. A relative called Syed Sibte Husain brought a suit against Syed Mohammad for certain property belonging to the family alleging that it was wakf. The proceedings did not continue for long against Syed Mohammad Husain, as he died. On the death of Syed Mohammad Husain his three brothers, Syed Zafar Mehdi, Syed Dildar Ali and Syed Razi were impleaded as defendants in his place. Syed Sibte Husain succeeded in the trial Court, but in appeal to the Court of the Judicial Commissioner of Oudh a Bench of that Court dismissed the suit of Syed Sibte Hussain with the exception of relief claimed as to certain property which was admittedly wakf, and the three brothers Syed Zafar Mehdi, Syed Dildar Ali and Syed Razi remained in possession of the property of the deceased Syed Mahomed Husain in three equal shares. This is the litigation which was concluded by the decision of the Bench of the Judicial Commissioner's Court dated 10th March 1915 filed as Ex. E5 in the present book. On 6th November 1917 Syed Zafar Mehdi executed the deed now in suit, Ex. 2, in favour of Abul Fazal for a consideration of Rs. 2,000. The deed is primarily a deed of conditional sale of a one-third share in Bholamau, one of the villages which had belonged to Syed Mohammad Husain. It contained, however, a condition under which on the happening of certain eventualities a one-third share in Behta Murtaza, another village which has been the property of Mohammad Husain, could be also affected. On 26th August 1918 Syed Zafar Mehdi mortgaged by Ex. E-1 this one-third share in Behta Murtaza with other properties to Ganga Prasad defendant 5 in these proceedings and the sole contesting respondent in this appeal. In year 1920 Ali-Fatima Begam, the step-mother of Zafar Mehdi and the mother of Syed Dildar Ali and Syed Razi to-

gether with Mt. Hajra Begam and Mt. Atiqah Begam, the sisters of Syed Dildar Ali and Syed Razi, instituted a suit against Syed Zafar Mehdi, Syed Dildar Ali, Syed Razi and a lessee called Syed Aulad Husain for possession of their shares in the property left by Syed Mohammad Husain under the Mahomedan Law. The defendants asserted that under a custom of the family females were excluded from inheritance. They pointed out that from the death of Moulvi Dildar Ali up till the time of the institution of the suit no female had ever succeeded to any portion of the property. They further called a mass of evidence including certain *wajibul-arz* to establish the custom which they asserted. They did not, however, succeed before the trial Court and the decision of the trial Court was affirmed by a Bench of the Judicial Commissioner of Oudh in *F. C. Appeal No. 11 of 1921 decided on 2nd May 1922*. The learned counsel for the parties have agreed to bring the record of this case Ex. 10 on to the file of the present appeal and we have permitted it to be brought on in order to enable us to pronounce judgment as it elucidates certain points. In the event of this case going further the necessary portions of this record will be printed and brought on the record of the appeal.

From the above facts we arrive at the following findings: When Syed Zafar Mehdi executed the deed Ex. 1 he was not in a position to know that his step-mother and his two stepsisters intended to institute a suit against him which challenged his right to the ownership of a portion of the one-third share in Bholamau. Abdul Fazal the original transferee under Ex. 1 has given evidence in which he stated that at the time of the execution of that deed he has insisted upon obtaining some sort of indemnity. He said:

"On date of Ex. 1 and even before execution Ex. 1, I was aware that Zafar Mehdi had brothers, sisters and mother, though I did not know then the exact number of brothers and sisters. Therefore I required the mortgagor to hypothecate five annas four pies share in Behta in case any brothers', sisters' and mother's share went away in any claim by them or by some reason the mortgagor's share was reduced. In 1918 the mother, three sisters and one brother sued Zafar Mehdi, Dildar Ali, Syed Razi and they got their share taken away out of five annas four pies leaving only two annas six pies

10/11krs., in Bholamau and Behta Murtaza each."

Abdul Fazal has made a misstatement in respect of the latter portion, for the claim was not brought by the mother, three sisters and one brother, but by the mother of Dildar Ali and Syed Razi and two of their sisters. No brother was a party. No other brother was then alive. At the time that the deed of 26th August 1918, Ex. E-1, was executed there was no reason why Syed Zafar Mehdi who executed the deed should have known that this suit was likely to be instituted. From our examination of the record we have no reason to suppose that the plea that females were excluded under a family custom was a dishonest plea. The plea, it is true, did not succeed, but a mass of evidence was produced to support it and there is nothing to show that Syed Zafar Mehdi did not honestly believe that females were excluded from succession. If females were excluded from succession he was entitled to a one-third share in Bholamau and Behta Murtaza. The suit of 1920 was, however, successful and on 2nd May 1922 the share of Syed Zafar Mehdi in Bholeman and Behta Murtaza was reduced to the extent already stated and consequently he lost possession of his share to the extent to which it had been reduced. Now with these facts above stated there will be less difficulty in disposing of this appeal.

Syed Zafar Mehdi is dead and the main persons impleaded were Syed Dildar Ali, Syed Razi, Mt. Hajra Begam and Mt. Atiqah Begam who have succeeded as his heirs. These persons did not contest the suit and have taken no interest in its decision. The reason why they have taken no interest is clear. The amount due under the deed Ex. 1 has swelled to a very large amount by accrual of compound interest. The share in Behta Murtaza has already passed out of their hands for it has been foreclosed by Ganga Prasad under a decree Ex. E-2, which he obtained on the basis of the deed Ex. E-1. He obtained this decree on 15th July 1925. The matter has now been reduced to this. Is the appellant entitled to obtain foreclosure over the share in Behta Murtaza or is the foreclosure already obtained by Ganga Prasad effective. The case for Ganga Prasad was that under Ex. E-1 he was entitled to priority over the

plaintiff in respect of Ex. 1. We now examine the contents of Ex. 1 eliminating unnecessary words. This deed states that Syed Zafar Mehdi has made a conditional sale without possession over a one-third share in Bholamau for a consideration of Rs. 2,000. So far the deed only affects the transfer of Bholamau. The material passage then follows :

"I the declarant do further stipulate that no other person or persons male and female"

(the learned trial Judge has misread these words as male heirs ; they are clearly Zakur and Unas and not Zakur and Warisan):

"has a right and share in this property, nor is it mortgaged, sold or gifted to any one, nor is it hypothecated by way of security ; that if after the completion of this deed, on the claim brought by any person at any time the property in whole or part goes out"

(there is nothing said about vendee's possession or vendor's possession, but the clear meaning is out of the transferrer's possession):

"or is sold as security or hypothecated property, then besides the legal steps to which for the reasons given above I shall be liable, the vendee is empowered with my free will to get compensation and have the deficiency made good from my five annas four pies zamindari share in village Behta Murtaza, Pergana Rokha, Tahsil Salon, District Rae Bareilly and to get the compensation for the consideration realised by means of foreclosure."

Without payment of the full consideration he covenanted that he would not in future transfer either of the villages, and the villages are referred to as mortgaged property.

The learned counsel for the appellant has argued that the effect of these provisions is to create a mortgage both of Bholamau and Behta Murtaza, such mortgage only to take effect in the case of Behta Murtaza, if the share in Bholamau becomes reduced. His argument is that on 6th November 1917 the mortgage came into being over Behta Murtaza. We cannot agree with this contention. As we read it no mortgage of Behta Murtaza came into being on 6th November 1917. The case is one to which the provisions of S. 21, Act 4 of 1882 have application.:

"Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case, on the happening of the event,

in the latter, when the happening of the event becomes impossible."

Under S. 2 of the same Act it is said nothing in Chapter 2 of this Act shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist Law. S. 21 is in Chap. 2, but there is nothing in S. 21, which offends any rule of the Mahomedan Law. Now as we understand it under the provisions of 6th November 1917 the transferee of the property, that is to say, of the share in Bholamau had created in his favour an interest in Behta Murtaza which would take effect only on some portion of the share in Bholamau passing out of the transferrer's possession. A portion of the share of Bholamau passed out of the transferrer's possession on 2nd May 1922 and on the happening of that event the contingent interest became a vested interest. But it did not become vested until 2nd May 1922 and the deed Ex. 1 was executed in favour of Ganga Prasad on 26th August 1918. Thus priority is in our opinion with Ganga Prasad and in these circumstances the plaintiff-appellant has no right to obtain any relief by foreclosure or otherwise in respect of the share in the village Behta Murtaza. That share has already been foreclosed in favour of Ganga Prasad. We therefore dismiss this appeal with costs.

v.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 131

STUART, C. J., AND WAZIR HASAN, J.

Qamar Ara Begam—Plaintiff—Appellant.

v.

Sultan Begam and others—Defendants—Respondents.

First Appeal No. 125 of 1928, Decided on 6th November 1929, against decree of Sub-Judge, Mohanlalganj, Lucknow, D/- 23rd May 1928.

Paradanashin lady — Alienation by aged though literate lady in favour of persons in closer communion — Court will protect her interest and on her death of her heirs — If case under Imamia law, in absence of justification for transfer, Court will set aside alienation — Mahomedan Law — Imamia School.

Where there is an elderly person, even an intelligent elderly person who is found to have divested himself or herself of a mass of property for the benefit of persons in close communion with the transferrer, Courts will protect and in some cases zealously protect the interests of such persons. They will always demand

explanations. If in addition to the fact that such person is aged and such person is a woman, the need for protection is greater. Where the woman is a paradanashin woman the need is greater still and where such woman is illiterate it is greatest of all. Further the protection given to such a lady must be extended to her heirs after her death, since according to general law or Mahomedan Law the heirs are in the same position as the person to whom they are heirs. Under Imamia Law in particular there is special case to protect the heirs as against the intruder. It is for the person who has entered into transaction with the lady to justify it. In the absence of justification once it is shown that he has benefited by the transaction the transaction will be set aside: *A.I.R.* 1925 *P.C.* 204; 7 *Cal.* 245 (*P.C.*); 18 *Cal.* 545 (*P.C.*); 29 *Cal.* 749 (*P.C.*); 29 *Cal.* 664; 34 *All.* 455 (*P.C.*); 36 *All.* 81 and *A.I.R.* 1915 *P.C.* 24, *Rel. on.* [P 140 C 1, 2]

Iqbal Ahmad, Ali Zaheer and Makund Behari Lal—for Appellant.

M. Wasim, Abid Husain and Ghulam Hasan Naqvi—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff Nawab Qamar Ara Begam for a one-third share in the property of the deceased Nawab Abida Begam according to the rule of intestate succession of the Imamia law. The deceased lady was a Shia (as is the plaintiff) and the Imamia law governs the succession. There was at first contest as to the plaintiff's title to claim a one-third share but that contest has now been abandoned. The only points remaining in dispute are whether certain property claimed by the plaintiff has been rightly excluded from the estate of the deceased lady and relief refused in respect of it in the decree, and whether certain property has been rightly included in the estate of the deceased lady and relief awarded in respect of it in the decree. The plaintiff urges in her appeal that certain items have been wrongly excluded and defendants-respondents 1 to 6 have filed cross-objections that certain items have been wrongly included. Nawab Abida Begam was the daughter of Agha Ali Khan, who is described in Ex. 40 as Aminuddaula. He is apparently the Aminuddaula who was Prime Minister in the reigns of King Amjad Ali Shah and King Wajid Ali Shah the last two kings of Lucknow. He left Lucknow (apparently) before the annexation and took up his residence in Cawnpore. Nawab Abida Begam was admittedly born in the year 1844. In certain

documents she is described as not having been born in that year, but it is now admitted that she was born in 1844. She married her cousin Nawab Akbar Husain of Lucknow in 1856. He was the son of Aminuddaula's sister. She resided with him in Cawnpore until his death on 28th November 1889. No children were born to them. After his death she transferred her residence to Lucknow about the year 1890. She died on 25th September 1924 at the age of 80 while in Mesopotamia upon a pilgrimage. The family of the lady and the family of her first husband were amongst the first families of Shias in Oudh. Ordinarily her father would have possessed a considerable amount of cash and jewellery, a portion of which would have descended to her on his death.

A certain Abid Husain was employed by her husband as his private physician on a salary of Rs. 35 to Rs. 40 a month: see evidence of Husain Ali Khan P. W. 1. He also was a man of position. It is admitted that his grandfather Masi-huddaula who was the "Royal physician" had two sons Mirza Mohammad Husain and Mirza Muzaffar Husain. Abid Husain was the son of Mirza Mohammad Husain. He married his cousin Mustafa Begam a daughter of Mirza Muzaffar Husain. She died in 1894 or 1896. Abid Husain accompanied Nawab Abida Begum to Lucknow and became one of her general agents: see Ex. 8. After Abida Begam had come to Lucknow she filed a suit for dower and her share in Nawab Akbar Husain Khan's estate in the Court of the District Judge of Lucknow against her late husband's brother. This suit was filed on 31st January 1891. The plaint is Ex. 1. The suit was decreed on 5th March 1892: see Ex. 3 for Rs. 55,506-13-0, Rs. 40,000 represented her dower, Rs. 11,983-5-4 represented a quarter share in his moveable property and Rs. 3,523-7-8 represented costs. On the death of her husband she became entitled to a monthly income of Rs. 293-10-2 in his wasika or political pension. She further was in possession of what Sadiq Husain a brother of Abid Husain, who was produced as D. W. 2 as a witness by the defendant-respondent, describes as "unlimited jewellery and ornaments." The evidence as to her share in her husband's wasika is contained in Ex. 38. On the death of her mother Afzal Mahal

on 30th November 1894, she obtained a share in her mother's wasika which brought her in an extra monthly allowance of Rs. 249-4-10 a month : see Ex. 39.

It is said that her father also had a wasika but we cannot find any evidence that the lady shared in it. It is admitted that this total wasika of Rs. 542-15-0 was increased in 1910 to over Rs. 800 a month and in 1914 we find from Ex. 40 that she obtained in addition a monthly income of Rs. 88-6-10 a month. In this document she is wrongly stated as having been born in 1851. Thus by 1914 her income from her wasika alone had increased to about Rs. 900 a month. Up-till 1896 she resided in a rented house in Lucknow. On 14th October 1893, she executed a deed of release in favour of Abid Husain. The document itself has not been put in evidence, but the fact that she had executed such a deed of release is mentioned in Ex. A-45 a document to which we shall come later. Abid Husain was not wholly without means but he was not well off. He was a physician. As has been stated he received a small salary from Nawab Akbar Husain Khan. He could well have supplemented that salary by private practice. On the plaintiff's side it is suggested that he had practically no private practice. The other side suggests that he had a considerable private practice. It is a safe conclusion that his private practice would not have brought him in more than Rs. 50 to Rs. 100 a month. His father Mirza Mohammad Husain was a wasikadar and a zamindar. His monthly wasika was Rs. 101 and the profits of his zamindari are estimated at Rs. 2,000 to Rs. 3,000 a year. He had a large family of six sons and four daughters: see the evidence of Kanhaiya Lal P. W. 3. On the death of his wife Mustafa Begam Abid Husain and his two daughters Sultan and Fatima inherited property from Mustafa Begam of a value from Rs. 600 to 700 a year. He obtained his legal share in his father's property when the father died. But his father did not die until 1904.

He married Nawab Abida Begam. We cannot say exactly when he married her but he probably married her shortly after Mustafa Begam's death. In Ex. A-45 which was executed on 31st August 1898, Nawab Abida Begam refers to him

as her husband. Some difficulty appears to have been in the mind of the learned trial Judge owing to the fact that on the record is Ex. A-1, which evidences that a marriage took place between Abid Husain and Nawab Abida Begam at Khurasan on 29th August 1903. The lady was then on a pilgrimage and was accompanied by Abid Husain. From this fact the learned trial Judge has inferred that they lived together as a man and wife without being married until 1903. We do not think that there is any reason to suppose that this was the case. We consider that the fact that the lady described him as her husband in 1898 in a document, which was registered, affords sufficient ground for saying that they were married in or before that year. The explanation of the subsequent ceremony is probably that they were first married, as Shias could legally be married, in the Mutai form, and that they subsequently became united permanently by an ordinary marriage. There can be no doubt on the evidence as to the fact that Nawab Abida Begam was strongly attached to Abid Husain who was first her general agent and subsequently her husband. She was also strongly attached to his two daughters from Mustafa Begam, Sultan and Fatima whom she brought up as though they were her own children. She was specially attached to Sultan who is defendant 1 in this suit. Sultan resided with her from the day that she was a small child until the old lady's death.

From 1893 onwards Abid Husain commenced to accumulate property in his own name. In 1893 he purchased at a Court sale in execution of a decree a house in Katra Abu Turab Khan, Lucknow City for Rs. 1,825: see Ex. A-28 and Ex. A-29. On 18th January 1896 Nawab Abida Begam purchased for Rs. 2,500 another house in Katra Abu Turab Khan: see Ex. 5. She and Abid Husain then took up their residence in these houses which were adjacent. They converted them into one residence. They continued to reside on these premises until their respective deaths. (Their Lordships then gave the different investments in different properties and dealing with the accounts, proceeded). There is now no contest as to the fact that the plaintiff appellant is entitled under the Imamia Law to a one-

third share in the estate of the late Nawab Abida Begum. The contest is to the extent of the estate. The learned trial Judge took great care in deciding the case, and we are greatly obliged to him for the intelligent manner in which he has discussed the merits. Although we do not agree with all his conclusions our appreciation of the trial remains the same. The case was unfortunately put up by no means well by the counsel on both sides in the lower Court. It was difficult for the plaintiff appellant to obtain exact information as to the estate of the deceased lady. She is the granddaughter of the deceased lady's stepsister. The interests of the other heirs-at-law have been transferred to Sultan Begam whose conduct the plaintiff-appellant is mainly attacking. Nawab Abida Begam had lived ever since her marriage to Abid Husain first with Abid Husain who was practically the sole person who influenced her directly, and after his death with Abid Husain's daughter Sultan and Sultan's husband Taqi Ali Khan who were in very close relationship to her. The transactions which present the greatest difficulty were transactions which took place when the old lady was from 78 to 80 years of age. The persons in the best position to state the truth as to these transactions were Taqi Ali Khan and Sultan Begam. The learned trial Judge has found and in our opinion rightly found that so far from telling the truth they have endeavoured to conceal the true facts, and have gone further and told a series of untruths as to what really happened. The voluminous documentary evidence and the voluminous accounts were not presented as clearly to the learned trial Judge as they have been presented to us. We have further had the advantage of hearing the arguments of leading counsel on each side who have helped us very greatly in the decision of the appeal. Nevertheless it has taken after the close of arguments a very great deal of time to examine and collate the documentary evidence and it has been obligatory to preface the actual decision with the lengthy statement of facts which we have found necessary to make in this judgment.

The learned trial Judge's decision can be summarised conveniently under cer-

tain heads. He found that it was impossible to avoid the conclusion that Abid Husain had during his lifetime utilised Nawab Abida Begam's money as though it was his own. He found that practically all the transactions by which he purchased property were conducted with Nawab Abida Begam's money. He found that in practically every instance when he had advanced money in his own name he had advanced Nawab Abida Begam's money. He found that the money which he deposited to his credit in the banks was Nawab Abida Begam's money. He has pointed out with great force that from the time that Nawab Abida Begam came to Lucknow up till the time of his death she had conducted not a single transaction of purchase except the purchase of the one house which she subsequently transferred to her husband by deed of sale Ex. A-97 and that she had no banking account. He has found, however, that owing to her conduct after the death of Abid Husain, particularly owing to the fact that in the suit filed by Jafri Begam, so far from asserting that the property in question was her own she accepted that property as belonging to Abid Husain, and took her share as a Shia widow in that property, her heir, that is to say the plaintiff appellant, is precluded from reopening any of the transactions in which Abid Husain was concerned. He refused to grant relief in respect of the loans and war bonds, and in respect of the Sikandar Manzils. He set aside the transfer by C. 19.

In respect of the transactions after Abid Husain's death we are only concerned now with the purchase of the war loans and war bonds, the purchase of the house Sikandar Manzil and the deed of transfer Ex. C-19 which was executed in 1923. There is also the small matter of the two gold bangles. These are the questions which we have to decide in this appeal.

The learned counsel for the appellant stated that he could not press the appeal in so far as it related to property covered by the decree passed in Jafri Begam's case (Ex. A-54). He stated that he recognized that the learned trial Judge had decided correctly that Nawab Abida Begam was bound by that decree. We have already stated how

that decree came into being, and we have no more to say there than that we agree with the view taken by the learned trial Judge which is not now controverted by the plaintiff-appellant. Everything included in this decree thus goes out of the appeal. But the learned counsel argued that his client was at liberty to include in Nawab Abida Begam's estate the revenue paying property which Abid Husain had purchased in his own name as detailed in the earlier part of this judgment. His case here was that Nawab Abida Begam had declared distinctly in Ex. 35 that this property was her property purchased with her own funds and entered fictitiously in the name of her husband. He pointed out that Ex. 35 could not operate either as a deed of gift or as a deed of hiba-bil-ewaz for two reasons. In the first place it could not be admitted in evidence as a deed of gift or a deed of hiba-bil ewaz, as it was not properly stamped. This difficulty could be removed by payment of excess stamp duty and penalty. But the further difficulty remained that Fatima Begam and Sultan Begam, although they at the beginning utilised this deed as against their grandmother Jafri Begam had subsequently abandoned that position and relinquished any rights which they possessed under the deed. He further pointed out that it could not be treated as an effective agreement because under the agreement Fatima Begam and Sultan Begam had agreed to pay an annual allowance to Nawab Abida Begam and they clearly had never paid that allowance. This is apart from the peculiarities of the deed itself, including the remarkable statement that Nawab Abida Begam had written it and the lists with her own hand. We agree that Ex. 35 is of no avail in this appeal.

It was not suggested by the learned counsel for the respondents that it was of any avail. He, however, argues that it has some evidential value as showing that the money was the lady's own. On this point it is also of no importance for we are satisfied apart from the deed that the money was the lady's. He argues from this that, as there never had been any judicial pronouncement as to the title of the property in question, the mere fact that the property

was allowed to remain in the names of Jafri Begam, Fatima Begam and Sultan Begam, who would have been entitled to it under the provisions of the Imamia Law does not show that it was in fact their property. He is right in his contention that the mutation proceedings confer no title. He concludes from this that as the property had been purchased with Nawab Abida Begam's funds in the name of Abid Husain, as there is no presumption of advancement in Abid Husain's favour, and as the circumstances show that he was holding the property for the lady's benefit as a trustee, his heirs, who are now represented by Sultan Begam and Fatima Begam, with the exception of a small portion of the property which Jafri Begam did not transfer to Sultan, continue as trustees on behalf of the heirs-at-law, who include the plaintiff-appellant. This argument would prevail if it were not for one fact. We are satisfied that the conduct of Nawab Abida Begam not only as evidenced by her conduct in the mutation proceedings but by her conduct in the subsequent suit brought by Jafri Begam establishes that she abandoned all claim to this property.

She undoubtedly had originally a right to claim this property and to treat Abid Husain as her benamidar. But it is clear to us that she had with full knowledge of what she was doing abandoned all such rights. Whether she abandoned those rights in favour of Fatima Begam and Sultan alone as would appear from Ex. 35 or whether she abandoned those rights in favour of these two girls and Jafri Begam in addition does not appear to us to be very material. She clearly abandoned the rights. While we give full weight to the fact that she was a pardanashin lady and that she had no one to advise her we cannot accept a conclusion other than the conclusion that she abandoned those rights intelligently. The peculiar mentality of the lady apparently induced her to forgo all benefits. The major benefits were in the property that formed the subject matter of Jafri Begam's suit. The benefits accruing to her from possession of the revenue-paying property which Abid Husain had purchased in his own name, were considerably less. We have it clearly established that she

took part in the mutation proceedings, and that she employed an agent to state her case. This agent stated on her behalf that she preferred no claim to have her name entered. We see no reason to suppose that at the time the lady who was then 66 years of age, did not appreciate what she was doing. As we have already stated, she was devoted to Sultan Begam, she was extremely attached to Fatima Begam and she was on terms of friendship with Jafri Begam, whom the evidence shows she not only kept for some time in her own house but whom she selected as a companion in a pilgrimage in which she paid all expenses. For the above reasons we uphold the decision of the learned trial Judge in respect of the revenue paying property also and do not allow the appeal in respect of that property.

Before we come to the remaining transactions we again recapitulate some of the peculiar facts. Up till the time of the death of Abid Husain, Nawab Abida Begam had no banking account. As we have shown she opened accounts after 1911. With the exception of Rs. 3,571-4-2 which were paid into her account from what she received from Abid Hussain's estate the remainder of the payments were clearly from other sources. On 5th October 1914 she withdrew Rs. 5,159-10-6. In May 1917 she withdrew Rs. 18,667-8-3. On 1st March 1919, she withdrew Rs. 5,621-9-9. She thus withdrew in all over Rs. 29,000. After that she never opened any account. These accounts are, as we have stated, Ex. 56 and Ex. 62. During the period between the death of Abid Husain and the death of Nawab Abida Begam, as we have shown, Taqi Ali Khan and Sultan Begam had banking accounts and were making payments into them which were altogether incommensurate with their means. It is not necessary to labour that point. At the time of Nawab Abida Begam's death no cash is left and her unlimited jewelley has dwindled down to ornaments worth Rs. 65, an amount of jewelley which may safely be said was probably less than that possessed by most of her own maidservants. During this period while Nawab Abida Begam was becoming older and older she had been practically in the sole charge of Sultan Begam and Taqi Ali Khan and it is very signifi-

cant to observe the transactions which were proceeding side by side with the withdrawal of the amounts from Nawab Abida Begam's Bank accounts. (Their Lordships here considered the transactions as regards war loans and came to the finding that the amount of loans was advanced by Nawab Abida Begam.) The learned trial Judge has not arrived at exactly this conclusion. But his main finding is that on the evidence as a whole any funds that came from Nawab Abida Begam in this transaction must be taken to have been transferred by a valid gift to Sultan Begam.

We shall advert to this point again in considering the law governing the case. But we should here add some observations. It is by no means clear to us that anything was given to Sultan for her own benefit in this connexion. Jafar Ali Khan whose evidence we consider reliable had only to guide him his impression that Nawab Abida Begam wished to purchase the loans for the benefit of Sultan. He admits that the old lady consulted him in order to ascertain whether the investment was a safe one and he has used the words that she wanted to know whether there was any risk in her investing the money in the name of Sultan. His evidence is equally compatible with the transaction being a benami transaction for the benefit of Nawab Abida Begam or a gift to Sultan Begam. It is perfectly possible that the income from the war loans might have been received by Nawab Abida Begam. We have gone at great length into the history of the transactions during the life of Abid Husain. These transactions show that Nawab Abida Begam had in his lifetime permitted continuously Abid Husain to conduct transactions in his name in her account. We have seen that in her bank accounts she always associated with herself the names of other persons unconnected with the transactions. In these circumstances there is justification for a finding that Nawab Abida Begam took the war loans for herself although in the name of Sultan Begam and that is the finding at which we arrive. (Their Lordships then proceeded to consider the other transaction regarding war bonds and arrived at the conclusion that the transaction was a benami transaction and that the real bene-

fiary was Nawab Abida Begam.) These conclusions are supported by the subsequent conduct of Taqi Ali Khan and Sultan. As we have already stated, very shortly after the old lady's death they sold the bonds and purchased for Rs. 35,000 a perpetual maintenance of Rs. 2,100 a year. They thus converted marketable securities which according to plaint brought in Rs. 1,840 a year for a security not easily marketable bringing in Rs. 2,100 a year. Two conclusions are possible. One is that Taqi Ali Khan was showing punctilious care in improving the interest of the investment and that he was ready to give up marketable securities for a small additional income. The other is that the transaction was intended to obscure the previous transactions and render it more difficult for any heir of Nawab Abida Begam to put a hand on the proceeds. We prefer the latter conclusion.

We therefore find in favour of the plaintiff-appellant in respect of the war loans and the war bonds.

Our decision will now deal with Sikandar Manzil. The learned Judge has found that this house was constructed with the money supplied by Nawab Abida Begam. We consider this conclusion is justified. Jafar Ali Khan, the defendants' own witness, the husband of Fatima, who is a respectable person, has deposed as follows in cross-examination:

"I believe that the house known as Sikandar Manzil was constructed with the money of Abida Begam. Sikandar Agha and Sultan Begam had no independent means large enough to build a house of this value."

If the income from the war loans and bonds had really been the income of Taqi Ali Khan and Sultan they would have had sufficient means to construct this house, for that income, as we have said, amounted to Rs. 1,850 a year. So it is clear that Jafar Ali Khan's impression was that that income was not theirs. The conclusion of the learned trial Judge that the money from which this house was constructed came from Nawab Abida Begam is in our opinion a correct conclusion. It is very noticeable that after the construction of this house commenced Nawab Abida Begam never opened any banking account and there is nothing to show what became of her savings. The evidence here is cumulative. The lady was growing older and older and her affairs were being left more and more

in the hands of Sultan and Taqi Ali Khan. The learned Judge takes the view that the circumstances point to the conclusion that the lady intended the property to be the property of Sultan, her husband and her children. It is difficult to see why she should have wished this. It was not a question of constructing a house for the residence of Taqi Ali Khan Sultan and their children either before or after her death for we have it in evidence that Sikandar Manzil has never been occupied by any member of the family, that it is not now occupied by Taqi Ali Khan and Sultan and that it is still let out on rent. It is not clear where Taqi and Sultan are at present residing. Sultan obtained house property from her father's estate. The conclusion at which we arrive here is that the land was purchased benami on behalf of Nawab Abida Begam, that she provided the materials for the construction of the house and that the house is part of her estate.

We now come finally to the questions raised in the cross-objections. Only two were argued. The learned counsel contested the finding declaring that that C 19 was a fictitious transaction. This deed is stated to have been executed in the following circumstances. Nawab Abida Begam, who was then seventy-nine years of age, was going on a pilgrimage, Sultan has deposed that she required money for the journey and that she had no money. Sultan does not explain why the lady had been unable to put by sufficient for the purpose out of the balance left after she had paid the modest expenses of her household. Nawab Abida Begam had previously not required to transfer property to pay the cost of a pilgrimage. The explanation which Sultan gave was that she wished to give Nawab Abida Begam the money but that the old lady refused to take it because she said that she would not go on a pilgrimage on money given her by anybody and certainly not on money given by a young woman. It is very likely that Nawab Abida Begam would refuse to go on a pilgrimage on money given to her by Sultan Begam. But there is no explanation worth the name as to why she required the money. The deed was registered at Nawab Abida Begam's house. Cash was certainly paid in the presence of the Sub-Registrar but that

fact proves nothing, as Nawab Abida Begam, Sultan Begam and Taqi Ali Khan were all living in the same house. The conduct of Taqi Ali Khan and Sultan is to be noted here. It will be seen from Ex. 55 that on the very day when this deed was executed Rs. 10,200 were borrowed by Sultan and Taqi Ali Khan on a promissory note from the Allahabad Bank, City Office. Great stress has been laid on this fact by their learned counsel.

It certainly would ordinarily appear that the fact they had borrowed this money on that date showed that it was a genuine transaction but if the account is looked at further it will be seen that this conclusion is disturbed. The rapidity with which most of this amount was paid back was remarkable. On 31st October 1923, Rs. 180 were paid back. On 16th November, Rs. 414 were paid back. On 24th November, Rs. 336 were paid back. On 3rd December, Rs. 170 were paid back. On 13th December, Rs. 1,300 were paid back. On 19th February 1924 Rs. 2,295 were paid back and on 21st February 1924 Rs. 3,000 were paid back. Thus Rs. 7,695 were paid back between 31st October and 21st February. The balance was paid back on 3rd April, by a transfer from a fixed deposit account. These circumstances go to show that the loan was taken to create evidence of the genuineness of the deed. Considering the circumstances of Sultan and Taqi Ali Khan it cannot be accepted without explanation that they paid back Rs. 7,695 in four months except upon the hypothesis that the money they took out of the bank they paid back again. No explanation is given. They may have spent the balance or reinvested it. We agree with the learned trial Judge in his finding that this was a purely fictitious transaction and that the rights which the lady had in her mother's house still remained part of the estate. There now only remains the portion of the cross-objection which refers to the two gold bangles. Nothing else was argued by the learned counsel for the respondent. The evidence as to these bangles is this. The defendants' own witness Sadiq Husain D. W. 2 has deposed that when he saw Nawab Abida Begam shortly before her death she was wearing gold karas and gold earrings. The gold karas and gold

earrings have disappeared. The learned Judge has drawn the conclusion that the gold karas were the bangles mentioned in the plaint and that they are worth Rs. 500. We consider this a very reasonable conclusion. It is not a very large amount of jewellery to credit to the estate of a lady who had brought, according to the same witness when she came to Lucknow an unlimited amount of jewellery and ornaments. This concludes all the points raised.

We have, however, to make some final observations. We have already stated our findings that Nawab Abida Begam was a lady of very high social position whose father had been Prime Minister to the kings of Oudh. We do not wish to emphasise unduly the probability that such a lady would possess ordinarily a large quantity of jewellery and ornaments and cash. There is evidence that she had "unlimited jewellery" and ornaments. The property which she derived from the first husband largely went in creating a religious endowment. But her income was more than ample for her needs, such as they were. At the end she was in the enjoyment of a wasika of some Rs. 900 a month. She lived modestly in an unpretentious house in unpretentious manner. She seems to have paid largely towards the expenses of Taqi Ali Khan and his wife Sultan and their children but Sultan had a small income of her own and it would not appear that the total expenses would have amounted ordinarily to more than half her income. This is shown by the fact that during the period when she did put money into the bank she put in a large amount in spite of the facts that she gave suitably towards religion and that she went on several occasions on pilgrimages taking with her friends and relatives whose expenses she paid. Such a lady might not be expected to leave a large estate but it is somewhat surprising that at the end although of frugal habit and with large opportunities for savings her total estate according to the defendant consisted of the one house which she received in part satisfaction of her claim against the estate of Abid Husain, promissory notes and shares of a value of Rs. 6,900 a small amount of household articles and jewellery of the value of Rs. 65. While at the same time Sultan

and Taqi Ali Khan upon their modest incomes and capital acquired at least the Sikandar Manzil, Nawab Abida Begam's rights in her mother's house and war bonds and war loans worth Rs. 36,000 and Sultan had also 8,000 with which to buy up the claims of the coheirs. We do not know how much else they have. We have not their full bank accounts. These facts have to be borne in mind in considering the evidence. The learned counsel for the respondents has argued strenuously that nothing should be taken against his clients which is not proved by evidence. We agree. But we have to consider the question of the burden of proof. Here we take for our guidance as to the law which should govern the subject the recent decision of their Lordships of the Judicial Committee in *Faridunnissa v. Mukhtar Ahmad* (1). Their Lordships refused to give effect to a disposition by way of wakf made by an illiterate pardanashin lady. It is true that we are not here dealing with a deed except in the instance of Ex. C-10, and it is true that Nawab Abida Begam was not illiterate, and that so far from being illiterate she was a lady of some education and of literary tastes. But at the time of the transactions in regard to which we have varied the decree of the Court below, she was over seventy years of age and, although she appears to have been in possession of her faculties to an extent greater than might have been expected at her advanced age, she was a lady of very advanced age and she was a pardanashin lady. We consider that we can find no better guidance, even allowing for the difference of the facts, than in the words of their Lordships at p. 350 (of 52 I. A.) of that decision:

"The law of India contains well known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependant upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred... The case of an illiterate pardanashin lady, denuding her-

self of a large proportion of her property without professional or independent advice, is one on which there is much authority."

The lady was not illiterate. She was pardanashin. She was at that time in close association with Taqi Ali Khan and Sultan Begam and on the evidence, as we read it, she was in association with few others. We do not believe those of the plaintiffs' witnesses when they say that they were intimate with the lady. The decisions of their Lordships (to which they refer later) are as follows:

Sudisht Lal v. Mt. Sheebarat Koer.; (2) *Wajid Khan v. Ewaz Ali Khan* (3); *Shambati Koeri v. Jago Bibi* (4); *Sham Koer v. Dah Koer* (5); *Sajjad Hussain v. Abid Husain Khan* (6); *Kali Bakhsh Singh v. Ram Gopal Singh* (7); *Sunitabala Debi v. Dhara Sundari Debi* (8).

These decisions all relate to deeds executed by a pardanashin lady or instruments of agreement reduced to writing made by pardanashin ladies and they have no direct bearing upon the facts of this case. But the principles to be derived from these decisions have direct bearing on the facts of the case. The principles are these: Where there is an elderly person, even an intelligent elderly person, who is found to have divested himself or herself of a mass of property for the benefit of persons in close communion with the transferrer, Courts will protect, and in some cases will protect zealously, the interests of such persons. They will always demand explanations. This is the law in England. It is also the law in India. Where in addition to the fact that such a person is aged, such a person is a woman, the need for protection is greater. Where the woman is a pardanashin woman the need is greater still, and where such a woman is illiterate it is greatest of all. Here the

(1) A. I. R. 1925 P. C. 204=47 All. 703=28 O. C. 338=52 I. A. 342 (P. C.).

(2) [1880] 7 Cal. 245=3 I. A. 39=4 Sar. 222 P. C.).

(3) [1891] 18 Cal. 545=18 I. A. 141=6 Sar. 46 (P. C.).

(4) [1902] 29 Cal. 749=29 I. A. 127=6 C. W. N. 682=8 Sar. 304 (P. C.).

(5) [1902] 29 Cal. 664=29 I. A. 132=6 C. W. N. 657=3 Sar. 280 (P. C.).

(6) [1912] 34 All. 455=15 O. C. 271=16 I. C. 197=39 I. A. 156 (P. C.).

(7) [1913] 36 All. 81=16 O. C. 378=21 I. C. 985=41 I. A. 28 (P. C.).

(8) A. I. R. 1919 P. C. 24=47 Cal. 175=46 I. A. 272 (P. C.).

lady was not illiterate but all the other factors are present. Who are the persons who have benefited while her estate has dwindled to a minimum. Those persons are her second husband's daughter, neither an heir nor a blood relation of herself and that daughter's husband. They are the persons who have been living with her for years and to whom she would have turned on every occasion. The protection to be given to such a lady must legally be extended to her heirs after her death. According to the Imamia law, according to all Mahomedan law and according to general law, the heirs are in the same position as the person to whom they are heirs. But under the Imamia law in particular there is special case to protect the heirs as against an intruder. It is for the persons who have benefited by these transactions to justify them. If they justify them, it is well. But once it is shown that they have benefited by these transactions the transactions will be set aside in absence of such justification. The defendant-respondents have had every opportunity of justifying the transactions. They have failed pitifully to do so. Further their defence has been most dishonest.

As a result we decree the appeal to this extent. We direct that the plaintiff-appellant shall be permitted to obtain one-third of Rs. 36,000, that is to say, Rs. 12,000 as against Taqi Ali Khan and Sultan Begam personally. We do not grant a portion in the share of maintenance purchased by Ex. 13 but the share of Sultan Begam in the property acquired by purchase from the other heirs will be liable in execution of this amount. The other property of Sultan and Taqi Ali Khan will also be liable as against each respectively. We further allow to the plaintiff-appellant a one-third share in the Sikandar Manzil. We dismiss the cross-objections. Although the plaintiff-appellant has not succeeded in respect of the whole of her appeal, we consider that the conduct of Sultan Begam and Taqi Ali Khan has been such that they should pay jointly and severally the whole costs of her appeal. We accordingly award her the costs of her appeal against Taqi Ali Khan and Sultan Begam jointly and severally. No costs are awarded against

the other respondents. We dismiss the cross-objections with costs and direct that the cross-objectors pay the costs of the cross-objections incurred by the plaintiff-appellant. The remaining costs will be on parties.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 140

PULLAN, J.

Muhammad Mumtaz Ali Khan—Plaintiff.

v.

Muhammad Saadat Ali Khan—Defendant.

Original Suit No. 7 of 1928, Decided on 22nd November 1929, In re Report of Chief Inspector of Stamps.

(a) Cosharer—Lambardar—Suit for profits—Payments by managing cosharer made on behalf of estate must be taken in account—Additional Court-fee is not necessary for the set off.

In a suit for profits by cosharers against the managing cosharer, it is open to the managing cosharer to state the details of payment made by him on behalf of the estate, and such payments should be taken into account in assessing the profits due to cosharers and such sums cannot be regarded as set-off necessitating additional court-fee by the defendant.

[P 141 C 1]

(b) Court-fees Act, Sch. 1, Art. 1—Sch. 1, Art. 1, governs written statement pleading set-off or counter-claim as regards maximum.

Although proviso to Art. 1, Sch. 1, refers only to maximum of fee leviable on a plaint or memorandum of appeal, and leaves out any reference to written statement pleading a set-off or counter claim, there is no authority for charging a larger sum on a written statement than that paid as maximum in Sch. 1.

[P 141 C 2]

Judgment. — This matter has been laid before the Court for consideration of a report made by the Chief Inspector of Stamps, U. P. He found that in this suit the written statement of the defendant, besides claiming set-off of all the expenses incidental to the management and ownership of the property, claims certain specific sums which in his opinion should be charged with court-fee. The first of these claims is half the expenditure incurred by the defendant in defending the title suit against one Abdul Halim representing a sum of over 1½ lacs. The second consists of two items, a sum of Rs. 17,000 said to have

been borrowed on behalf of the plaintiff from the defendant and a second item of Rs. 8,084-6-0 which has been realized by the Crown from the defendant for income-tax payable by the plaintiff. The last involves a very large sum said to have been left in cash by the late Rani Kaniz Begam, Rani of Utraula, together with her unpaid dower debt to half of which the defendant claims to be entitled. The Chief Inspector was of opinion that possibly the first item, that is expenditure on the law suit, might be regarded as an equitable set-off but, in any case, the sums claimed, even apart from this, being greatly in excess of the maximum of Rs. 4,10,000 mentioned in Sch. I, Court Fees Act, the defendant should pay a duty of Rs. 3,000. On this report, I asked for a note by the Deputy Registrar. He has accepted the Chief Inspector's report in principle but has maintained first that there is no such thing as an equitable set-off and that, therefore, the sum paid on account of the law suit should also be charged with stamp duty, and secondly that there is no maximum prescribed for a set-off and that, therefore, an ad valorem duty should be charged on the whole amount claimed by the defendant.

I have heard counsel on these points, and I am satisfied that this suit is a suit for profits. Without going into the facts, I may say that there was a compromise on the basis of which the Raja of Utraula, who is the plaintiff in this case, was entitled to one-half of the Nanpara estate. The validity of the compromise is no doubt challenged but if it were accepted, the Raja of Utraula would undoubtedly be entitled to a considerable sum by way of profits which have not been paid to him. In a suit of this nature it was open to the defendant, who was the lambardar, to state in detail payments made by him on behalf of the estate which should be taken into account for ascertaining the amount payable by way of profits. The expenses of a law suit conducted by the lambardar for the benefit of the estate must certainly be taken into account in assessing the profits due to a cosharer, and the same may very well be the case in respect of the two items of Rs. 17,000 and Rs. 8,084-6 0, the first of which is said to have been advanced to the plain-

tiff and the second paid as income-tax on the plaintiff's behalf. I do not consider that these sums can be regarded as a set-off in a suit for profits and I am not, therefore prepared to agree with the report or the office note in respect of these items.

The last item is of a different nature. If the defendant were seriously claiming a half share in 13 lacs out of the estate of the late Rani of Utraula it would be a claim which has nothing to do with the profits of the Nanpara estate and would be a counter claim chargeable with duty, but Mr. Wasim for the defendant points out that he does not wish to make any such claim. He says that the claim is time-barred and that he has only mentioned it in his written statement to show why he has not paid a certain portion of the profits due to the plaintiff. It is not necessary in a written statement to give reasons for non-payment and it is useless to put forward a time-barred claim. If this claim were allowed to remain in the written statement, I would certainly hold that it is liable to pay a court-fee. Mr. Wasim agrees that this passage may be deleted from the written statement, and if this is done there will be no need for the defendant to pay any amount in respect of the Court-fee on his written statement.

As the Deputy Registrar has asked for a finding on the last point raised by him, I am prepared to say that, in my opinion, the Court-fees Act does not authorise the recovery of any sum by way of Court fee in excess of Rs. 3,000. It is true that the proviso to Art. 1, Sch. I refers only to the maximum fee leviable on a plaint or memorandum of appeal, and leaves out any reference to a written statement pleading a set-off or counter-claim, but, as there is nothing in the Act to suggest that there is any fee in excess of Rs. 3,000 leviable on a sum upwards of Rs. 4,10,000, I do not consider that there is any authority for charging a larger sum on a written statement than that fixed as the maximum in Sch. I. It may be remarked that this schedule is simply headed "Ad Valorem Fees" and the table reference applies to the whole schedule not in particular to Art. 1, which is the only Article which makes any proviso indicating that there is a different ma-

ximum for the fees leviable on a plaint or memorandum of appeal from those leviable on a written statement. I see no reason to confine the heading of the first column of the table of rates to a plaint of memorandum of appeal. Rather it appears to me that these words apply equally to written statements claiming a set-off. The words are :

"when the amount or value of the subject matter exceeds but does not exceed".

I gave this opinion in respect of the maximum fee only, but offer no opinion as to whether in the case of, for instance a declaratory suit filed on a ten rupee stamp a claim for a set off should or should not be charged ad valorem.

I therefore order that the written statement be accepted without further fee and that the file of this suit and the connected suit should be submitted forthwith to the Commissioner for disposal. With the consent of Mr. Wasim I order para. 23 be deleted from the written statement.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 142

WAZIR HASAN AND SRIVASTAVA, JJ.

Narain Das—Plaintiff—Appellant.

v.

Asa Ram—Defendant—Respondent.

Second Appeal No. 217 of 1929, Decided on 9th December 1929, from decree of Addl. Sub-Judge, Fyzabad, D/- 23rd April 1929.

U P. Land Revenue Act (1901), Ss. 111 and 233—When order of postponement is within Cl. (a), S. 111, Civil Court has jurisdiction to decide question of title.

The whole object of Cls. (a) and (b), S. 111, U. P. Land Revenue Act, is to avoid a clash of jurisdictions between Courts of revenue and civil Courts and the means of attaining the object are prescribed by Cls. (a) and (b). A case may fall within Cl. (a) or it may fall within Cl. (b). In either case the Court of revenue declines to determine the question of title raised in the partition proceedings and stays the proceedings in order to await the decision of that question by a Court of competent jurisdiction, that is, the civil Court.

[P 144 C 2]

Where an objection is made by a recorded co-sharer involving a question of proprietary title which is being determined by a civil Court and the revenue Court postpones the application for partition till the decision of the civil

suit, the effect of its order is that it has declined to grant the application until the question in dispute has been determined by the competent Court in which this suit is pending. The order of postponement is within terms of Cl. (a) and the civil Court has jurisdiction to try the question of title [P 144 C 1]

K. P. Misra and Hardhian Chandra—for Appellant.

H. P. Sand—for Respondent.

Order.—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated 23rd April 1929, affirming the decree of the Munsif of the same place dated 22nd December 1928.

In the suit out of which this appeal arises, the plaintiff seeks the relief of possession of a one anna three pies zamindari share in village mohalla Qaziana, patti Jafri Begam, mohal Qaziana, paragana Haveli, in the District of Fyzabad. The suit has been dismissed on the preliminary ground that it is not maintainable, having regard to the provisions of Ss. 111 and 233, U. P. Land Revenue Act, 3 of 1901.

We are of opinion that the Courts below have misconstrued the provisions of S. 111 of the said Act. If those provisions are not applicable it must be admitted that S. 233 has no bar to the present case. The facts which have a bearing on the question for decision are as follows:

On 19th April 1928 the defendant, Babu Asa Ram made an application for partition to the Court of Revenue of Fyzabad under Chap. 7, U. P. Land Revenue Act of 1901, in respect of the one anna three pies share in question and in respect of which the entry in the revenue records stood in the name of the defendant. Necessary proclamation and notices were issued. One of the persons who appeared in response to the proclamation and the notices was the present plaintiff. His answer to the application for partition was that the defendant had no title to the share of which he claimed partition and that he, that is the plaintiff, had instituted a suit in a competent civil Court against the defendant for determination of the question of title in respect of the share in question. The result was that the Court of revenue seised of the partition proceedings on the opinion that the case fell within Cl. (a), S. 111, Land Revenue Act of 1901, ordered postponement of the

proceedings till the decisions of the civil Court. When the civil Court came to decide the case it held by the order under appeal that it had no jurisdiction to take cognizance of the suit involving the question of the determination of title to the share in question because the determination of that question was within the exclusive jurisdiction of the Court of revenue in the partition proceedings. This opinion is formed on the ground that, admittedly Cls. (b) and (c), S. 111 being inapplicable, on a proper construction of Cl. (a) the order of postponement made by the Court of revenue was not an order within the terms of that clause and, therefore the jurisdiction of the Court of revenue subsists in spite of that order.

Now sub-S. (1), S. 111, is as follows:

"If, on or before the day so fixed, any objection is made by a recorded cosharer, involving a question of proprietary title which has not been already determined by a Court of competent jurisdiction, the Collector may either:

(a) decline to grant the application until question in dispute has been determined by a competent Court, or

(b) require any party to the case to institute within three months a suit in the civil Court for the determination of such question, or

(c) proceed to enquire into the merits of the objection."

So far as the opening part of S. 111 is concerned every element of it is satisfied in the present case. An objection was made by a recorded cosharer involving a question of proprietary title which had not been determined by a Court of competent jurisdiction. This being so, it was open to the Collector to take action under any of the three Cls. (a), (b) and (c). He has admittedly not taken action under Cl. (b) or Cl. (c); but we are of opinion that the effect of his order postponing the application for partition till the decision of the civil suit is that he has declined to grant the application until the question in dispute has been determined by the competent Court in which the suit was pending. Any other construction will lead to an impasse. The Court of revenue has clearly by postponing the application declined to proceed with it and is awaiting the decision of the civil Court in the matter of the question of title to the property in suit. The civil Court now by the order under appeal has refused to determine that question. The lower appellate Court refers to a deci-

sion of a Bench of the High Court at Allahabad in the case of *Faqira v. Hardewa* (1) and has read the decision as an authority in support of the view it has taken in the present case.

We think that the Court below has misconstrued that decision. Mukerji, J., in delivering his judgment in that case said:

"Clause (a) may again mean that the Collector may keep the application in suspense where, for example, a civil suit may already be pending between the parties at the date of the application. In my opinion, even in the latter case, the result be the same, namely, the Collector would deny jurisdiction in himself to decide the question of title. It cannot be the case that simultaneously the question of title should be pending both before the revenue Court and the civil Court."

The observations made by the learned Judge in the quotation given above are wholly apposite to the present case except that the civil suit between the parties in the present instance was not pending at the date of the application but had come into existence before the date of the objection raised by the plaintiff. It is clear to our minds that the whole object of Cls. (a) and (b), S. 111, U. P. Land Revenue Act, is to avoid a clash of jurisdictions between Courts of revenue and civil Courts and the means of attaining the object are prescribed by Cls. (a) and (b). A case may fall within Cl. (a) or it may fall within Cl. (b). In either case the Court of revenue declines to determine the question of title raised in the partition proceedings and stays the proceedings in order to await the decision of that question by a Court of competent jurisdiction, that is the civil Court.

Accordingly we allow this appeal, set aside the decrees of the Court below and direct under O. 41, R. 23, Civil P. C., that the suit, out of which this appeal has arisen, be restored to its original number in the register of suits pending in the Court of first instance and tried and decided according to law. The plaintiff's costs hitherto incurred will be paid by the defendant. Future costs will abide the event.

R.M./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 144

STUART, C. J., AND WAZIR HASAN, J.

Mt Maharaji Kunwar and another—
Defendants—Appellants.

v.

Court of Wards, Deara—Plaintiff—
Respondent.Second Rent Appeal No. 32 of 1929,
Decided on 30th October 1929.Oudh Rent Act, S. 127—Tenant grove-
holder continues to occupy land on vanishing
of grove—Provision in *wajibularz* entitling
tenant grove-holder to cultivate land on
vanishing of grove at rent payable by sur-
rounding tenants—Tenant is neither tres-
passer nor tenant under S. 127.Where there is a special provision in the
wajibularz of the village which entitles ten-
ant grove-holder after the grove has ceased to
exist to cultivate the land at a rate payable by
tenants of the surrounding land, if the tenant
grove-holder remains in occupation after the
grove has disappeared, he cannot be treated
either as a trespasser or tenant within the
meaning of S. 127, he becomes entitled to culti-
vate the land at the prevalent rate of rent: 8
O. L. J. 60 (B.R.), Dist. [P 144 C 2]

E. R. Kidwai—for Appellant.

G. H. Thomas and H. K. Ghosh—
for Respondent.**Judgment.**—This appeal presents
some difficulty. The facts are these:
The defendants-appellants are two
widows who had the rights of grove-
holders in a certain grove in the village
of Govindpur in the Sultanpur District.
It is admitted on both sides that the
trees of this grove have disappeared and
that the land has been brought under
cultivation. The plaintiff, who is the
proprietor, brought a suit in the rent
Court against the two defendants for
Rs. 8-10 as representing the arrears of
rent with interest for three years. The
plot in question is 10 biswas in area
and the rent demanded was only Rs. 2.
He instituted this suit under the provi-
sions of S. 127, Act 22 of 1886 as amen-
ded, treating them as persons retaining
possession of land without being entitled
to it. His case was that he was enti-
tled to eject them as trespassers but
that he preferred to treat them as ten-
ants and hold them liable for the rent
of the land at such rate as the Court
might determine to be fair and equitable.
In addition he applied in his plaint to
eject them as unprivileged tenants. The
learned Assistant Collector who tried
the case dismissed it on the ground that
there was a special provision in the
wajibularz of the village which entitledtenant-grove-holders after the grove had
ceased to exist to cultivate the land at
a rate payable by tenants of the sur-
rounding land. An appeal was filed to
the learned District Judge of Fyzabad
who placed a different construction on
the *wajibularz* and following a deci-
sion of the Board of Revenue in *Pan-
cham Lal v. Sardar Nihal Singh* (1),
which decided that, where land has
ceased to be grove land and has been
brought under cultivation, the land-
holder is at liberty to treat the occupier
as a tenant, reversed the decree of the
lower Court and decreed the suit. We
do not consider that the decision in
question is sufficient for the decision of
this particular appeal. It may well be
that in many instances a grove-holder
would be considered a trespasser, when
remaining in occupation of the land
after the trees have disappeared, and in
those circumstances the provisions of
S. 127, Oudh Rent Act, would apply and
the landholder could treat such a person
either as a trespasser or as a tenant
within the meaning of S. 127. But
here on our construction of the *wajib-
ularz* the defendants-appellants are not
trespassers. They have become entitled
to cultivate the land at the prevalent
rate of rent. Thus S. 127 has no appli-
cation. In the interests of the defen-
dants-appellants themselves it appears
better to determine the matter of the
rent once for all. Their learned counsel
tells us that they have no objection to
paying the rent. What they fear is
ejectment on the ground that they are
trespassers. We consider that we can
meet this difficulty by treating this suit,
which does not lie under S. 127, as lying
under S. 108 (2) read with S. 32 (B).
There is no difficulty as to fixing the
rate of rent. The plaintiff claims rent
at Rs. 2 a year and the defendants say
they are ready to pay rent at that rate.
We accordingly convert the decree into
a decree for arrears of rent payable by
a tenant. We leave the amount at
Rs. 8-10 and we set aside that portion
of the decree which provides for the
defendants-appellants' ejectment.The parties will bear their own costs
throughout these proceedings.

V.B./R.K.

Order accordingly.

(1) [1920] 8 O. L. J. 60 (B.R.).

A. I. R. 1930 Oudh 145

Full Bench

STUART, C. J., WAZIR HASAN AND
RAZA, JJ.(Noran Margaret) Robinson — Ap-
plicant.

v.

(In the matter of estate of late) H. H.
Robinson.Testamentary Case No. 3 of 1929, De-
cided on 22nd January 1930.(a) Court-fees Act, Sch. 1, Art. 11 —
Money standing to credit of deceased in
provident fund is his asset liable to assess-
ment under Sch. 1, Art. 11.Money standing to the credit of a deceased
person in Railway Provident Fund deposit is
personal property, that is an asset of the dece-
ased, and if such sum exceeds rupees one
thousand it is liable to assessment under Sch. 1
Art. 11 : 46 Cal. 962, Ref. ; A. I. R. 1925 Nag.
108 and A. I. R. 1926 Nag. 306, Expl. and not
Followed. [P 147 C 1]

(b) Provident Funds Act (19 of 1925), S. 2

(c) — Widowed sister is not "dependant."

(Per Stuart, C. J.) — Married sisters are not
dependants within the meaning of S. 2 (c)
and having married they cannot return to the
status of unmarried sisters on widowhood so
as to come within the meaning of the word
'dependant.' [P 146 C 1]

H. G. Walford — for Applicant.

G. H. Thomas — for Secy. of State.

Order of Reference

Pullan, J. — By my order, dated 18th
October 1929, I granted probate to the
applicant of the will of the late Henry
Harold Robinson. The applicant des-
cribes herself as the widowed sister of
the deceased and she seeks to obtain
probate without paying the court-fees
on that portion of the estate which con-
sists of a sum in deposit in the Railway
Provident Fund. I have been referred
to two rulings of the Nagpur Judicial
Commissioner's Court reported in *Agnus
Mary v. James William* (1) and *Digam-
ber, In re* (2). These rulings are practi-
cally identical, and the learned Addi-
tional Judicial Commissioner accepting
a decision of the Board of Revenue in
Bengal held that provident fund money
is exempt from duty. I have not seen
the decision of the Bengal Board of
Revenue. The view taken by the Ad-
ditional Judicial Commissioner in so
far as he gives an opinion of his own is
that provident fund money does not
form an asset of the estate. He also

(1) A. I. R. 1925 Nag. 108.

(2) A. I. R. 1926 Nag. 306.

observes that the railway company
ordinarily refuses to pay the money
without letters of administration by
way of protection. I am not myself
able to agree that provident fund money
in deposit is not an asset of the dece-
ased. I have been referred to two rul-
ings of the Calcutta High Court: *Hindley
v. Joynarain Marwari* (3), and *Secy.
of State v. Raj Kumar* (4) and to an-
other ruling of the Bombay High Court
Veerchand v. B. B. & C. I. Ry. (5). All
these judgments have discussed the na-
ture of the provident fund in order to
show that it is not liable to attachment.
But provident fund is defined in the
Provident Fund Act (Act 19 of 1925) as
"a fund in which subscriptions or deposits
of any class or classes of employees are received
and held on their individual accounts,....."

It will appear, therefore, that a pro-
vident fund deposit is regarded as per-
sonal property, that is to say, an asset
of the deceased. S. 4 of the same Act
lays down the procedure of the officer
of the Government or the railway as the
case may be in making payments of the
sum due if the depositor is dead. It is
clear that he is required to pay the sum
to a dependant, or to a nominee, when
the sum does not exceed Rs. 5,000 with-
out requiring letters of administration
or probate, but where the sum exceeds
five thousand rupees the nominee is re-
quired to produce either probate or let-
ters of administration. In view of this
provision of the Act I am inclined to
suppose that the learned Additional
Judicial Commissioner had before him
cases in which the railway company
had required letters of administration
either from a dependant or from a
nominee in a case where the sum did
not exceed Rs. 5,000. But it certainly
appears from his order that in Bengal
the procedure adopted is to dispense with
the fees required for probate or letters
of administration in every case. There
is nothing in the Court-fees Act which
helps the applicant. It is very desirable
that there should be a procedure uniform
in all provinces in matters of this kind,
but I do not feel justified sitting singly
in following the authorities to which I
have been referred, feeling as I do that
they are in conflict with the terms of the

(3) [1919] 46 Cal. 962 = 54 I. C. 439 = 24
C. W. N. 288.

(4) A. I. R. 1923 Cal. 585 = 50 Cal. 347.

(5) [1905] 29 Bom. 259 = 6 Bom. L. R. 921.

Provident Fund Act and the Court-fees Act. As, however, the matter is of considerable importance and may affect a large number of people who can ill afford to pay duty on the comparatively small sums which they receive from the provident fund of deceased persons, where they cannot claim to be dependants under the provisions of S. 2, Cl. (c) of the Act, I refer this matter to a Full Bench under S. 14 (1), Oudh Courts Act.

Opinion

Stuart, C. J.—This is a reference made by Pullan, J., to a Full Bench under S. 14 (1), Oudh Courts Act. The question under reference arises in the following circumstances. Henry Harold Robinson, a Foreman in the employment of a State Railway, died on 6th August 1929, at Lucknow within the jurisdiction of this Court. His sister Norah Margaret Robinson has applied to this Court for probate of a will made by the deceased on 1st August 1929, in her favour. The applicant for probate is a widow. She married a certain W. Robinson who was no relation of hers. He is now deceased. The learned counsel for the applicant when applying for probate excluded from liability to duty under the Court-fees Act a sum of Rs. 34,549-9-0 which was standing at the time of his death to the credit of the deceased in the Railway Provident Fund. Pullan, J., has referred to a Bench the question as to whether this sum is liable to the assessment of Court-fees under the provisions of Art. 11, Sch. 1, Court-fees Act. In the first place it is to be noted that the applicant Norah Margaret Robinson is not a "dependant" of the deceased within the meaning of S. 2 (c), Provident Funds Act of 1925. If she had not married she would have been a dependant. Married sisters are, however, not dependants within the meaning of that section and having married they cannot return to the status of unmarried sisters on widowhood. But it is clear from a document filed before us that although the lady was not a dependant of the deceased she was the person nominated by him under the provisions of S. 4 of the Act to receive the whole of his provident fund in the event of his death, and further by the will to which I have already referred she is the sole legatee and beneficiary of all his property. The question for deci-

sion now is: Is the amount standing to the deceased's credit in the provident fund "property" within the meaning of Art. 2, Sch. 1, Act 7 of 1870 (Court-fees Act). If it is property it is undoubtedly liable to tax. It is not exempted under the provisions of S. 19 of the Act for the total is over Rs. 2,000-0-0. Mr. Walford on behalf of the applicant has argued that the amount in the provident fund cannot be considered to be the property of the deceased because the deceased had no real control over the amount in his lifetime and because even after his death it would be taken, (if taken by a dependant) free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or the depositor under the provisions of S. 3, Act 19 of 1925. This certainly imposes qualifications of the title to the amount, but the latter qualification in this particular instance has not arisen for, as I have already pointed out, the applicant is not a dependant of the deceased. It is unnecessary to discuss the effect of the portion of the section which states that such a sum vests in the dependant after the death of the deceased as the applicant is not a dependant. It is clear that the enjoyment of the amount standing to the credit of a person in the provident fund is governed by many restrictions. I cannot, however, see that the restrictions in question prevent it being considered as the "property" of the deceased in such a case where, as it here comes into the hands of a person other than his dependant.

I express no opinion as to what would happen if it came into the possession of a dependant. The only reason for taking a contrary view is based upon two decisions of an Additional Judicial Commissioner in the Judicial Commissioner's Court at Nagpur to which Pullan, J., has referred. The view taken by the learned Additional Judicial Commissioner apparently was that the provident fund did not form an asset of the estate of the deceased depositor. This view was based upon an opinion, not quoted, stated to have been received from the Board of Revenue of Bengal and the Advocate General of Bengal. What were the reasons for this opinion I am not in a position to

say. But in this case the learned Government Advocate, who is representing the revenue authorities of this province, has contended that the amount in question is property subject to the payment of court-fees. I am unable to look upon the amount as other than "property" subject to the payment of court-fee and would answer the reference accordingly.

Wazir Hasan, J. — The question under reference is stated in the the judgment of the learned Chief Judge just now delivered. The applicant Mrs. Norah Margaret Robinson has applied to this Court for probate of the will of her deceased brother Henry Harold Robinson. Henry Harold Robinson was an employee in the East Indian Railway and at his death there existed in the hands of the Railway Administration a provident fund to his individual account. The applicant claims title to this fund generally under the will of the late Henry Harold Robinson dated 1st August 1929 and in particular under nomination duly made by Henry Harold Robinson on 22nd February 1929. The applicant's title to this fund on the basis of the will just now mentioned may be wholly ignored in these proceedings because under the provisions of sub-S. (1), S. 5, Provident Funds Act, 1925 she has an absolute right to this fund by reason of the nomination just now mentioned, notwithstanding any disposition, testamentary or otherwise, made by the subscriber. But with a view to obtain possession of this fund she is required by law to produce a probate or letters of administration evidencing the grant to her of administration to the estate of the deceased. This is clear from Cl. (i), Cl. (c), sub-S. (1), S. 4 of the same Provident Funds Act. The application which she has now made for the probate of the will of her deceased brother, if succeeds, shall enable her to produce the probate required by law which will further enable her to obtain the payment of the provident fund from the hands of the officer whose duty it is to make the payment.: vide S. 4, sub-S. (1), Provident Funds Act, 1925.

It is agreed that the applicant is liable to pay duty on the probate which she seeks to obtain in respect of the provident fund unless she is exempted

from the payment of such a duty by any provision of law. Now S. 19, Court-fees Act, gives a description of documents which are not chargeable with any court-fee. Under Cl. (8) of the said section probate of a will is exempt from liability to duty where the amount or value of the property in respect of which the probate is granted does not exceed Rs. 2,000. Admittedly in this case the amount of the provident fund does exceed the sum of Rs. 2,000. The case of the applicant, therefore, does not fall within the exemption contained in Cl. (8), S. 19, Court-fees Act, 1870. Art. 11, Sch. 1 of the said Court-fees Act, states the amount of the court-fee which shall be payable on a probate. That Article, therefore, has no reference to the question of liability for or exemption from the duty. It only determines the value of the court-fee. The exemption, if any must be sought in the substantive portion of the Court-fees Act, 1870, and as just now shown the provident fund, now being considered, is not exempt from liability to pay duty.

The position is so clear to my mind that it requires no argument to support it. On behalf of the applicant, however, Mr. Walford has argued that the provident fund in the hands of the railway administration to which the applicant lays claim as a nominee of her deceased brother is not "property" within the meaning of Art. 11, Sch 1, Court-fees Act, 1870 or exemptory Cl. (viii), S. 19 of the Act. The argument is founded on the nature of the provident fund and its legal characteristics. It is pointed out that such a fund is not capable of being assigned or charged and shall not be liable to attachment under any decree or order of any civil, revenue or criminal Court in respect of any debt or liability incurred by the subscriber or depositor and neither the Official Assignee nor any receiver appointed under the Provincial Insolvency Act, 1920 shall be entitled to, or have any claim on, any such compulsory deposit: vide Sch 3, Provident Funds Act, 1925. The true nature of a provident fund has well been stated in the judgment, if I may respectfully say so, of Mr. Justice (now Sir) George Rankin in the case of *C. D. M. Hindley v. Joy-narain Marwari* (3) and I propose to reproduce a portion of the learned

Judge's judgment. Dealing with the Acts relating to a provident fund the learned Judge observes :

" These Acts make provision in the interests of certain large classes of employees for a scheme of compulsory and to a limited extent voluntary thrift. Part of the employee's wages is impounded whether he likes it or not; within narrow limits he has an option to contribute more; the employer has on his side to add a contribution : and these sums together with interest, profits or other increments make a total fund of which a defined proportion is held on the individual account of each employee. The legislature is dealing with people who are poor, with people who are being compelled, and with such people in very large numbers. Its intention is that such people shall in case of necessity be able to afford a passage home to Europe, in case of retirement have something to live on, in case of death something to leave

By rules made for this institution under the Act, when an employee dies his share if small is to be summarily and directly distributed according to special rules which brush aside the ordinary law as to wills or intestate succession. If his share is larger it is payable to his executor or administrator and to him only on production of his grant ; the burden of a due administration is thus put upon the proper shoulders. Whether the employee is in the service or out of service, whether he be alive or dead, his share is unattachable in the hands of the institution."

Such is the true nature of a provident fund and such are the limitations which law attaches to that fund. This nature and these limitations, however, do not make it the less " property " when that word is considered in its legal significance. I, therefore, agree that the answer which the learned Chief Judge has given to the question under reference is the only answer to the question.

Raza, J.—I have nothing to add to the judgments that have already been delivered and in which I concur. In my opinion also the money standing to the credit of the late Henry Harold Robinson in the provident fund is his property within the meaning of Art. 11, Sch. 1, Court-fees Act and is not exempt from the court-fees payable under that Article.

V.B./R.K.

Reference answered.

* * A. I. R. 1930 Oudh 148

Full Bench

STUART, C. J. AND WAZIR HASAN
AND SRIVASTAVA, JJ.

Bahadur Singh — Plaintiff — Applicant.

v.

Ram Phal and another—Defendant—Opposite Party.

Revn. Appln. No. 2 of 1929, Decided on 19th December 1929, against decree of First Sub-Judge, Bahraich, D/- 6th October 1928.

* * (a) Civil P.C. O. 21, R. 93—(Per Full Bench)—Auction purchaser deprived of property by third person by suit against auction purchaser, decree-holder and judgment-debtor, is entitled to bring suit for recovery of purchase money—(Srivastava, J., contra).

Per Full Bench.—When a person purchases immovable property at an auction sale in execution of a decree of a Court and subsequently loses the same under the decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, such an auction purchaser is entitled to bring a suit for the recovery of his purchase money as against the decree-holder : (Srivastava, J., contra) : 17 Cal. 436 (P.C.); 3 Cal. 806 (P.C.), *Relon*; 14 O.C. 343, *Ref.*; 22 O. C. 42, *Expl.*; A. I. R. 1921 All. 377; A. I. R. 1926 Cal. 971, *Diss. from: English Case Law discussed.* [P 152 C 2]

Per Stuart, C. J.—No doubt an auction purchaser deprived of his property can, if he discovered the absence of the judgment-debtor's title in time, file an application to set aside the sale, within a month. Since a suit is not expressly barred by any express provision in the Civil Procedure Code the auction purchaser has a right under general principles of equity to the purchase money and he can bring a suit for the same. [P 152 C 2]

Per Srivastava, J.—There is no guarantee of title given at a Court sale either by the Court or by the decree-holder and there is also no privity of contract between the auction purchaser and the judgment-debtor. The auction purchaser purchases with his eyes open. He takes the property subject to all the attendant risks. He ought to have known, and must be deemed to know when he bought the property that if he complained of any want of title in the judgment-debtor his complaint could be entertained only subject to the limitations prescribed by the Civil Procedure Code inasmuch as the right of refund given by the provisions of the Code of Civil Procedure is creation of and can, therefore, be exercised only subject to the limitation and qualification laid down therein. The terms of O. 21, R. 93, clearly limit the remedy in cases in which the sale has been set aside under R. 92 and do not extend to cases in which the sale has not been set aside even though a decree might have been passed in a suit brought by a third person against the purchaser. [P 161 C 1]

(b) Interpretation of Statutes—Statutes of procedure do not create new rights or extinguish existing ones.

Per Wazir Hasan, J. — The Codes of procedure neither profess nor are they intended to create new substantive rights which do not exist in law independently of them. Similarly they do not extinguish such existing rights though they may operate to bar remedies of procedure. [P 153 C 1]

(c) Civil P. C., 1908—Interpretation with reference to earlier Code is not right.

Per Wazir Hasan, J.—It is not right to interpret the Code of 1908 with reference to the Codes of 1859 and 1882: 23 Cal.563 (P. C.) and A.I.R.1928 P.C. 2, *Bef.* [P 159 C 1]

G. S. Bajpai for R. N. Shukla—for Applicant.

A. N. Bahadur—for Opposite Party.

Order of Reference

Pullan, J.—The facts out of which this application in revision has arisen are as follows: Certain groves were put up to sale in execution of a decree against one Nand Kumar and a portion of this property was purchased at the auction sale by Fateh Bahadur Singh the present applicant on 10th March 1923. There is no reason to suppose that at that time the purchaser had any reason to doubt that the judgment-debtor was the owner of the property and it was, therefore, impossible for him to make an application within 30 days under R. 91, O. 21, Civil P. C., to have his sale set aside. It was not until the year 1926 that a suit was brought by the ground-landlord of these groves, who claimed possession of the groves, alleging that Nand Kumar had no transferable interest in the share of the groves which had been purchased at auction sale by Fateh Bahadur Singh. The latter was a party to the suit and the suit was decided in favour of the plaintiff. Fateh Bahadur Singh then brought the present suit to recover the money paid by him at the auction sale. The two Courts below have dismissed his suit on the ground that no such suit is maintainable. The lower appellate Court who probably did not have the latest rulings shown to him, was under the impression that he was acting contrary to rulings of the Allahabad and Calcutta High Courts and following a ruling reported in *Ram Dayal v. Ram Pal Singh* (1), which, in his opinion, laid down that a purchaser at a Court sale held in execution of a

decree, who is afterwards deprived of the property by a person claiming a title paramount, has a right to recover his money on making an application under O. 21, R. 93, Civil P. C., but has no right to recover it by a separate suit. Now R. 93, O. 21, Civil P.C., only comes into force where the sale of immovable property has been set aside under R. 92 and has no application whatever to the present suit. The only question is whether under the present Code of Civil Procedure an auction purchaser who is deprived in this manner of his purchase can or cannot bring a suit to recover the money which he paid at the auction sale. The apparent injustice of depriving the auction purchaser of all remedy, for there is no remedy in the present case at least, which he could get under the Act, has been commented on by many Judges of different High Courts, and in particular in the ruling of the Judicial Commissioner's Court which decided against the conviction of a Court, if I may say so, that the auction purchaser has no remedy: *Ram Dayal v. Ram Pal Singh* (1). Similar observations were made by a Judge of the Calcutta High Court in a recent decision *Rishikesh Laha v. Manik Molla* (2-3), although the decision in that case went against the auction purchaser in view of the state of authorities which were reviewed in the judgment. I have also been referred to what appears to be the latest decision of the Allahabad High Court which is reported in *Ram Sarup v. Dalpat Rai* (4), where Sulaiman, J., has made the following observation:

"The auction purchaser who purchases the property, therefore, takes a risk, and if it turns out that the judgment-debtor really has no interest in the property sought to be sold, it is the misfortune of the auction purchaser. Unless there is a special remedy provided for compensation, I fail to discover any rule of equity which would entitle him to get back his money."

In the judgment of the Calcutta High Court to which I have referred Page, J., very clearly says that in his opinion such an auction purchaser has an equity and that he should be allowed to bring a suit to recover the money paid by him. If this is so it is entirely outside the provisions of the Code of Civil Procedure and I cannot follow the head.

(1) [1919] 22 O. C. 42=51 I. C. 95=6 O. L. J. 360.

(2-3) A. I. R. 1926 Cal. 971=53 Cal. 758.

(4) A. I. R. 1921 All. 377=43 All. 60.

note in the Allahabad decision to which I have referred which runs :

" His right is limited to an application for an order for repayment after the sale has been set aside " ?

It does not appear to me that the case before their Lordships was one in which the Civil Procedure Code provides for any application, and it is not clear that either in that case or the one before me the sale has ever been set aside. In my opinion the auction purchaser either has a right to bring a suit or he has no right at all. As there is no authority of this Court on a point which is of some importance to auction purchasers I refer the decision of this application to a Bench under S. 14, Cl. 2, Oudh Courts Act.

Wazir Hasan and Pullan, JJ. — (23rd August 1929) — Having heard arguments in this case we have come to the conclusion that it raises a question of law of some importance. Accordingly we refer the following question for decision to a Full Bench under S. 14, sub-S. (1), Oudh Courts Act, 1925 :

When a person purchases immovable property at an auction sale in execution of a decree of Court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, is such a purchaser, entitled to bring a suit for the recovery of his purchase money as against the decree-holder ?

To the above question we want to add a rider to the effect that the auction purchaser at the date of the auction had no knowledge of the paramount title which succeeded in the suit mentioned in the question.

Opinion

Stuart, C. J. — This is a reference to a Full Bench from a Bench of this Court in which we are asked to answer the question :

" When a person purchases immovable property at an auction sale in execution of a decree of Court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, is such a purchaser entitled to bring a suit for the recovery of his purchase money as against the decree-holder ? "

The facts of the appeal from which this reference has arisen are these. Ramphal held a decree against Nand Kumar father of Deota Din. In execu-

tion of this decree he attached and put to sale Deota Din's rights and interests in a certain grove. After attachment a Court sale took place and Bahadur Singh purchased one-fourth of those rights for a certain sum of money. But later a suit was brought by the superior proprietor against Bahadur Singh, Ramphal and Deota Din for the possession of this grove. That suit was decided in favour of the superior proprietor and in consequence Bahadur Singh lost all rights in the grove. He then instituted a suit against Ramphal and Deota Din for the recovery of his purchase money and other damages. The Courts below have dismissed this suit on the ground that the only remedy open to Bahadur Singh was by an application under O. 21, R. 91, and relief under O. 21, R. 93. The Courts below relied on a decision of Mr. Daniels as Additional Judicial Commissioner of the Judicial Commissioner's Court in *Ram Dayal v. Rampal Singh* (1). Mr. Daniels' decision supports the decision of the Courts below. It is, however, to be noted that Mr. Daniels stated that in his opinion the auction purchaser, when subsequently found to have lost all the benefit of his purchase owing to the claim of a person holding a paramount title, was an object for sympathy, and that he would have granted him relief if he had felt that the previous decisions of the Court permitted him to do so. It is unfortunate that it was not brought to the notice of Mr. Daniels that a previous decision of the Judicial Commissioner's Court did authorize him to do so.

The decision in question is a decision of a Bench, *Brij Mohan Lal v. Mt. Munni Bibi* (5), where Mr. Lindsay (afterwards Sir Benjamin Lindsay) found that the rule of "caveat-emptor" had no application in India in the case of ordinary sales of goods by private contract, and that in India an attachment is made at the risk of the attaching creditor, and he is responsible for any results, which can be traced to an unlawful attachment carried out upon application made by him. In the case of a sale in execution in India, although there is no warranty given by the Court or by the officer entrusted with the duty of carrying out the sale, there is a

warranty by the decree-holder that the property does belong to the judgment-debtor. The property is sold as the property of the judgment-debtor on the representation to that effect made to the Court by the decree-holder who is taking out execution. Mr. Piggot (afterwards Sir Theodore Piggot) who was sitting with Mr. Lindsay does not appear to have affirmed Mr. Lindsay's decision in entirety, but he agreed in the order proposed. Thus Mr. Daniels could have given effect to his desires in the matter, had he been referred to the decision in *Brij Mohan Lal v. Mt. Munni Bibi* (5). The question which we have to decide has been rendered more difficult of decision by the fact that a large number of diverse views have been expressed by a large number of Judges of different High Courts upon the subject. I do not propose myself to discuss the decisions of the High Courts upon the subject for I find sufficient guidance in two decisions of their Lordships of the Judicial Committee. The first of these is *Dorab Ally Khan v. Abdool Azeez* (6). The facts here were as follows: Judgment had been obtained on the original side of the High Court of Calcutta against a certain judgment-debtor. The Sheriff of Calcutta under a writ of *fi. fa.* attached and brought to sale certain property in Oudh. We need not go into the question, as to whether the property was or was not the property of the judgment-debtor. It is clear that the Sheriff of Calcutta had no jurisdiction to attach and sell the property. The purchaser of the property at the Court sale was subsequently ejected under an order of the Courts of Oudh, and the auction purchaser then brought a suit against the decree-holder to whom the purchase money had been paid, to recover compensation. Their Lordships of the Judicial Committee referred to the fact that under the law of England a purchaser in a sale by a private contract could not recover his money if he were evicted by a title to which the covenants did not extend. This proposition of law does not, however, apply to India.

Their Lordships went on to discuss whether this principle would, even in England, apply to sales in *invitum*

under colour of a legal process. They laid down that it would not so apply because while a purchaser at a private sale had a full opportunity of investigating title a purchaser at a Sheriff's sale had a very inadequate means of investigating title, and because at a Sheriff's sale all that was sold was the right, title and interest of the judgment-debtor with all defects. They continued that it was perfectly clear that when the property had been so sold under a regular execution and the purchaser had been afterwards evicted under a title paramount to that of the judgment-debtor he had no remedy against either the Sheriff or the judgment-creditor. He had no remedy against the Sheriff because the Sheriff was authorized by the writ to seize the property and to pass the debtor's title without a warranty and he would have no right against the judgment-creditor in these circumstances because the judgment-creditor was not responsible for the sale, the Sheriff being responsible. But nevertheless their Lordships did not dismiss the suit. They sent it back for decision upon other points. The reason that I have referred to this decision at such length is because it is a prelude to the next decision. The first decision referred to a Sheriff's sale. In the year when the sale in question took place a Sheriff's sale in Calcutta was governed by the same law and the same rules as a Sheriff's sale in England. But we have to consider now the position in respect of sales under the Civil Procedure Code which follow on attachment.

Under the provisions of the present Code it is the duty of a decree-holder under O. 21, R. 13, when applying for attachment, to fill up the form which is given No. 6 in Appendix E of Act 5 of 1908. We are here concerned with the attachment and sale of immovable property. The decree-holder applies for attachment and sale and he has to state what he believes to be the judgment-debtor's right, title and interest in the property, and he further has to declare that to the best of his knowledge and belief this statement is correct. I am not digressing when I point out that when the plaintiff applies for attachment before judgment of property he has under the provisions of O. 38, R. 7 to describe the property in the same manner. Now

(6) [1880] 3 Cal. 806=5 I. A. 116=3 Suther 519=3 Sar. 818 (P.C.).

I come to the next authority and this is the most important one. This is the decision of their Lordships of the Judicial Committee in *Kissory Mohan Roy v. Hursook Das* (7). In this case certain plaintiffs had attached certain jute before judgment. It was subsequently discovered that the jute in question was not the defendant's property, and in a subsequent suit damages were awarded against the persons responsible for the attachment. They were the appellants before the Judicial Committee. Their Lordships stated at p. 27 (of 17 I. A.) :

"The appellants mainly relied upon the English case of *Walker v. Olding* (8), which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. *Walker v. Olding* (8) would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England, the execution of a decree for money is intrusted to the Sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the ex parte application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value. In the present case, by the terms of the parwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellant. The illegal attachment of the respondent's jute on 28th November 1883, was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent deterioration of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment."

Sir Benjamin Lindsay in the decision in *Brij Mohan Lal v. Mt. Munni Bibi* (5) relied upon this decision as authority for the proposition that in India the decree-holder became, when he made an application for attachment, responsible for the description of the judgment-debtor's right, title and interest in the property. He argued that the principles laid down in *Kishory Mohan v. Harsook Dass* (7) were equally

applicable to proceedings in attachment and sale in execution after judgment as to proceedings in attachment prior to judgment. Sir Benjamin Lindsay said at p. 348 :

"It seems to follow from this exposition of law that in India the attachment is made at the risk of the attaching creditor and that he is responsible for any result that can be traced to an unlawful attachment carried out upon application made by him."

I concur in this view and therefore find that in India a person who has purchased property at a Court sale held under the provisions of Civil Procedure Code and has subsequently been deprived of that property because it has been found that the judgment-debtor had no title in that property has a cause of action and a right to obtain damages from the person who is benefited by the sale. It would not follow that the decree-holder would be the only person who benefited by the sale. If the sale had left a surplus the judgment-debtor also might have benefited. The criterion would be I consider as follows. The auction purchaser has paid his money and in the end has got nothing for it. Who got that money? The persons who got that money are liable to refund it to the auction purchaser.

I now come to the next aspect of the question. Do the provisions of Civil Procedure Code contained in O. 21, Rr. 91 and 93 bar such a suit? It was the opinion of a Bench of the Allahabad High Court in *Ram Sarup v. Dalpat Rai* (4) and of a Bench of the Calcutta High Court in *Rishikesh Laha v. Manik Molla* (3) that either the only right which such an auction purchaser could have was the right conferred upon him by the provisions of Rr. 91 and 93 or in the alternative that if he had "aliunde" any other rights he was deprived of those rights by the incorporation of these rules in the present Civil Procedure. As I have already said I consider that if the statute law is silent on the subject such an auction purchaser has a right under the general principles of equity, and I cannot find that there is anything in the rules in question which can deprive him of that right. True they give him another remedy. He is allowed if he can discover the absence of the judgment-debtor's title in time to file an application to set aside the sale

(7) [1890] 17 Cal. 436=17 I. A. 17=5 Sar. 472 (P.C.).

(8) [1863] 1 H. & C. 621=9 Jur. (n.s.) 53=11 W. R. 186=7 L. T. 633=92 L. J. Ex. 142.

within a month. But I can see nothing in these rules which deprives him of his general right. The ordinary rule is that a suit lies until it is expressly barred by express provision. The Civil Procedure Code in many places bars certain suits laying down that the parties must take their remedy by an application and that no suit in such cases lies. But here there is no such provision and where there is no such provision I cannot see that the suit can be barred. For the above reasons I should answer the question referred to us in the affirmative.

Wazir Hasan, J.—Before entering into the task of answering the question referred to the Full Bench for decision I propose to make certain preliminary observations and they are as follows :

(1) The Codes of Procedure neither profess nor they are intended to create new substantive rights which do not exist in law independently of them. Similarly they do not extinguish such existing rights though they may operate to bar remedies of procedure.

(2) Such Codes are not exhaustive. They are merely enabling statutes.

(3) A proclamation of sale of property under the rules of Civil Procedure Code is not an invitation to gamble. The auction sale is not a game of chance. It is a legal transaction with legal consequences from beginning to end. The notion therefore that a bidder at such a sale merely gambles is to my mind out of place in considering the nature and the effect of such a sale.

(4) The doctrine of caveat emptor is not a rule of general application in India.

(5) According to S. 3, Oudh Laws Act, 1876 :

"the law to be administered by the Courts of Oudh shall be as follows :

- (a).....
- (b).....
- (c).....
- (d).....
- (e).....

(f)..... all enactments for the time being in force and expressly, or by necessary implication, applying to British India or Oudh or some part of Oudh :

(g) in cases not provided for by the former part of this section, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience."

The question under consideration may well be resolved into two parts :

(1) Is there a substantive right in equity or outside equity existing in favour of a person who happens to be the purchaser at a public auction to recover the sale price either in part or in whole from the person in whose hands it lies when such a purchaser has lost the property in a claim of paramount title ?

(2) If the answer to the foregoing question is in the affirmative, is the remedy of enforcing such a right by means of a suit barred by the provisions of the Civil Procedure Code ?

My answer to the first question is in the affirmative and to the second question in the negative.

I now proceed to give my reasons for the answer to the first question. I feel that in this connexion I am free to resort for help and guidance to such principles of English law as are not the outcome of any peculiarity of that system but are principles of justice, equity and good conscience.

The celebrated case of *Moses v. Macferlan* (9) I place at the forefront of my judgment. I am aware that the actual decision has been overruled in *Marriot v. Hampton* (10). In *Moore v. Fulham* (11) Lord Halsbury said :

"The principle of law is, not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered."

This, however, does not affect the masterly exposition, if I may respectfully say so, of the principle of equity in the judgment of Lord Mansfield, C. J. In describing the nature of an action for money had and received, Lord Mansfield said :

"This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and, therefore, much encouraged. It lies only for money which ex aequo et bono, the defendant ought to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law, as in payment of a debt barred by the statute of limitation, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play ; because in all these cases the defendant may retain it with a safe conscience, though, by positive law, he was barred from recovering : but it lies for money

(9) 2 Burr. 1005=1 W. Bl. 219.

(10) 4 R. R. 439=7 Term Rep. 269=2 Esp. 546.

(11) [1895] 1 Q. B. 399=64 L. J. Q. B. 226=59 J. P. 596=43 W. R. 277=71 L. T. 862.

paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion, or oppression, or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances."

The above statement of the principle of equity underlying an action for money had and received must be qualified having regard to the development of law since the decision in *Moses v. Macferlan* (9) was given. In *Sinclair v. Brougham* (12) Lord Sumner said :

"There is now no ground left for suggesting as a recognizable 'equity' the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."

But the equity in the right to recover money paid under a mistake of fact still holds good. The technical form of the action by means of which the said right may be enforced is of no importance in this country. In *Milnee v. Duncan* (13) Bayley, J., said :

"There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of the law he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches are imputable to him (in respect of his omitting to avail himself of the means of knowledge within his power), he may recover back such money."

As pointed out by the Editors of the Revised Reports in the foot-note at p. 500 :

"The dicta in this judgment as to the effect 'means of knowledge' are overruled by the judgments of the Court of Exchequer in *Kelly v. Solari* (14)."

To the judgment in *Kelly v. Solari* (15), I will have occasion to refer later.

In *re, the Bodega Co. Limited* (15), Farwell, J. said :

"Lord Mansfield, speaking of the action for money had and received in *Moses v. Macferlan* (9) at 1012 says ; 'It lies for money paid by mistake ; or upon a consideration which 'happens to fail.' The mistake on which you can recover must, as Bramwell, B., puts it in *Aiken v. Short* (16) at 215 be a mistake as to a fact which, if true, would make the person paying liable to pay the money ; not where, if true, it would merely make it desirable that he should pay the money. That I apprehend, means this, if you are claiming to have money repaid on the ground of mistake, you

must show the mistake is one which led you to suppose you were legally liable to pay."

Now I come to the case of *Kelly v. Solari* (15) already referred to. The general principle of equity that money paid under a mistake of fact may be recovered was again affirmed by the Court of Exchequer in this case. The limitation applied by Bayley, J., in the case of *Milnes v. Duncan* (13) as to omitting to avail of the means of knowledge within power was set aside. Lord Abinger, C. B. said :

"I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment."

As stated by Williams, J., in *Townsend v. Crowdy* (17).

"No doubt at one time the rule that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But since *Kelly v. Solari* (14) it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry."

In *Kelly v. Solari* (14) the principle itself was stated by Parke, B. in the following words :

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it ; though a demand may be necessary in those cases in which the party recovering may have been ignorant of the mistake."

It need hardly be said that the principle is not limited to actions founded on contract as is evident from the case of *Kelly v. Solari* (14) itself : nor is there any reason in the principle itself as to why it should be so limited. In my opinion it is of general application and there is no case so far as I know contrary to this opinion. The case of *Kelly v. Solari* (14) was followed in *Imperial Bank of Canada v. Bank of Hamilton* (18), the decision in which was given by their Lordships of the Privy Council and is therefore binding on us as an authority. The case just now mentioned was again a case in which the relief was not founded on a contract. Lord Lindley,

(12) [1914] A. C. 393=83 L. J. Ch. 465 = 30 T. L. R. 315=58 S. J. 302=111 L. T. 1.

(13) 6 B. & C. 671=5 L. J. (O. S.) K. B. 239 = 9 D. & R. 731.

(14) 11 L. J. Ex. 10=6 Jur. 107=9 M & M 54.

(15) [1904] 1 Ch. 276=73 L. J. Ch. 198=52 W. R. 249=11 Manson 95=83 L. T. 694.

(16) [1856] 1 H. & N. 210=4 W. R. 645 = 25 L. J. Ex. 321.

(17) [1860] 8 C. B. (N. S.) 477=29 L. J. C. P. 300=2 L. T. 537=7 Jur. (n. s.) 71.

(18) [1903] A. C. 49 = 72 L. J. P. C. 1 = 19 T. L. R. 56=51 W. R. 289 = 87 L. T. 457.

in delivering the judgment of the Privy Council on appeal from the Supreme Court of Canada, said :

" But means of knowledge and actual knowledge are not the same, and it was long ago decided in *Kelly v. Solari* (9) that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since and their Lordships consider it applicable to the present case."

To my mind the above pronouncement is conclusive on three points :

(1) That an action would lie to recover back money honestly paid under a mistake of facts ;

(2) that it is enough that the person paying money had no knowledge of the true state of facts at the time of the payment though he had had means of knowing the true facts ; and

(3) that the action would lie even in cases where money has not been paid by virtue of a contract.

If I understand the English law correctly an action in the special form of an action for money had and received would not lie in the circumstances of this case for the reason that the liability to repay did not arise ex contractu : but even in that system the difficulty was got over by introducing the fiction of a contract. As pointed out by Lord Dunedin in the case of *Sinclair v. Brougham* (12) :

" The English common law has various actions which, under a classification which I understand to be really one of modern growth, are divided into actions in respect of contract and of tort. But in the Roman law the actions covering the same field are actions ex contractu and quasi ex contractu, actions ex delicto and quasi ex delicto And coming to the case of money while mutuum was proper loan, promutuum covered the cases where money was had and received without contract, and a special form of action for the common case of the payment of a supposed but non-existing debt was known as condictio indebiti. Now the English law, having no quasi contracts, got over the difficulty in such cases as the action for money had and received by the fiction of a contract. It is, I think, obvious that the distinction between the fiction of a real contract on the one hand, and the existence of a quasi contract on the other, is a distinction of a most metaphysical description. Both systems, at any rate, in the case of money paid under a mistake, in fact, recognize the obligation to repay where there is no jus in re. Both systems, I think, recognize the equitable rule, and proceed to carry it out according to the forms of their own development."

His Lordships went on to say :

"It is not, however, necessary that the claim

should be one capable of being made good by action at law. It will suffice if there is an equitable remedy."

The action for money had and received :

"cannot be founded on a jus in re for you cannot have a jus in re in currency. It shows that both an action founded on a jus in re, such as an action to get back a specific chattel and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him."

As I have already observed, we in this country are not bound by any specific form of action but we are bound to administer law according to justice, equity and good conscience. The judgment of Viscount Haldane, L. C., and the judgment of Lord Dunedin in the case of *Sinclair v. Brougham* (12) referred to above make it abundantly clear that there is an equitable remedy in favour of a person placed in the position of the present plaintiff to recover his money back. What are the facts ? This is answered in the rider added to the questions what the Divisional Bench has sent to the Full Bench that the auction purchaser at the date of the auction had no knowledge of the paramount title which succeeded in the subsequent suit. It follows that the plaintiff bought this property at the auction sale under a mistake of fact. This being so, he is entitled to the relief for which he has prayed in the suit, out of which this reference arose, on the principle of equity stated above.

Further I see no reason why on the facts of this case the fiction of a contract induced by considerations ex aequo et bono and imported into common law action for money had and received, as is clear from the judgment of House of Lords in the case of *Sinclair v. Brougham* (12), should not be introduced in this case when the introduction clearly rests on principles of justice, equity and good conscience.

In the present case and other cases of this nature the decree-holder moves the Court to attach and sell the property of of the judgment-debtor. The proclamation of sale is in essence an invitation by the decree-holder to the public at large to come and buy the property. This is an offer and a bidder accepts it when he offers the highest bid to buy the property. The whole transaction

becomes an executed contract as soon as the purchase money is paid and the sale is confirmed. I very much desire that I should not be misunderstood. I do not say that this is a case of purchase under a contract in its technical sense. All I say is that the likeness between the elements of a real contract and the circumstances of this case is so great that it justifies resorting to the fiction of a contract. It is agreed that if the plaintiff had purchased this property *ex contractu* and the events had happened as they have happened in this case he would be entitled to the relief now prayed for in this suit. It will serve no useful purpose to pause to consider whether the relief would emerge out of a claim for money had and received, for breach of warranty or for failure of consideration. The undoubted fact remains that the prayer for such a relief would be recognized and granted by Courts of law.

The decision of their lordships of the Judicial Committee in *Dorab Ally Khan v. Abdul Azeer* (6) was cited in support of the view taken by the lower Court. On the contrary, I am of opinion that the observations made in that case support the view which I am taking in the present case. The particular relief decided by that judgment failed because of the legal position of the Sheriff acting under a writ of *Fi Fa*. The position of a decree-holder attaching and bringing to sale the property of the judgment-debtor by regular execution proceedings is in my judgment wholly different from the position of a sheriff acting under a writ of *Fi Fa*. This is clear from the decision under consideration and is also clear from the judgment of the same tribunal in *Kissory Mohan Roy v. Hursook Dass* (7), to which I with refer in detail hereafter.

In the arguments for the respondent emphasis was laid on the following passage in the judgment of Sir James, W. Colville in the case of *Dorab Ally Khan v. Abdul Azeer* (6).

"Now it is, of course, perfectly clear that when the property has been sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor."

It is argued that the words "regular execution" mean execution similar in nature to proceedings under Civil Pro-

cedure Code relating to the execution of a decree by attachment and sale of the judgment-debtor's property. I am of opinion that this is not the meaning of the expression "regular execution" in the passage quoted above. What it means is execution by a Sheriff under a writ of *Fi Fa* within his jurisdiction. This is clear from what precedes the passage under consideration and also from what immediately follows it. The latter is as follows :

"This, however, is because the Sheriff is authorized by the writ to seize the property of the execution debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good".

It is well to bear in mind that the actual case was a case of execution outside the territorial jurisdiction of the Sheriff. According to the judgment of their Lordships of the Judicial Committee execution by Sheriff inside or beyond his territorial jurisdiction stood on the same footing.

I will now endeavour to show how this case is an authority for the view which I am taking. Their Lordships say :

"The High Courts have assumed that if the defendant (the judgment creditor) is to be treated as a principal in the transaction (and Lordships think he ought to be so treated) the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immovable property. This view does not appear to their Lordships to be correct. The defendant directed the Sheriff to sell in his character of sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the Sheriff as Sheriff and with the incidents attaching to sale. For the above reasons their Lordships are of opinion that action cannot be properly determined without further investigation into the facts as they cannot say that the plaintiff and the other documents on the record do not disclose a *prima facie* case for some relief against the defendant. There is no doubt a further question whether the plaintiff has shown a case which if proved would entitle him to recover back the purchase money as money had and received to his use as upon a total failure of consideration They only decide that the plaintiff has not wholly failed to disclose a good cause of action on the face of the record and that the cause ought to be tried on the other issues that have been or may be raised in it."

The case was accordingly remanded for trial. To my mind the meaning of observations quoted above is perfectly clear and it is this that the plaintiff of that case had no cause of action because

the sale was exclusively the act of the Sheriff but that he had a cause of action for a relief in the nature of money had and received against the judgment-creditor if facts necessary for such a relief were established. Obviously the case could not possibly have been remanded for inquiry as to such facts, had no action of the nature of an action for money had and received been permissible in law. I hold therefore that this decision is an authority for the view that an action like the present is maintainable and that it is so independently of any specific rule of procedure.

Now I come to the case of *Kissorymohan Roy v. Hursook Dass* (7). It is possible to state the proposition of law laid down by their Lordships of the Judicial Committee in that case detached from the facts of that case :

"In India, warrants of attachment in security are issued on the ex parte application of the creditor who is bound to specify the property which he desires to attach, and its estimated value. In the present case by the terms of the perwana no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on 28th November 1883 was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent depreciation of the jute being the natural and necessary consequences of their unlawful act their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment."

The case was one of attachment before judgment but there is no difference in legal characteristics between such an attachment and an attachment after judgment in execution of a decree. In cases of attachment before judgment the plaintiff is required unless the Court otherwise directs to specify the property required to be attached and the estimated value thereof and the Court orders the attachment of the whole or a portion of the property so specified: see O. 38, Rr. 5 and 6, Civil P. C., 1908. In cases of attachment for execution of a decree the decree-holder has to make an application to the Court. The application for execution has to be signed and verified by the applicant, that is the decree-holder or his agent. The application is to contain a prayer for attachment and sale or for sale with-

out attachment of any property. Where the application is made for attachment of any immovable property belonging to the judgment-debtor it shall contain at the foot:

(a) a description of such property sufficient to identify the same, and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant and in so far as he has been able to ascertain the same: see Rr. 10, 11 and 12 of O. 21, Civil P. C. The statement of particulars which the decree-holder makes under Cl. (b), R. 13 may or may not amount to a warranty but it certainly amounts to a representation on which a purchaser would be justified to rely: *Mahomed Kala Mea v. Harperink* (19). This being the nature of attachment and consequent sale in proceedings arising out of execution of a decree, it seems to me that the dictum of their Lordships of the Judicial Committee quoted above is a conclusive pronouncement on the question of the liability of a judgment-creditor for the consequences of his act, if the attachment and the sale turn out to be illegal and result in loss to any person. It appears to me that the fact that the decree-holder in specifying the judgment-debtor's interest in the property desired to be attached and sold acts up to his best belief only is no defence to a claim by a person who has suffered a loss in consequence of the act of attaching and selling illegally the property of a third person. As pointed out by their Lordships of the Judicial Committee in the case just now referred to, the absence of malice and probable cause is no defence to a claim preferred after wrong has been done by an unlawful act of the decree-holder. I do not think that I should pause to consider as to whether the decree-holder's act in attaching and selling a third party's property as the property of his judgment-debtor was or was not an unlawful act within the meaning of the decision of their Lordships of the Judicial Committee. It would not be denied that it was unlawful nor do I think that it is necessary for me to consider the question as to whether the fact that the decree-

(19) [1909] 36 Cal. 323=1 I. C. 122=36 I. A. 32 (P. C.).

holder attaches and sells the attached property through the intervention of the Court and not directly absolves him from liability or not. Here again to my mind that fact is wholly immaterial and does not affect the liability of the judgment-creditor for the consequences of his unlawful act. If the Court proceeds to make the attachment prayed for by the decree-holder it cannot attach any property other than the property specified and declared by the judgment-creditor to be the property of the judgment-debtor nor can the Court sell any property other than the property so attached.

The judgment-creditor, therefore being directly responsible for the consequences of his unlawful act as shown above loss may be caused to more than one person. In the first instance, the loss is caused to the person whose property was sold and in the second instance to the person who gave his money as a consideration for purchasing such property and which money went into the pockets of the decree-holder. I have no doubt in the circumstances that the decree-holder is liable to make good the loss to both. The first mentioned party has already been recouped by the restoration of his property and the second party is, in my opinion, entitled to redress in the present suit.

It now remains to consider the second of two questions set forth at the outset of this judgment. On this part of the case the contention on behalf of respondents is that the relief now sought for by the plaintiff is barred by the provisions of the Civil Procedure Code and the reasoning on which the argument rests is as follows: The relief was barred under the Code of 1859; the bar was removed by the Code of 1882 and the relief became open since and finally the provisions of the Code of 1882 which permitted such a relief have been removed from the Code of 1908 and therefore on this day the relief must be held as barred by the provisions of the new Code.

With great respect I am not impressed with this reasoning at all and I think it is unsound. If the purchaser has suffered an injury by the act of the decree-holder he has a right to be redressed and there must be remedy in

law to allow such a redress *ubi jus ibi remedium*. I have already held that he has such a right and if he has it, admittedly there was no express provision in the Code of 1859 which took away that right, nor is there any such provision in the present Code. I also think that the provisions of the Code of 1882 which have been construed to create such a right for the first time cannot be so construed when closely examined. The provisions of S. 315 of the Code of 1882 have been construed to create the purchaser's right to recover the purchase money even in cases not falling under S. 312 or 313 and they are further construed to authorize him to seek relief by means of a suit. I do not agree with this construction. S. 315 occurs in Chap. 19 of the Code of 1882 and the chapter is expressly devoted to the procedure "of the execution of decrees." The setting in which the provisions of S. 315 are placed clearly emphasize the construction that the purchaser shall be entitled to receive back his purchase money in the event of a finding by the Court that the judgment-debtor had no saleable interest in the property when that finding is recorded in execution proceedings following but before the confirmation of the sale. The last clause of S. 315 is:

"The repayment of the said purchase money may be enforced under the rules provided by this Code for the execution of a decree for money."

Obviously there could be no need for such a provision if the purchaser was given only the right of instituting a suit in the usual way: and no separate provision of law such as the one under consideration was required to entitle a person to execute a decree which he may obtain in a suit instituted by him. S. 315 therefore to my mind does not make provision for enabling a purchaser to recover the purchase money by means of a suit. Codes of procedure are never intended and nowhere profess to create substantive rights. They merely embody rule of procedure. But even if I assume that the construction contended for on behalf of the respondents is correct, I hold that S. 315 recognized a pre-existing right and did not create it.

The construction, which I have adopted above, is supported by the provi-

sions of Rr. 91 and 93, O. 21 of the Code of 1908. These rules enable the purchaser to have the auction sale set aside by an application on the ground that the judgment-debtor had no saleable interest in the property sold and obtain an order for repayment of his purchase money. The Code of 1908 is therefore and if I may say so rightly limited to proceedings in execution initiated by means of an application and does not deal with substantive rights of persons which may exist in their favour independently of the rules of procedure. Such rights are neither created nor extinguished by the provisions of the Code. S. 47 of the Code of 1908 is the only section in which the remedy by suit in certain cases is excluded in preference to an application in execution proceedings. I am not prepared to hold, in the absence of any such bar as to a suit of the nature of the present suit, that it is barred by the Code of Civil Procedure.

The Code of 1908 simply enables the purchaser to obtain the relief as to the repayment of his purchase money in execution proceedings and before the confirmation of the sale and the right to the relief arises on proof of the fact that the judgment-debtor had no saleable interest in the property sold. Who is entitled to adduce this proof? Having regard to the limitation of the proceedings, the answer must be: the purchaser, the judgment-debtor and possibly also the decree-holder. (I also think that "no saleable interest" is not an appropriate expression to connote "no interest" and does not connote it). Clearly a person who lays claim to a paramount title has no locus standi in those proceedings. Admittedly he has a right to sue to establish that title and to implead the purchaser, the decree-holder and the judgment-debtor, and if the suit succeeds the purchaser must deliver the property to the claimant. It is only then and in those circumstances that the purchaser acquires the right to the relief of refund. How the enforcement of such a right by means of a suit can be held to be barred by the provisions of Rr. 91 and 93, I frankly admit, surpasses my comprehension. Those provisions have simply no application.

Further I am of opinion that it is not right to interpret the Code of 1908 with reference to the Codes of 1859 and

1882: see the observations of their Lordships of the Judicial Committee in the cases of *Norendra Nath Sircar v. Kamalbasini Dasi* (20) and *Ramanandi Kuer v. Kalawati Kuer* (21).

It has been argued on behalf of the respondents that the view which I am taking will entail a great loss to the decree-holder. The argument does not appeal to me. It seems to me inevitable that somebody must suffer. Between the two, the purchaser and the decree-holder, we have to decide who should suffer. When the true facts on which the execution proceedings and the sale resulting therefrom are taken into consideration, as I have endeavoured to show in a previous part of the judgment, the responsibility rests primarily on the shoulders of the decree-holder. He should therefore take the consequences and not the purchaser, who came on the scene only as it were on an invitation by the decree-holder.

I feel and feel strongly that I have the misfortune to differ from the decisions of the High Courts in India: *Ram Sarup v. Dalpat Rai* (4), *Rishikesh Laha v. Manik Molla* (3), *Tirumalaisami Naidu v. Subramanian Chettyar* (22), *Balvant Raghunath v. Bala* (23) and *Habibuddin v. Hatim Mirza* (24). In the Province of Oudh, however, there have been no decisions which would compel me to abide by the principle of stare decisis. Here, therefore, I am not in any manner guilty of unsettling settled law. The two cases decided in this province are *Brij Mohan Lal v. Mt. Munni Bibi* (5) and *Ram Dayal v. Rampal Singh* (1). The opinion expressed by Sir Benjamin Lindsay, then Judicial Commissioner of Oudh, in *Brij Mohan Lal v. Mt. Munni Bibi* (5) is the same as mine while the opinion of Daniels, J., in *Ram Dayal v. Rampal Singh* (1) would have been the same had the decision of Sir Benjamin Lindsay been placed before him. In this state of case-law in the province of Oudh, I see no reason why I should not give expression to my own opinion which I have formed in the present case irrespective of the considera-

(20) [1896] 23 Cal. 563=23 I. A. 18=6 Sar. 663 (P.C.).

(21) A. I. R. 1928 P. C. 2=7 Pat. 221=55 I. A. 18 (P.C.).

(22) [1917] 40 Mad. 1003=45 I. C. 109.

(23) A. I. R. 1922 Bom. 205=46 Bom. 893.

(24) A. I. R. 1925 Lah. 467=6 Lah. 283.

tion that I am coming into conflict with a large body of views contrary to my own. My answer, therefore, to the question referred to the Full Bench is in the affirmative.

Srivastava, J.—The question referred to the Full Bench for decision is that when a person purchases immovable property at an auction sale in execution of a decree of Court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor and when such person at the date of the auction had no knowledge of the paramount title which succeeded in the suit, whether such a person is entitled to bring a suit for the recovery of his purchase money as against the decree-holder. We have to decide this as a dry question of law and it is therefore unnecessary to make any reference to the facts of the case which have given rise to this reference.

If the question were to arise in relation to a purchaser at private sale the answer would present no difficulty. Generally in the case of private sales there are express covenants of title contained in the sale deed which protect the vendee against any defects in the title of the vendor. Apart from such express covenants, S. 109, Contract Act, in the case of sales of goods and S. 55, sub-S. (2), T. P. Act, in the case of sales of immovable property make provision for an implied warranty of title of the vendor. The question therefore is whether in the case of execution sales there is any such warranty of title, whether expressed or implied, on the part of the decree-holder which may entitle the auction purchaser to claim his purchase money from him. The matter seems to be concluded by the decision of their Lordships of the Judicial Committee in *Dorab Ally Khan v. Abdool Aziz* (6). It is true that this was a case of a sale by the Sheriff under a writ *fi fa* and that the law of execution as laid down in the Civil Procedure Code is different from the law relating to attachment and sales made by the Sheriff but their Lordships after pointing out the distinction between the position of a purchaser at a private sale and that of a purchaser at a Sheriff's sale went on to observe as follows :

"Now it is, of course, perfectly clear that

when the property has been so sold under a regular execution, and the purchaser is afterwards evicted, under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good."

These observations are not limited to cases of Sheriff's sales but apply also to cases where the property has been "sold under a regular execution." Leaving this authority aside I fail to find anything in the provisions of the Civil Procedure Code relating to execution of decrees which could be construed as a warranty on the part of the decree-holder. Rather the said provisions seem to me to negative any such warranty. *Ex facie* a decree-holder can have no definite knowledge as regards the title of another party, the judgment-debtor. Counsel for the applicant has relied upon the reference made to the judgment-debtor's property in the form of the application for execution of decree as given in No. 6 of Appendix E, Sch. 1, Civil P. C. In column 10 of this form it is said that the amount as claimed :

"be realized by the attachment and sale of the defendant's immovable property specified at the foot of this application."

In the verification clause the decree-holder is required to show that :

"what is stated in the above description is true to the best of my knowledge and belief and so far as I have been able to ascertain the interest of the defendant in the property therein specified."

This may well be read with the provisions of O. 21, Rr. 13 and 66, Civil P. C. O. 21, R. 13 provides that the application for execution shall contain :

"(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain the same."

Similarly O. 21, R. 66 (2), which deals with the proclamation of sales, lays down that the proclamation shall "specify as fairly and accurately as possible" the necessary particulars relating to the property proclaimed for sale. Sub-R. 3 of this rule provides that :

"every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore proscribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-R. (2) to be specified in the proclamation."

The very qualified texture of the rules quoted above shows that the decree-holder could not be expected and has not therefore been required to vouch for the title of the judgment-debtor in the property sought to be sold. He is only required to specify the judgment-debtor's interest :

"so far as he has been able to ascertain the same."

Similarly the proclamation issued by the Court does not undertake to guarantee the title of the judgment-debtor but only professes to specify the particulars "as fairly and accurately as possible." The net result therefore is that both the decree-holder and the Court neither affirm nor deny the title of the judgment-debtor. All that they put up for sale is the right, title and interest of the judgment-debtor whatever it might be. It follows that if it subsequently turns out that the judgment-debtor has no title, the decree-holder having never guaranteed that the judgment-debtor had a good title, he cannot be legally made liable for the refund of the purchase money. The case is clearly one to which the principle of caveat emptor would apply. No doubt, as remarked in *Eichholz v. Bannister* (25), the rule of caveat emptor is beset with so many exceptions that they well nigh eat it up. As I have pointed out before, the provisions contained in S. 109, Contract Act, and S. 55, T. P. Act, have abrogated that rule in the case of private sales in this country. But the principle of the rule as enunciated by Erle, C. J. at p. 289 would fully apply to the case of execution sales in India :

"But I take the principle to be this. I am in possession of a horse or other chattel : I neither affirm or deny that I am the owner : if you choose to take it as it is, without more, caveat emptor, you have no remedy, though it should turn out that I have no title."

Thus in my opinion there is no warranty by the decree-holder and there is nothing in the general law which could entitle an auction purchaser who is evicted by a person possessing a paramount title to claim the purchase money from the decree-holder. But the legislature when enacting the Codes of Civil Procedure of 1877 and 1882 gave the auction purchaser a limited right, according to the conditions laid down therein, to get back his purchase money

(25) 144 E.R. 284.

when the judgment-debtor had no saleable interest in the property sold. S. 315, Act 16 of 1882 ran as follows :

"When a sale of immovable property is set aside under S. 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid."

"The repayment of the said purchase money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money..."

Section 313 of the same Code provided that :

"The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein."

Thus it will appear that S. 315 declared a purchaser entitled to receive back his purchase money either (1) :

"when a sale of immovable property is set aside, under S. 313,"

in other words on the :

"ground that the judgment-debtor had no saleable interest in the property sold, or, (2) when it is found that the judgment-debtor had no saleable interest in the property."

The second class of cases must clearly refer to cases other than those mentioned in the first class. It was, therefore, held in many cases decided with reference to the provisions of this section, to apply to cases in which the sale had not been set aside under the summary provisions of S. 313 but where in any regular suit there had been an adjudication about the judgment-debtor having no saleable interest. It is not necessary for me to make reference to those decisions as the Code of Civil Procedure, Code (Act 5 of 1908) has materially altered the provisions of law on the subject. O. 21, R. 93, Act 5 of 1908 which corresponds to S. 315, Act 14 of 1882, has omitted two and four paragraphs altogether and has substituted the words "shall be entitled to an order for repayment" in place of the words "shall be entitled to receive back" as they were used in para. 3 of the old section. The result of this amendment seems clearly to be to confine the remedy given by this rule to the first class mentioned above, namely, when a sale has been set aside on the ground that the judgment-debtor had no

saleable interest in the property sold. It is no longer possible for an auction-purchaser to claim refund of his purchase money in a case where the sale has not been set aside under O. 21, R. 91, corresponding to the old S. 313, even though it might have been found in a regular suit that the judgment-debtor had no saleable interest. I am further strengthened in this view by the change made in the language of para. 3. The words now used namely "shall be entitled to an order for repayment" confine the remedy to execution proceedings, whereas the words which were used in the old S. 315, namely, "shall be entitled to receive back," were much more general and justified the view which had been taken in certain cases decided with reference to the old Code that a separate suit was maintainable to enforce refund of the purchase money where the case fell under para. 2, S. 315. It is hardly necessary for me to speculate as regards the reason for the legislature so limiting the scope of the provisions of the old S. 315 or the reason for their restricting it still further in O. 21, R. 93 of the present Code. However, the reasons are not far to seek. After a sale has been confirmed and the money has been paid to the decree-holder or distributed amongst them if they are more than one it would be often difficult to get back the money. This difficulty would increase with the lapse of time. Besides it would be impolitic to leave the decree-holder in a position of uncertainty for an indefinite period. It would also in many cases be most unfair to the decree-holder to make him refund the purchase money when possibly his own rights for enforcing the decree have become barred and when the judgment-debtor has secured full benefit of the sale.

Be it as it may, the right of refund given in these provisions of the Civil Procedure Code is a creation of the statute law and can therefore be exercised only subject to the limitations and qualifications laid down therein. The terms of O. 21, R. 93 clearly limit the remedy to cases in which the sale has been set aside under R. 92 and do not extend to cases in which the sale has not been set aside even though a decree might have been passed in a suit

brought by a third party against the purchaser.

It has been argued that the provisions of O. 21, R. 93 do not bar suit for refund of the purchase money. This is quite correct. But the question remains that if such a suit is instituted, what is the sanction for the Court giving the auction purchaser a decree for refund in that suit. I have shown above that no such sanction can be found either in the general law or in the statute law. The learned counsel for the applicant answered this by pointing out that as the period of limitation for an application to set aside a sale as prescribed by Art. 166, Sch. 1, Lim. Act is only 30 days, therefore, if the purchaser is unable to discover the defect in the judgment-debtor's title or is for any other reason unable to make the application within that period, he would be deprived of all remedy unless he is allowed to institute a separate suit for refund of his purchase money. He argued that the auction-purchaser should be entitled to the refund, by reason of the failure of consideration, on grounds of natural justice and equity. The argument is no doubt attractive but I have not been impressed with its soundness. I have shown before that there is no guarantee of title given at a Court sale either by the Court or by the decree-holder. It is also obvious that there is no privity of contract between the auction purchaser and the judgment-debtor. The auction purchaser purchases with his eyes open. He takes the property subject to all the attendant risks. He ought to have known and must be deemed to know, when he brought the property, that if he complained of any want of title in the judgment-debtor his complaint could be entertained only subject to the limitations prescribed by the Civil Procedure Code. This being the correct position I fail to see how the auction purchaser can invoke any equity in his favour. I do not deny the right of a vendee to recover back his purchase money where the consideration fails and the purchaser is unable to get what he paid for. But in a case like the present the true consideration is the assignment of the right, title and interest of the judgment-debtor, whatever it might be. Looked at in this light it cannot possibly be said that there has

been a failure of consideration which could entitle the auction purchaser to any relief on grounds of equity. In this connexion I might refer to the observations of Patteson, J., in *Chapman v. Speller* (26). In this case the defendant purchased certain articles at a Sheriff's sale and subsequently sold them to the plaintiff. The articles were afterwards claimed and taken away a third person under a superior title. The plaintiff sued the defendant to recover the price on the ground of failure of consideration. Their Lordships remarked.

"But we are of opinion that the facts do not raise the point on which he relies; the true consideration was the assignment of the right whatever it was, that the defendant had acquired by his purchase at the Sheriff's sale; and that the consideration has not failed."

I have already pointed out some of the complications which might arise if the decree-holder is to be hung up in uncertainty and doubt as regards his position more or less indefinitely. If the principle urged by the applicant is accepted it would follow that the auction purchaser must also be conceded the right to claim a proportionate refund in case he loses only a part of the property by reason of the judgment-debtor's title being partially defective. If the auction purchaser is allowed to claim a refund afterwards on the ground of his having made a bad bargain why should not the decree-holder or the judgment-debtor have the corresponding right to recover from him the full price in case he happens to make a good bargain and succeeds in getting the sale confirmed in his favour at a low price. It is obvious that such a suit cannot be entertained. In *Mt. Izzatunnissa Begam v. Kunwar Pertab Singh* (27) their Lordships of the Judicial Committee decided that where immovable property was sold subject to two mortgages which after completion of the sale were declared invalid, in such a case the purchaser was entitled to the benefit accruing to the property from its having been exonerated from mortgage liability and that he was not liable to account to the vendor for the amount thereof as unpaid purchase money. Then again, how would the so called equities bet-

ween the decree-holder and the auction purchaser be adjusted when the decree-holder himself happens to be the auction purchaser? If we pursue the argument based on equity to its logical conclusion then the party who is really and truly benefited is the judgment-debtor and if for any equitable consideration a right of suit is conceded in favour of the auction purchaser it should more appropriately be against the judgment-debtor rather than against the decree-holder. For these reasons I am of opinion that this ground based on equity must fail.

Next let us turn to the case law on the subject. Strong reliance has been placed by the applicant on the decision of their Lordships of the Privy Council in *Kissory Mohun Roy v. Hursook Dass* (7) and on the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Brij Mohun v. Mt. Munni Bibi* (5). In the first of these cases the plaintiff brought a suit for damages in respect of certain bales of jute belonging to him which had been attached and sold in a suit to which he was not a party. In this case their Lordships of the Judicial Committee pointed out the distinction between the law of execution in India and in England. They observed as follows:

"In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India, warrants for attachment in security are issued on the ex parte application of the creditor who is bound to specify the property which he desires to attach, and its estimated value."

In conclusion their Lordships having held that the illegal attachment was the direct act of the decree-holder, the attachment having been made of goods pointed out by him to the officer of the Court who was allowed no discretion in regard to the selection of the goods which he attached, the decree-holder was responsible in law to the plaintiff. This case is quite distinguishable. It is the case of a wrong committed by the decree-holder in relation to a person who was no party to the suit and has no bearing on the question under consideration. In *Brij Mohun Lal v. Mt. Munni Bibi* (5), Mr. Lindsay (afterwards Sir Benjamin Lindsay) did express the opinion that in execution sales it might

(26) [1849] 14 Q. B. 621=19 L. J. Q. B. 239=14 Jur. 652.

(27) [1903] 81 All. 593=3 I. C. 793=36 I. A. 203 (P.C.).

"be properly said that there is a warranty by the decree-holder that the property does belong to the judgment-debtor."

I must respectfully dissent from this observation of the learned Judge. It may be pointed out that Mr. Piggot (afterwards Sir Theodore Piggott) found himself unable to concur unreservedly in the view expressed by his colleague and preferred to decide the case on another ground. It is worthy of note that this case arose out of proceedings which had been taken under the former Civil Procedure Code (Act 14 of 1882). The report does not show that any question was raised on behalf of the appellant about the right of an auction purchaser to claim a refund by means of a regular suit, and the learned Judge never considered the change made by the legislature in the provisions of O. 21, R. 93, Civil P. C. The decision of Sir Benjamin Lindsay cannot therefore be regarded as any authority on this point. Moreover as the proceedings which gave rise to the suit arose under the old Civil Procedure Code therefore it can be possible to support the conclusion arrived at by Sir Benjamin Lindsay on the ground accepted by the Madras High Court in *Tirumalaisami Naidu v. Subramanian Chettiar* (22), namely, that the right of suit should be deemed to have accrued under the old Code and could not therefore be affected by the provisions of the new Code.

I do not consider it necessary to discuss the cases decided with reference to the old Civil Procedure Code, inasmuch as Act 5 of 1908 has, in my opinion, materially altered the law on the subject. In *Rishikesh Laha v. Manik Molla* (3) a Bench of the Calcutta High Court consisting of Cuming and Page, JJ. held that the effect of O. 21, R. 93 is that the only method under the Civil Procedure Code by which an auction purchaser at a Court sale is entitled to obtain a refund of the purchase money is by applying to set aside the sale as therein provided. They held that the rulings relied upon by them should now be followed as a settled "cursus curiae" and remarked that the decision in *Prasanna Kumar Bhattacharjee v. Ibrahim Mirza* (28), in which it was held that the auction purchaser could claim a refund of the

(28) [1917] 36 O. L. J. 205=41 I. C. 924.

purchase price without having recourse to O. 21, R. 93, could not be regarded as a binding authority or as having been correctly decided. In *Tirumalaisami Naidu v. Subramanian Chettiar* (22), Oldfield and Phillips, JJ. held that :

"in a Court sale nothing passes beyond the right, title and interest of the debtor; and as there is no guarantee that it (warranty) exists or is of any particular extent, the purchaser could have no cause of action apart from the statute. The former Code accordingly conferred on him a special right which the present Code has restricted and for the enforcement of which it provides special procedure."

In *Balvant Raghunath v. Balavalad Malu* (23) Sir Norman Macleod, C. J., and Coyajee, J., decided that where a person purchases property at a Court sale but does not succeed in obtaining possession thereof he must get the sale set aside under O. 21, R. 91, Civil P. C., before he can obtain the right to ask for a refund of the purchase money. The learned Judges distinguished the previous decision of their Court in *Rustomji Ardeshir v. Vinayak Gangadhar* (29) on the ground that it was a case under the Code of 1882 and did not approve of the remarks made in that case about implied warranty of some saleable interest. In *Habibuddin v. Hajim Mirza* (24) Sir Shadi Lal, C. J., and LeRossignol, J. held that in the case of a sale made in execution of a decree there is no implied covenant of title either by the decree-holder or by the Court and the doctrine of caveat emptor fully applied to such a sale. Consequently they came to the conclusion that the auction purchaser could not bring a suit for refund of his purchase money on the ground that the judgment-debtor had no saleable interest in the property. In *Nannu Lal v. Bhagwan Das* (30) Sir Henry Richard, C. J. and Muhammad Rafique, J. held that under the present Civil Procedure Code, an auction purchaser who has been deprived by means of a suit against the judgment-debtor of the property purchased by him cannot obtain a refund of the purchase money without getting the execution sale set aside. The same view has been taken

(29) [1911] 35 Bom. 29=7 I. C. 955=12 Bom. L. R. 728.

(30) [1917] 39 All. 114=27 I. C. 9=14 A. L. J. 1216.

by another Bench of the same Court consisting of Sulaiman and Gokul Prasad, JJ. in *Ram Sarup v. Salpat Rai* (4). Lastly in *Ram Dayal v. Rampal Singh* (1) Daniels, A. J. C. (afterwards Daniels J.), though he felt impressed by what he thought to be the hardship of confining the purchaser to the remedy under O. 21, R. 93 felt himself bound to follow the law as laid down by a Bench of the Judicial Commissioner's Court in another case and relying on it held that a purchaser at a Court sale who is afterwards deprived of the property by a person claiming title paramount, has a right to recover his money on making an application under O. 21, R. 90, Civil P. C. but has no right to recover it by a regular suit.

Thus it will appear that the High Courts of Calcutta, Bombay, Lahore and Allahabad and the late Court of the Judicial Commissioner of Oudh are all agreed that the right of an auction purchaser for repayment of his purchase money is confined to cases in which the sale has been set aside under O. 21, R. 92, Act 5 of 1908 and that the auction purchaser has no right to recover it by means of a regular suit. Against this overwhelming weight of authority in support of the view adopted by me we have not been referred to a single case decided with reference to the provisions of the new Civil Procedure Code, (Act 5 of 1908) in which a contrary view might have been taken. The view taken by me may be right or it may be wrong. Even if it turns out to be wrong I will have the satisfaction of having erred in large company.

For the above reasons I would answer the question referred to the Full Bench in the negative.

By Court.—In accordance with the opinion of the majority of the Judges we answer the question referred to the Full Bench in the affirmative.

V.B./R.K.

Reference answered.

A. I. R. 1930 Oudh 165

STUART, C. J.

Nihal Chand and others—Appellants.

v.

Jai Ram and others—Respondents.

Criminal Ref. No. 51 of 1929, Decided on 24th October 1929, made by 2nd Addl. Sess. Judge, Lucknow.

Criminal P. C., S. 145 (1) (2) (8)—Molasses form produce of land and being subject to decay can be ordered to be sold.

Molasses can be treated as the produce of the factory within the meaning of S. 145 (8) where the land about which there is dispute consists of factory building including vats. A sugar mill produces molasses. The word "produce" is not necessarily confined to what is grown on the ground. It refers also to a finished article or semi-finished article made from raw material. [P 166 C 1]

Where, therefore, the produce is subject to speedy and natural decay, the Magistrate's order for its sale is justified and the Magistrate has jurisdiction to pass such order. The sale proceeds should be made over to persons in possession of molasses only if they give reasonable security. Security need not be in cash. Recognized Government securities as War Bonds are sufficient. [P 166 C 1]

St. George Jackson—for Appellants.

G. H. Thomas and R. P. Verma—for Respondents.

Judgment.—The facts are stated in the order of reference. I need only summarize them. The proceedings were under S. 145, Criminal P. C. Nihal Chand and Jagannath were the lessees of certain factory buildings. Jai Ram Das was the lessor. The lessor's case was that certain vats containing molasses were not included in the lease. The lessee's case was that these vats were included in the lease. At a certain period it was alleged that there was an apprehension of a breach of the peace. The Superintendent of Police posted a guard to prevent a breach of the peace. Proceedings then took place under S. 145 and finally orders were passed which are the subject of this reference. All apprehension of a breach of the peace has now ended, for the lease has come to an end and the lessees have given up possession over every portion of the premises. But what has happened in the meanwhile has been this. Action had to be taken in respect of the molasses in the vats. The Magistrate, treating these molasses as property subject to speedy and natural decay, sold the molasses. The sale proceeds are about Rs. 25,000 which at the present moment are in the hands of the receiver. The Magistrate went on to order that the sale proceeds should be handed over to Nihal Chand and Jagannath provided they deposited cash security or bank receipts. This order has been attacked on the ground that the Magistrate had no jurisdiction to pass it. I consider that the Magistrate had jurisdiction to pass it.

He was dealing with a dispute in respect of land within the meaning of S. 145 (1) and 145 (2). The land in question consisted of the factory buildings including the vats. I can only treat the molasses as the produce of the factory within the meaning of S. 145 (8). I do not think I am straining the meaning of the words. A sugar mill produces molasses and the molasses can be fairly called the produce of the mill. In the same way a flour mill produces flour and I should consider flour to be the produce of a flour mill. The word "produce" is not necessarily confined to what is grown from the ground. It refers also in my opinion to a finished article or a semi-finished article made from raw material. In these circumstances the Magistrate's order was justified. The produce was subject to speedy and natural decay, so he made an order for its sale. The molasses having been sold, it is now to be seen what disposal is to be made of the sale proceeds. As Nihal Chand and Jagannath have been found to have been in possession of the molasses the sale proceeds should ordinarily be made over to them. But the Magistrate has rightly decided that the sale proceeds are only to be made over to them if they give reasonable security. He was dealing with possession only. I know nothing as to the title to the molasses and I have been careful to hear nothing on the subject as that question will have to be decided elsewhere. But it is obvious that if the sale proceeds are handed over to Nihal Chand and Jagannath some security should be taken from them in event of the title to the molasses being found eventually to be with Jai Ram Das. So security must be taken.

I do not, however, consider it proper to take security in cash. In fact such an order has no meaning. Nihal Chand and Jagannath would then take out the amount in cash and pay the amount back in cash. Fixed deposit receipts would be better. But it appears to me that it will be sufficient if Nihal Chand and Jagannath deposit any recognized Government securities such as War bonds. They inform me that they are ready to deposit War bonds and I direct that they may take out the sale proceeds if they deposit War bonds of the same value and that they shall be permitted

to draw interest on these War bonds as it falls due. I next come to the question of the time during which this deposit should be retained. I am informed by the learned counsel for Jai Ram Das that he claims a balance against Nihal Chand and Jagannath. He will not require more than a year for the purpose of filing a suit to recover this balance; of course he can file a suit whenever he likes within the period of limitation, but I fix this limit for withdrawal of security. I direct that after a year Nihal Chand and Jagannath may withdraw their security. If the suit has been filed before the year has expired it will be for Jai Ram Das to obtain the orders of the Court for further security. It will of course be open to the trial Court to pass such orders. I order that the papers be returned with these directions.

R.M./R.K.

*Order accordingly.***A. I. R. 1930 Oudh 166**

WAZIR HASAN, J.

Gajadhar Singh and another—Defendants—Appellants.

v.

Bhagwan Bux Singh—Plaintiff—Respondent.

Second Rent Appeal No. 27 of 1929, Decided on 25th November 1929, from the decree of Dist. Judge, Fyzabad, D/- 20th December 1928.

Oudh Rent Act (as amended by Act 4 of 1921), S. 127—Scope.

Section 127 embraces the case of a person who though originally entered lawfully into possession of land but has unlawfully retained possession: 15 O. C. 311; A. I. R. 1926 Oudh 555 and 1 O. C. 28, Dist. [P 167 C 2]

*H. Husain—for Appellants.**R. D. Sinha—for Respondent.*

Order.—The appeal is dismissed with costs; vide my judgment of date in R. A. No. 21 of 1929.

(Sd.) Wazir Hasan. 25-11-1929.

Judgment.—This is the defendant's appeal from the decree of the District Judge of Fyzabad, dated 20th December 1928, affirming the decree of an Assistant Collector of First Class of Sultanpur dated 24th September 1928 in a claim for rent under S. 127 of the Oudh Rent Act, 1886.

The facts are as follows:

The lands in question were held by the defendant as *sir* and *khudkasht* under the plaintiff, who is the superior

proprietor and taluqdar of the village in which these lands lie. The plaintiff obtained several decrees for rent against the defendant and in process of execution, proceedings under S. 61, Oudh Rent Act, were taken and the taluqdar obtained formal possession. After the termination of those proceedings no decree for rent was ever obtained nor any rent was paid amicably. The plaintiff then sued the defendant in the civil Court for ejectment, early in the year 1921. The civil Court held in that suit that having regard to the antecedent circumstances the defendant was a trespasser and therefore liable to be ejected. A decree for the recovery of possession in pursuance of that view was made in favour of the plaintiff. In April 1921 the decree was formally executed. It is agreed that in spite of what had so far happened the defendant has retained actual possession of the lands in question. On those facts the plaintiff has sued the defendant for a decree for arrears of rent under the provisions of S. 127, Oudh Rent Act, 1886, and as already stated the decree prayed for has been granted by the Courts below.

In second appeal the only point argued is that the provisions of S. 127, Oudh Rent Act, 1886, are not applicable to the facts of this case and in support of the argument reliance is placed upon a decision of Mr. Stuart (now Sir Louis Stuart) in *Deputy Commissioner, Fyzabad v. Gur Dayal Singh* (1) and upon a decision of the late Mr. Justice Gokaran Nath Misra in *Anporna Kuer v. Ram Ratan Singh* (2).

As regards the former decision I am of opinion that it has ceased to be of any application to the present case for the reason of the alteration in the law. It was held in that case that the provisions of that section could only apply to the case of a person wrongfully and unwarrantably entering upon and cultivating the land of a landlord without his consent and not to the case of a person lawfully entering upon the land with the landlord's consent, but remaining on it against his will. This was the interpretation placed on the language of S. 127 as it then stood. The important words were "any person in occupation of land without consent of the

landlord." It was held in the case of *Deputy Commissioner, Partabgarh v. Sheoambar* (3) that the word 'occupation' meant occupation in the first instance. Mr. Stuart (now Sir Louis Stuart) followed the decision in *Deputy Commissioner, Partabgarh v. Sheoambar* (3).

The language of S. 127 was materially altered in the year 1921: see Oudh Rent Amendment Act 4 of 1921. The present section now enacts the law to be as follows :

"A person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant."

The new section therefore embraces the case of a person who though originally entered lawfully into possession of land but has unlawfully retained possession. The decree of the civil Court mentioned above is conclusive on the question that the defendant has retained possession of the land at any rate since the date of that decree as a trespasser. The case decided by my late brother Misra, J., is also inapplicable to the facts of this case. In that case though the tenant had failed in his suit contesting the notice of ejectment yet the landlord had not taken proceedings to eject the tenant under S. 60, Oudh Rent Act. The learned Judge held in those circumstances that the landlord's remedy lay in the rent Court and not in civil Court by instituting a suit for possession. The appeal fails and is dismissed with costs. The judgment will also govern appeals Nos. 22, 23, 24, 25, 26 and 27 of 1929, which are also dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(3) [1898] 1 O. C. 28.

A. I. R. 1930 Oudh 167

WAZIR HASAN AND PULLAN, JJ.

Jugal Kishore and another—Defendants—Appellants.

v.

Jagmohan Dass—Plaintiff—Respondents.

Ex-Decree Appeal No. 31 of 1929, Decided on 20th November 1929, from order of Su b-Judge, Mohanlalganj, D/- 18th March 1929.

Civil P. C., S. 35—Order as to costs should not be interpreted as personal order in absence of specific provision.

S. N. D. A. R., S. A. L. L. B.,
Vakil High Court,
SRINAGAR (Kashmir)

(1) [1912] 15 O. C. 811=17 I. C. 464.

(2) A. I. R. 1926 Oudh 555.

Unless there is a specific reference to any personal order for payment of costs, a decree for costs should not be interpreted to imply a personal decree for costs: 20 All. 523 (F. B.) and 40 All. 109 Ref. [P 168 C 2]

Ali Mahomed—for Appellants.

Ali Zahir and *D. K. Seth*—for Respondent.

Judgment.—The present appellants detained the decree for foreclosure in a mortgage suit against one Jagmohan Dass. The judgment of the first Court was affirmed by a Bench of this Court and the decree contained the following words:

"The respondent 1 and 2's cost of this appeal amounting to Rs. 1,114-3-0 only, as noted below are to be paid by the appellants."

The decree-holders acting on the belief that this order amounted to an order by this Court that the costs should be recovered personally from the opposite party took out execution for this amount. The judgment-debtor paid the amount into Court and filed a petition that the costs were not separately recoverable but must be added to the mortgage money. The Subordinate Judge accepted this application and ordered that the sum paid by the judgment-debtor should be returned to him. Against this order the present appeal has been filed.

It has been the practice of the Courts in India in cases of foreclosure decrees to make the amount of costs a burden on the property, and all the authorities which have been cited by the appellants do no more than assert that in certain cases the Court may in its discretion direct that the costs should be recovered personally.

For the general principle governing such cases we need only refer to the Full Bench decision of the Allahabad High Court in the case of *Maqbul Fatima v. La'ta Prasad* (1), which was followed in *Dambar Singh v. Kalyan Singh* (2) and elsewhere. In both those cases there was a decree in which it was specifically laid down that one party should pay to the other a certain sum of money as costs. It was held by the Allahabad High Court that this was merely a form and that it was not necessary that these words should be held to imply that the Court had passed

a personal decree for costs. The judgment of the Bench of this Court which has been given effect to in the words in the decree which we have quoted above makes no reference to any personal order for payment of costs by the respondent. The Court merely stated that the appeal having failed was dismissed with costs. In our opinion it would be most improper to read into the judgment words which do not occur there and to conclude that the learned Judges intended to depart from the ordinary procedure in such cases and to pass a personal decree for costs against the respondent. No doubt the Court had such power, but we are of opinion that it did not exercise that power in this case. We consider the judgment of the learned Subordinate Judge is correct.

We dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 168

SRIVASTAVA, J.

Muhammad Yahya Khan—Defendant—Appellant.

v.

Alia Bibi—Plaintiff—Respondent.

Second Rent Appeal No. 44 of 1929, Decided on 12th December 1929, from decree of Dist. Judge, Rae Bareilly, D/- 23rd April 1929.

(a) U. P. Land Revenue Code, S. 111—Object of S. 111 explained.

Section 111 is intended to avoid any clash between the jurisdiction of the revenue Court and the civil Court. The object is that after the revenue Courts have become seised of the partition, all questions relating to title should be determined by or under the directions of the revenue Court. If no objection has been raised or if such objections has been raised and it has been decided in accordance with the rules laid down in S. 111, the Collector is to proceed with the framing of the partition proceeding.

[P 170 C 1]

(b) U. P. Land Revenue Code, S. 111—Person is barred by S. 111 when he fails to avail of opportunity raising objection to title.

One essential condition for the rights of any person to be barred by reason of S. 111 is that the person concerned should have had an opportunity of raising an objection regarding the question of title and should have failed to avail himself of the said opportunity: 23 O. C. 125. Rel. on. [P 170 C 1]

(c) Oudh Rent Act, S. 127—Transferee of fractional share in sir land cannot oust holder of same land, who is in possession.

A transferee of the three pies fractional share in sir land by reason of his purchase of three pies share is not justified in ousting the person who is in exclusive possession of land which

(1) [1898] 20 All. 523 = [1898] A. W. N. 157 (F. B.).

(2) [1918] 40 All. 109 = 43 I. C. 537 = 15 A. L. J. 914.

has been allotted to him at a revenue partition as his *sir*: 1922 *Board of Revenue Cases* 147, *Rel. on.* [P 170 C 2]

Ali Muhammad—for Appellant.

Zahur Ahmed—for Respondent.

Judgment.—This is a second rent appeal by the defendant who has been unsuccessful in both the Courts below. It arises out of a suit under S. 127, Oudh Rent Act relating to one plot 592 with an area of 17 biswas 10 dhurs. The plaintiff's case was that at a revenue partition which took place in this village, a patti was formed in the name of the plaintiff and that the plot in suit was allotted to her patti, as her *sir* and that the defendant's possession of the plot in question was wrongful. The defendant's reply was that he had purchased a three pies share from one Ahmad Ali who had purchased the said share at a Court sale and that by virtue of this purchase he had become a cosharer in the plaintiff's patti and so his possession of the plot in dispute was as a cosharer and could not be wrongful.

Both the Courts below have relying upon the provisions of S. 233 (k) of Act 3 of 1901, rejected the defendant's contention and have decreed the plaintiff's suit. The only contention urged on behalf of the defendant in support of the appeal is that the rights acquired by him in respect of the three pies share came into existence for the first time after the partition proceedings had been framed and therefore his rights could not be barred by reason of the partition and his possession in relation to the plot in suit must be considered to be that of a cosharer. In order to determine this question it is necessary to state a few facts. It appears that Karam Maula father of both the plaintiff and the defendant made a mortgage of a three pies share in the year 1913. The mortgagee obtained a decree for sale on foot of this mortgage in the year 1920 and in execution of the decree, the aforesaid share was put to sale and purchased by Ahmad Ali on 21st May 1924. Ahmed Ali obtained formal delivery of possession through Court in respect of the share purchased by him on 15th December 1924. He also obtained mutation in his favour from the revenue Court on 18th March 1925 and shortly after on 24th July 1925 he sold the said share to the defendant, Muhammad

Yahya Khan, while the execution proceedings under the decree for sale obtained on foot of the mortgage executed by Karam Maula were going on, the plaintiff on 28th March 1922 made an application for imperfect partition of the share held by the family, described as khata No. 2. On 12th March 1923 a partition proceeding was framed. The partition dragged on for several years and was ultimately confirmed on 26th August 1925. It was to take effect from the July following. It might be mentioned that Ahmad Ali the original purchaser at the auction sale as well as Muhammad Yahya defendant, were parties to the partition by reason of shares possessed by them in khata No. 2 which formed the subject of partition. It should also be noted that on 25th August 1924, Ahmad Ali made an application asking that the three pies share which had been purchased by him should be allotted to his share but this application was rejected by the partition Court, as the applicant had not obtained mutation in his favour and was not a recorded cosharer in respect of it.

On the facts stated above, two questions require determination in this appeal. The first question is whether the title set up by the defendant in respect of the three pies share is barred by the provisions of S. 233 (k) read with S. 111, Land Revenue Act (3 of 1901), and the second question is whether assuming that the defendant is a cosharer in the plaintiff's patti, the present suit in respect of the *sir* plot No. 592 is or is not maintainable under S. 127, Oudh Rent Act.

As regards the first question I am of opinion that the title of the defendant cannot be barred by S. 233 (k) read with S. 111, Land Revenue Act. The scheme for partition as laid down in Chap. 7, Land Revenue Act is that on receipt of an application for partition, the Collector is required to issue a proclamation calling upon the recorded cosharers who have not joined in the application to state their objections to the partition within a time to be fixed in the proclamation. The duty has been laid upon recorded cosharers to file objections raising questions of title on or before the date so fixed. The object of this provision of S. 111, Land Revenue

Act is perfectly clear. It is intended to avoid any clash between the jurisdiction of the revenue Court and the civil Court. The object is that after the revenue Courts have become seised of the partition all questions relating to title should be determined by or under the directions of the revenue Court. If no objection has been raised or if such objection has been raised and it has been decided in accordance with the rules laid down in S. 111, the Collector is to proceed with the framing of the partition proceeding. In the present case it is clear that Ahmad Ali acquired the three pies share at the auction sale more than a year after the partition proceeding had been framed. It is therefore obvious that no objection based upon the title acquired by Ahmad Ali under the auction sale could possibly be raised within the time fixed in the proclamation. The fact that at a late stage of the partition, Ahmed Ali did as a matter of fact raise such an objection and that the objection was decided against him, seems to me to be of no consequence.

One essential condition for the rights of any person to be barred by reason of S. 111, is that the person concerned should have had an opportunity of raising an objection regarding the question of title and should have failed to avail himself of the said opportunity. I am supported in this view by the decision of Mr. Lindsay (afterwards Sir Benjamin Lindsey) in *Mahbub v. Muhammad Husain* (1) in which it was held that S. 233 (k), Land Revenue Act is no bar to a suit in cases where the plaintiff had no opportunity of raising an objection on a question of proprietary title in the revenue Court which effected partition. In the present case it is quite clear that the defendant or his predecessor had no such opportunity for the simple reason that the title came into existence long after the time fixed in the proclamation. Mr. Zahur Ahmad, the learned counsel for the plaintiff-respondent drew my attention to R. 9, Board's Circulars, 21-II, which provide that for special reasons objections raising questions of title may be entertained at a period subsequent to the date fixed for lodging the objections. Assum-

ing that the rules framed by the Board of revenue allow a discretion to the partition Court, in special cases, to entertain objections even beyond the time fixed, in the proclamation, yet I am not prepared to hold that the bar of S. 111 can be invoked against a party because he has failed to seek the assistance of the revenue Courts to entertain the objection, under the discretion allowed to them by the aforesaid rule. It seems to me that the terms of S. 111 are perfectly clear and can apply only to those cases in which the objection could have been raised "on or before the day so fixed" and was not raised. It might further be pointed out that in this case, Ahmad Ali did as a matter of fact move the revenue Court though long after the date fixed in the proclamation but his attempt was unsuccessful. I am therefore of opinion that the respondent's objection based on the provisions of S. 233 (k) must fail.

As regards the second question it is admitted that the plot in suit was the *sir* of Karam Moula and was allotted to the plaintiff as her *sir* at the revenue partition. The position therefore, is, that the defendant is a transferee of the three pies fractional share. He has a right to get the share separated by partition and to have specific plots appertaining to the said share specified and demarcated. The question arises whether he can in the meantime dispossess the plaintiff any particular plots of land which are in her exclusive possession as *sir*. I am of opinion that the lower Courts are right in holding that the defendant by reason of his purchase of the three pies share is not justified in ousting the plaintiff from the plot in suit which has been allotted to her as her *sir*. The terms of S. 127 are that

"a person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant, etc."

The question therefore reduces itself to this : whether the defendant can be regarded as a person not entitled to possession of the plot in suit. I agree with the Courts below that the defendant's purchase of the three pies share, does entitle him to possession of this specific plot. The decision of the Board of

(1) [1920] 23 O. C. 125=57. I. C. 497=7 O.L.J. 319.

Revenue in *Baldec Pal v. Chillu Ahir* (2) is quite apposite to the present case. The Board of Revenue in this case held that where a party only of the share of a proprietor is transferred, the proprietor is entitled to retain the whole of his sir land as her sir until the transferee gets the transferred part specified and demarcated. The appeal therefore fails and is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(2) 6 R. D. 69.

* A. I. R. 1930 Oudh 171

MISRA, J.

Gajendra Shah—Defendant — Appellant.

v.

Ram Charan—Plaintiff — Opposite Party.

Civil Revn. Appln. No. 41 of 1928, Decided on 11th January 1929, from order of Sub-Judge, Kheri, D/- 16th November 1928.

(a) Civil P. C., O. 17, R. 1—Principle guiding Courts in awarding adjournment costs enunciated—Oudh Civil Rules, R. 68.

The principle which the Court awarding the costs should always bear in mind is that it should order the payment of a sum commensurate with the costs, which in the opinion of the Court the party ready to proceed will have to incur owing to the adjournment. The amount to be awarded should not be one of the nature of penalty or of punishment. It is this very principle that is underlying R. 68, Oudh Civil Rules, which deals with the costs of adjournment. [P 173 C 1]

* (b) Civil P. C., O. 8, Rr. 1 and 10 read with Provincial Small Cause Courts Act—Written statement not necessary in absence of specific notice in summons.

In Small Cause Court suits it is not necessary as a rule for a defendant, in the absence of any notice to that effect in the summons, to file a written statement. The Court trying the case ordinarily takes down the defence of the defendant as set up before him orally by defendant, or his pleader, if he is represented. And if in such circumstances Court desires the defendant to file a written statement, the Court should grant the defendant or his pleader time asked for and should not burden him with adjournment costs. [P 172 C 1, 2]

Murli Manohar—for Appellant.

P. N. Rozdon—for Opposite Party.

Judgment.—This is an application for revision of the decree passed by the learned Subordinate Judge, Kheri, sitting on the Small Cause Court side, on 16th November 1928.

The facts of the case are that the plaintiff instituted the present suit for recovery of a sum of Rs. 75 on the

ground that he was a mason by profession and that he had worked for defendant 1 from 26th July 1926, to 8th February 1927. The rate at which he was engaged was stated by the plaintiff to be Rs. 1-8 per diem. The plaintiff alleged that the total number of the days for which he worked at the place of defendant 1 was 173, and his wages for that period amounted to Rs. 259-8 out of which he had been paid Rs. 174-8 and that the amount that was still due to him was Rs. 75 for which he claimed a decree. The suit was instituted principally against one Raja Gajendra Shah taluqdar of Khutar. There was another person named Bhupali, who was impleaded as defendant 2 on the allegation that at the instance of defendant 1 he had gone to fetch the plaintiff to work at the place of defendant 1. The suit was instituted on 11th July 1928.

The defence put forward in the case on behalf of defendant 1, who is now the applicant before me, was to the effect that the plaintiff had been paid his dues in full and nothing was now due to him. It was also contended that the suit was barred by limitation.

It appears that the suit was adjourned several times owing to the absence of defendant 2, who could not be served. The last date fixed in the case was 5th November 1928. On that date also defendant 2 was absent but the Court directed defendant 1 to file his written statement, which could not be done, because defendant 1 was not present in person on that date, but was present only through a pleader. The Court granted defendant 1 time to file the written statement but ordered him to pay a sum of Rs. 50 as costs of the adjournment. The case was then ordered to be put up on 16th November 1928 on which date defendant 1 put in his written statement and also put in an application asking the Court to give him time to deposit the money, which he had been ordered to deposit as the costs of the adjournment. The Court refused to grant him time and proceeded to try the case ex parte, rejecting the written statement filed on behalf of defendant 1.

The learned Subordinate Judge, who tried the suit on the Small Cause Court side as stated above, proceeded to try the case ex parte and granted the plaintiff a decree for Rs. 75. This is the

decree against which defendant 1 has applied for revision to this Court.

In revision it is contended that the learned Judge of the Small Cause Court was not justified in calling upon defendant 1 to file a written statement that very day and in ordering that failing to do so he was to pay a sum of Rs. 50 as costs of adjournment which, it is contended, was a very heavy sum and was not justified by the circumstances of the case. It is, therefore, prayed that the ex parte decree passed by the learned Judge of the Court below should be set aside and that the order for payment of costs should also be cancelled.

After hearing the parties in the case and after going through the record I am of opinion that there was no justification for the Judge of the Small Cause Court to award any costs from defendant 1, in any case, he was not justified in passing an order as to costs like the one which he passed in the present case.

I now proceed to give my reasons for having arrived at this conclusion.

From the facts which I have stated above it is clear that the case had been adjourned several times owing to the absence of defendant 2. It is argued on behalf of the plaintiff opposite party that it was at the instance of defendant 1 that defendant 2 did not put in his appearance. That may be so, but I do not find any material on the record to support the statement. There is no doubt that defendant 2 is alleged by the plaintiff to be the servant of defendant 1 but that circumstance alone cannot be a ground for holding that defendant 2 was being kept out of the way of defendant 1. If on 5th November 1928, which was the last date for hearing fixed in the case, defendant 2 was not present and the Court wanted to proceed with the case in his absence, he should have recorded the statement of the pleader Babu Murari Lal, who appeared on behalf of defendant 1, to show what was the defence of defendant 1 in the case. I may state that it was not necessary for defendant 1 to file a written statement. The summons which was issued to defendant 1 did not call upon him to file any written statement. In Small Cause Court suits it is not necessary as a rule for the defendant to file a written statement. The Court trying the case ordinarily takes down the defence of

the defendant, as set up before him orally by the defendant in person or by his pleader if he is represented. I do not think that under these circumstances it was necessary for defendant 1 to have filed his written statement. In any case even if the Court desired that defendant 1 should file a written statement it should have granted him the time which was asked for the purpose of the pleader, who appeared on his behalf before the Court. It is clear that the written statement could not be filed that very day because defendant 1, I gather from the record, was not present in Court. I am, therefore of opinion that when the Court ordered defendant 1 to file the written statement and when he had to adjourn the case at the request of the pleader of defendant 1, because it was not possible for him to file the written statement that very day the Court was not justified in awarding any costs of adjournment to the plaintiff. Nothing appears from the record showing any misconduct on the part of defendant 1 and the order directing the payment of costs seems to me to be an order, which was quite uncalled for.

Apart from the fact that the order of the payment of costs was not justified under the circumstances of the case I must express my sense of disapproval at the proceedings of the learned Subordinate Judge, so far as the amount of costs awarded by him was concerned. The amount of claim for which the suit had been brought was Rs. 75 and the amount of legal costs to which the plaintiff could have been entitled was only Rs. 3-12. I find from the certificate on the record that the pleader who appeared on behalf of the plaintiff received a sum of Rs. 7 as his fee for conducting the entire case from beginning to end. If the legal fee in the case was Rs. 3-12 and if the pleader for the plaintiff was engaged for the whole case on a lump sum of Rs. 7, I fail to understand the justification for awarding a sum of Rs. 50 on account of costs of adjournment. The subordinate Courts should realize that though the awarding of the costs of adjournment is entirely at their discretion, yet such award must not be arbitrary but should be exercised according to principles of justice and equity. The principle which the Court awarding the costs should always bear

in mind is that it should order the payment of a sum commensurate with the costs, which in the opinion of the Court the party ready to proceed will have to incur owing to the adjournment. The amount to be awarded should not be one of the nature of penalty or of punishment. It is this very principle that is underlying R. 68, Oudh Civil Rules, which deals with the costs of adjournment. I am, therefore, of opinion that in any circumstances of the case a sum more than Rs. 3 or 4 should not have been awarded as costs of adjournment in the present case.

I am also of opinion that when defendant 1 failed to deposit the heavy costs, which had been awarded by the Court below against him, more time should have been given to him to make arrangement for the payment of the said sum and that in any case the case should not have been tried *ex parte*. I find from the record that defendant 1 did actually file the written statement and that ought to have been enough to indicate to the Court the lines on which the defendant contested the case. Under these circumstances the order passed by the Court below that the trial of the suit should proceed *ex parte* against defendant 1 was not a just order, which can be maintained.

I, therefore, accept this application, set aside the decree passed by the learned Judge of the Court of Small Causes, dated 16th November 1928, and also the order for costs passed by him on 5th November 1928 and direct that the case should be tried on the merits. The order directing the trial of the suit *ex parte* will also be set aside, and the Court should now reinstate the suit on its original number, and should proceed to try it on the merits. The learned Judge may take the written statement, which has already been filed by defendant 1, as his defence in the case. If he does not wish to take it into consideration, he might call upon the pleader for defendant 1 to state orally what his defence in the case is.

Costs of the revision will be costs in the case.

V.B./R.K.

Case remanded.

A. I. R. 1930 Oudh 173

WAZIR HASAN AND PULLAN, JJ.

Gajraj Singh and others—Plaintiffs—Appellants.

v.

Munnu Lal—Defendant—Respondent.

First Appeal No. 58 of 1928, Decided on 8th January 1929, from decree Addl. Sub-Judge, Sitapur, D/- 18th November 1927.

Transfer of Property Act, S. 60—Mortgage for term of fifty years and with condition to take usufruct in part payment of interest—Mortgage money and balance of interest to carry interest at 12 per cent per annum—Subsequent deed of charge for loan carrying interest at 24 per cent. per annum compoundable with six monthly rests—Term as to interest in mortgage held not to operate as clog but rate of interest in case of charge held unconscionable and penal—Interest.

G, a shrewd man, in order to obtain release of his property from certain previous encumbrances, mortgaged his property to one M. The term of the mortgage was fixed at 50 years and it was agreed that the mortgagee should take the usufruct in part payment of the interest the other part accumulating at the contractual rate of 12 per cent per annum. Subsequent to the mortgage G borrowed a further debt from M and created a further charge on the same property agreeing to pay interest at 24 per cent per annum compoundable with six monthly rests. This charge was also for 50 years. G brought a suit for redemption contending first that the rate of interest in the mortgage operated as a clog on the equity of redemption and secondly that the rate of interest on the charge created was hard and unconscionable as the principle amount of the deed at the end of fifty years would amount to a big amount.

Held : (1) that under the circumstances the rate of interest at 12 per cent per annum in the case of mortgage was reasonable ; (2) that in the case of the charge the rate of interest was hard and unconscionable : 4 Luck. 415 and 6 O. W. N. 1320. [P 175 C 2]

*Ratha Krishna and B. K. Bhargava—*for Appellants.

*A. P. Sen and S. C. Das—*for Respondent.

Judgment.—This is a plaintiffs' appeal from the decree of the Additional Subordinate Judge of Sitapur, dated 18th November 1927, arising out of a claim for redemption of a mortgage, dated 17th June 1886, in respect of certain zamindari shares in two villages of Para and Baherwa in the district of Sitapur. The person who executed the mortgage just now mentioned was one Munnu Singh. Munnu Singh has since died and the first two plaintiffs Gajraj

Singh and Suraj Bakhsh Singh are his sons and the third plaintiff Gaya Bakhsh Singh minor is his grandson, being the son of a deceased son of Munnu Singh called Harihar Bakhsh Singh. There are three more plaintiffs in the suit and they are the transferees from the first two plaintiffs having obtained a mortgage from them in respect of the property now in suit. The mortgage is partly usufructuary and partly simple. The sole defendant Maharaj Munnu Lal is the son of the original mortgagee Maharaj Debi Din. The money borrowed under the mortgage in suit was a sum of Rs. 5,500. The usufruct of the mortgaged property when it came into the possession of the mortgagee, was to be appropriated towards the payment of part of the interest on the sum borrowed. Other part of the interest was to accrue and accumulate till it could be paid at the time of redemption. The term for which the mortgage was to subsist was fixed at fifty years certain.

On 25th May 1893, Munnu Singh further borrowed a sum of Rs. 98 from the mortgagee Debi Din and agreed to give interest thereon at the rate of 24 per cent per mensem compoundable with six monthly rests. The repayment of the sum thus borrowed was again secured by hypothecating the same property which was mortgaged under the earlier deed of 17th June 1886. It was further provided that all the terms of the mortgage of the last mentioned date were to form part of the new transaction of loan evidenced by the deed of 25th May 1893.

On 25th May 1893 Munnu Singh's further years had not expired but in the course of the progress of it in the Court below the defendant agreed to allow redemption and the matter was not reopened before us. The suit has, therefore been treated as a valid claim for redemption of the mortgage of 17th June 1886, and also of the former mortgage of 25th May 1893. It may be mentioned here that in the plaint the plaintiffs-appellants altogether ignored the existence of the mortgage of 25th May 1893. The controversy in respect of their liability to discharge the debt due under that mortgage only arose when the defendant claimed that redemption could not be allowed without

the plaintiffs satisfying the mortgage of 25th May 1893. When the plaintiffs came to file their replication in answer to this claim of the defendant they denied the execution of the mortgage, its validity and binding effect. In this state of pleadings an issue was raised and tried as to the mortgage of 25th May 1893. The trial Court has found the execution proved.

Several issues were raised between the parties in the suit out of which this appeal has arisen but they have all been abandoned now and the decision of the Court below in respect of these issues has been accepted before us in the arguments both on the side of the appellants and of the respondent, except as to matters which we shall now state and on which we have to pronounce our judgment. On the side of the appellants the only argument addressed to us is that the rate of interest which has been allowed by the lower Court in favour of the mortgagee in respect of the loan of Rs. 5,500 under the mortgage of 17th of June 1898, should not have been at the contractual rate of 12 per cent per annum, but that it should have been reduced for either of the two reasons: (a) that the property mortgaged was joint Hindu family property and Munnu Singh as manager of the family exceeded his authority in agreeing to pay interest at that high rate and (b) if the property mortgaged was not joint Hindu family property then the rate of interest acted as a clog on the exercise of the right of redemption in the circumstances of the case and therefore it should have been reduced. On the side of the respondent objection is taken to the reduction of the rate of interest as provided for by the deed of further charge, dated 25th May 1893. The lower Court has allowed interest to the defendant-respondent at the rate of 12 per cent per annum compoundable annually. The perusal of the memorandum of appeal and of the petition of cross-objection will disclose that besides the points which we have stated in this paragraph there were several other objections raised against the decree of the lower Courts but they were all expressly abandoned before us.

The first question for determination in the appeal, therefore is as to who

ther the mortgaged property is the property belonging to the joint family or it is the self-acquired property of the mortgagor only. The learned Subordinate Judge has held that it is of the latter character and we agree with him. This property was acquired by Munnu Singh under a decree of Court dated 9th September 1879 in a claim for pre-emption (Exs. A-5 and A-6 the judgment and decree respectively). The decree was made subject to the payment of Rs. 3,787-7-3 till 15th November 1879. The decree shows that the plaintiff Munnu Singh incurred an expenditure of Rs. 645-12-0 in prosecuting the suit for pre-emption. To this sum of money should be added the sum of Rs. 99 in lieu of which Munnu Singh purchased the right of pre-emption under the deed of 30th April 1879 (Ex. A-3). It is argued that for this sum of money he must have drawn on the family funds and if that is so it must be held that the family funds contributed to the acquisition of the property and that the property was, therefore, joint family property. But as the learned Subordinate Judge rightly points out the property in the possession of the family did not yield more than Rs. 58-11-6 profits a year. The whole family lived on this amount of profits and there was no other source of income at the time. It is therefore highly improbable that the family funds contributed the sum of money which Munnu Singh had to spend in acquiring the pre-empted property.

The evidence on the record unmistakeably leads to the inference that Munnu Singh must have borrowed money to the extent of about Rs. 750. It appears that with a view to provide himself with funds for the purpose of satisfying the pre-emption decree Mannu Singh mortgaged the pre-empted property before possession was obtained on 7th November 1879 (Ex. A-14) and thereby obtained a loan of Rs. 5,000. We agree with the learned Subordinate Judge that this amount of Rs. 5,000 was borrowed for the purpose of paying the sum of Rs. 8,987-7-3 in Court towards the pre-emption decree and that the rest to repay the debt which Munnu Singh must have incurred for the purpose of buying the right of pre-emption and fighting the suit to enforce that

right. The first line of argument therefore fails. We are of opinion that the second line of argument also fails. In support of the argument stress was laid on the provision contained in the mortgage of 7th June 1886, to the effect that that portion of interest, which was not to come out of the usufruct was to accumulate for a period of fifty years and at the end of that period of time it would have swollen to a figure much larger (about Rs. 30,000) than the market-value of the property mortgaged. Having regard to all the other circumstances of the case we do not think that the said provision is a clog on the equity of redemption and the plaintiffs should be relieved of it. As the learned Subordinate Judge says Munnu Singh was a man possessed of shrewd business capacity. By executing mortgage in suit he effected the release of half of the share in the village of Para and whole of the share in the village of Inayetpur from the earlier mortgage of 7th November 1879. for his own benefit. We have already said that the condition of the term of fifty years has been withdrawn by the mortgagee. It is further to be noted that the rate of interest is only 12 annas per cent. per mensem simple. This in itself was not unreasonable at all. Further it appears from the evidence on the record that in lieu of that portion of interest which the mortgagee was to receive from the usufruct of the property at the contractual rate of 12 annas per cent per mensem simple he could get, having regard to the usufruct of the mortgaged property in the year 1886, interest only at the rate of 6 annas 7 pies per cent. per mensem. The appeal, therefore, fails and is dismissed with costs.

—We now come to the point raised by the respondent as to the reduction of the rate of interest in respect of the mortgagee's claim under the deed of further charge, dated 25th May 1893. We already know that the term of 50 years was also annexed to the mortgage of 25th May 1893. The sum borrowed under this mortgage was only Rs. 98 and the interest on this was charged at the rate of 24 per cent annually with six-monthly rests. At the end of 50 years the mortgage-money would amount to over two lakhs of rupees. The term as to this rate of interest hav-

ing regard to the further term of 50 years was certainly hard and unconscionable. We agree, therefore, with the learned Subordinate Judge that in the circumstances the mortgagee only is entitled to interest at the rate of 12 per cent. per annum annually compoundable as the reasonable rate of interest. The learned Subordinate Judge has awarded to the mortgagee money due on the deed of 25th May 1893, at that rate of interest and we see no justification for interference with the decree of the learned Subordinate Judge. We accordingly dismiss the cross-objection also with costs. A fresh decree under O. 34 R. 2, Civil P. C., shall be prepared in this Court in terms of the decree of the lower Court allowing a period of six months to the plaintiffs from the date of the decree of this Court.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1930 Oudh 176**

RAZA AND PULLAN, JJ.

Ramana d—Plaintiff—Appellant.

v-

Murtaza and another—Defendants—Respondents.

Second Appeal No. 354 of 1928, Decided on 4th February 1929, against decree of Sub-Judge, Sultanpur, D/ 16th July 1928.

Civil P. C., S. 100—Question of fact—The conclusion of the lower appellate Court is final.

No Court of second appeal can entertain an appeal upon any question as to the soundness of the finding of fact by the Court of first appeal, and if, however unsatisfactory it might be if examined, there is evidence to be considered, the decision of that Court must stand final and when the decision given is legal and not perverse or contrary to reason that cannot be challenged : 19 Cal. 249 (P. C.) *Foll.*

[P 176 C 2]

*Aditya Prasad—for Appellant.**Ghu'am Hasan and Zafar Husain—for Respondents.*

Judgment.—This second appeal relates to a case in which a Kasaundhan Bania claims restitution of conjugal rights with a woman who is now said to have married a Mahomedan. In the grounds of appeal great stress is laid on the fact that the lower appellate Court recorded a finding that Dharauwa marriages are not recognized among Kasaundhan Banias and it is possibly on account of this ground of appeal that this appeal has been admitted. We

find however that It is unnecessary, and and indeed impossible for us, to consider this question at all. The lower appellate Court found, after examining the evidence of all the witnesses, at the bottom of page 20 of our book that no marriage is proved to have taken place between the plaintiff and defendant. 2. This was a question of fact and the only evidence adduced in support of it was the evidence of the witnesses which lower appellate Court disbelieved. In appeal we have been asked to hold that the opinion of the Munsif should prevail because he had the opportunity of seeing and hearing the witnesses. It is true that the Court of first instance has an advantage over the appellate Court in that it can see and hear the witnesses; but there is nothing to prevent an appellate Court from differing, and the greater experience usually possessed by the appellate Court counteracts, to some extent at least, the advantage which the Court of first instance obtains from seeing and hearing the witnesses. The law was laid down by their Lordship of the Judicial Committee in the case of *Ram Ratan Sukla v. Nandu* (1) and no subsequent decisions of their Lordships have diminished one word of that ruling. It was there held that

“No Court of second appeal can entertain an appeal upon any question as to the soundness of the findings of fact by the Court of first appeal, and if, however unsatisfactory it might be if examined, there is evidence to be considered, the decision of that Court must stand final.”

There is nothing in the judgment of the Court below which leads us to the belief that his opinion is perverse or contrary to reason. He appears to have considered the evidence carefully and given a legal decision upon it. That being so the decision cannot be challenged in second appeal. We therefore dismiss this appeal with costs; but we wish to say that we do not record any finding on the controversial matter raised in the appeal, namely, as to whether Kasaundhan Banias practise marriage by Dharauwa. We do not wish to go into the question of custom at all as it is not necessary for the decision of the appeal.

P. R./R.K.

Appeal dismissed.

(1) [1892] 19 Cal. 249=19 I. A. 1 (P. C.).

A. I. R. 1930 Oudh 177

WAZIR HASAN, AG. C. J. AND
PULLAN, J.

Ali Sher and others—Plaintiffs—Appellants.

v.

Wajid Ali and another—Defendants—Respondents.

Second Appeal No. 244 of 1928, Decided on 20th November 1928, against decree of Sub-Judge, Sitapur, D/- 26th March 1928.

Adverse possession—Cosharer — Cosharer out of possession owing to disappearance and subsequent death — Other cosharers cultivating land in absence—Possession of other cosharer is not adverse.

A cotenant out of possession starts with a presumption in his favour that the possession of other cotenant is not adverse but lawful and consequently if a cosharer disappears and is subsequently found dead and his cosharers cultivate the land in his absence, in the absence of any ouster or asserting of adverse possession they should be held to have been in possession of the property on behalf of their cosharer : *A. I. R. 1924 Oudh 256, Rel. on.*

[P 178 C 1]

A. Rauf—for Appellant.

Mohammad Ayub—for Respondent 1.

Judgment.—The dispute from which this litigation arose relates to the property of one Rahim Bakhsh who admittedly disappeared some time between the 1890 and the year 1900. On 4th January 1926, mutation of his three annas share was obtained by the present defendants on the allegation that they were his heirs. The present suit has been brought by two persons, Wajid Ali and Abib Ali, who state that they are the heirs of Rahim Bakhsh and entitled to his share. The plaintiffs have won their case in the lower Courts and the defendants have come before us in second appeal. They have rightly not pressed the first ground of appeal which is that the lower Courts were not justified in finding the relationship of the plaintiff to Rahim Bakhsh proved. This is a question of fact and it must be taken that the plaintiffs and not the defendants are the heirs of Rahim Bakhsh who is now presumed to be dead. The defendants' alternative case is that they have been in possession of this land since the year 1877 and that therefore they have obtained title by adverse possession. It is admitted that this property is part of the six annas share which belonged to

the mother of Rahim Bakhsh and was mortgaged by her to defendant 4 and the father of defendants 1 to 3 in the year 1875 and that Rahim Bakhsh got a decree for redemption of the whole six annas share on 24th October 1888. Thereafter he sold one three annas share to the same defendant 4 and the father of defendants 1 to 3 and his name has been entered subsequently in the khatwat as the owner of the remaining three annas share which he redeemed. It does not, however, appear that he executed a sale deed of the remaining three annas share to one Sajjad Mirza but it appears that this sale deed never took effect. We are asked in appeal to reconsider the view taken by the lower Courts as to this sale but we are unable to see how it affects the appellants' case. All that can be said is that there was such a sale deed but it was never acted upon for Sajjad Mirza who has been examined as a witness denies all knowledge of it and there was certainly no entry made in the revenue papers in his favour. We take it therefore that this sale deed was without effect and we are left with the position that the defendants appellants have always remained in possession of the three annas share. It is true that they were formerly in possession as mortgagees but their right as mortgagees came to an end with the redemption of the mortgage in the year 1881.

We have to consider what is the nature of their possession since they ceased to be mortgagees. They themselves claimed mutation in the year 1926 on the ground that they were the heirs of Rahim Bakhsh and it is only now that they have failed to make good that claim that they have come forward with a plea that they should be held to have been in adverse possession. Had they been merely mortgagees holding on to the land after the mortgage was redeemed, they could be held no doubt to be persons holding without title and they could thus have acquired ownership by adverse possession as against Rahim Bakhsh himself as well as against his heirs. But this is not the case. This property is *bhaiya chara* property in which Rahim Bakhsh held a share amounting to three annas. The defendants themselves are also cosharers in the village and they have always been cosharers in the village and have always been cosharers along with Rahim

Baksh. One of them also is the lam-bardar. There is no presumption that Rahim Baksh died on any particular date. He is dead now, since mutation proceedings of 1926 have established that fact but until then he was a cosharer and the defendants who were also cosharers were cultivating his land in his absence. It was held by one of us in *Indarpal Singh v. Thakur Din Singh* (1) that a cotenant out of possession starts with a presumption in his favour that the possession of the other co-tenant is not adverse but lawful. It is a principle of English Law that possession is never considered adverse if it can be referred to a lawful title, *Corei v. Appuhamy* (2) and in our opinion we should hold in the present case that the defendants appellants have all along been in possession of this property on behalf of their cosharer Rahim Baksh. There has been no ouster and no assertion of adverse possession. Even when the defendants-appellants themselves applied for mutation they applied as the heirs of Rahim Baksh. There is therefore no bar to the plaintiffs setting up their title to this property. They could not sue until Rahim Baksh was found to be dead and their cause of action arose, as they themselves state, when the defendants-appellants applied for mutation. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) A. I. R. 1924 Oudh 266=27 O. C. 77.

(2) [1912] A. C. 230=105 L. J. 836=81 L. J. P. C. 151.

A. I. R. 1930 Oudh 178

WAZIR HASAN, AG. C. J., AND MISRA, J.

Mata Din and others — Plaintiffs — Appellants.

v.

Iftikhar Husain and others — Defendants — Respondents.

First Appeal No. 15 of 1928, Decided on 28th February 1929, against decree of Sub-Judge, Sitapur, D/- 29th October 1927.

(a) Transfer of Property Act, S. 74 — Purchaser of portion of mortgaged property paying off prior encumbrance is entitled to stand in the place of vendor.

Where there are several mortgages, the owner of a portion of the property subjected to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor; he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee: *A. I. R. 1924 P. C. 36, Fell.*

[P 181 C 1]

(b) Limitation Act, S. 20 — Receipt of rent relating to portion of mortgaged property saves limitation against entire property.

Receipt of rent of a portion of a mortgaged property by a mortgagee in possession constitutes payment of interest within the meaning of S. 20 and saves limitation in respect of a relief directed against the entire mortgaged property or a portion thereof: *A. I. R. 1921 Bom. 437* and *A. I. R. 1922 Cal. 114, Rel. on. [P 182 C 1]*

Ali Zaheer, R. B. Lal and Raj Narain Shukla—for Appellants.

B. K. Bhargava, K. P. Misra, Bisheshwar Nath—for Respondents.

Judgment.—These are cross-appeals by the plaintiffs and defendants respectively from the decree of the Subordinate Judge of Sitapur dated 29th October 1927. The relief, for which the prayer is made in the suit, out of which this appeal arises, is a decree for foreclosure and in the alternative for sale of a seven annas' under-proprietary zamindari share in the village of Ranni, Pargana Muhmudabad, in the District of Sitapur. The owner of the village was one Umrao Ali. On his death the title devolved on his son, Wajid Ali, who is the defendant 10. The case involves a long array of facts, which can be stated in chronological order.

4—1—1898—Village Ranni was mortgaged by Umrao Ali by way of conditional sale to one Raja Tasadduq Rasul Khan for a term of 12 years. The mortgage money, principal and interest was repayable by yearly instalments of Rs. 500. In case of default foreclosure was to follow. The repayment of a portion of the mortgage-money had the effect of the release of a proportionate share of the mortgaged property.

22—9—1903—A six annas eight pies 8 kirants share of the village, which had been released from the effect of the previous mortgage, was again mortgaged to the same mortgagee by Wajid Ali by way of conditional sale for a term of six years.

17—12—1910—Wajid Ali mortgaged a nine annas share of the village to one Nathu Mal. The mortgage was without possession but the mortgagee was entitled to enter in possession of the share mortgaged if the mortgage money was not paid within one year of its date.

24—2—1913—Wajid Ali made a possessory mortgage of the entire village of Ranni to one Ragha Sah.

23—6—1913—Similar mortgage was made in favour of the same mortgagee.

1914—Early in this year Raja Tasadduq Rasul Khan put his two mortgages of 4th January 1898, and 22nd September 1903, in suit. Amongst others Raggha Sah was also a defendant in the two suits.

30—3—1914—Raja Tasadduq Rasul Khan obtained decree for foreclosure in each of his two suits.

12—10—1914—Raggha Sah paid Rs. 12,697-3-0 to Raja Tasadduq Rasul Khan in satisfaction of the decrees of 30th March 1914.

15—2—1915—Wajid Ali mortgaged with possession 407 specified plots (seven annas share) of the village of Ranni to Iftikhar Husain, Aijaz Husain, Mahmud Husain, Ikram Husain and Mt. Khaliqunnisa, defendants 1 to 5.

26—3—1915—Iftikhar Husain and his cosharers paid Rs. 16,697-3-0 to Raggha Sah. This was made up of Rs. 12,697-3-0 in respect of Raja Tasadduq Rasul Khan's decrees and Rs. 4,000 in respect of the mortgages of 24th February 1913, and 23rd June 1913.

29—3—1917—Nathu Mal the mortgagee under the deed of 17th December 1910, transferred his rights as such to Ram Lal and Raggha Sah.

16—4—1917—Ramlal and Raggha Sah instituted a suit for the recovery of possession of the nine annas share of the village mortgaged under the deed of 17th December 1910. Iftikhar Husain and his cosharers objected to a decree for possession unless the plaintiffs paid to them the mortgage money due under the two mortgages of Raja Tasadduq Rasul Khan which they had paid off, as previously stated, on 26th March 1915.

12—11—1917—A decree for possession of nine annas share was made in favour of Ramlal and Raggha Sah on condition that they paid the sum of Rs. 12,697-3-0 to Iftikhar Husain.

24—6—1918—Wajid Ali sold specified plots of land measuring 34 bighas 4 biswas situate in the village to Parbhu, Hinga, Raghubar and Mathura, defendants 6 to 9.

27—7—1919—Raggha Sah paid the said sum of money.

13—9—1919—Raggha Sah obtained possession over the nine annas share of the village in pursuance of the decree of 12th November 1917.

13—12—1920—Raggha Sah and Ramlal instituted a suit for foreclosure of the entire village under a claim of Rs. 19,887 on the foot of two mortgages of Raja Tasadduq Rasul Khan which they had satisfied, as already stated, on 27th June 1919. To that suit all the ten persons now defendants in the present suit were impleaded.

13—4—1923—A decree for foreclosure of the entire village of Ranni in the suit just now mentioned was made in lieu of Rs. 16,697-3-0 that is Rs. 12,697-3-0 for the mortgages of Raja Tasadduq Rasul Khan and Rs. 4,000 for the mortgage of Nathu Mal. Wajid Ali, Iftikhar Husain and his cosharers; Parbhu and his cosharers were given the right to redeem successively. Neither Wajid Ali nor Iftikhar Hussain did exercise their right to redeem.

7—1—1924—Parbhu and his cosharers sold one plot 388 out of the plots which they had purchased from Wajid Ali, on 24th June 1918, as already stated, to Matadin, Bindra Prasad, Mansukh and Gobind Prasad, the plaintiffs in the suit, out of which these appeals arise.

9—1—1924—The plaintiffs paid Rs. 19,320-9-5 to Ramlal and Raggha Sah in satisfaction of the decree of 13th April 1923.

27—2—1924—The plaintiffs made an application in the Court of the Subordinate Judge of Sitapur, asking for the making of the foreclosure decree of 13th April 1923, absolute in their favour in respect of the entire village of Ranni.

17—5—1924—The Court made the decree prayed for.

10—2—1925—On appeal from the decree of 17th May 1924, by Parbhu and his cosharers the late Court of the Judicial Commissioner of Oudh held that the plaintiffs could not get possession over the plots of land which they had agreed to leave in the possession of Parbhu under the sale of 7th January 1926. These plots must, therefore, be taken to have remained unaffected by the foreclosure decree of 17th May 1924.

7—1—1926—On an appeal from the same decree by Iftikhar Hussain and his cosharers and Wajid Ali this Court held that the plaintiffs could not get possession of lands held by Wajid Ali and Iftikhar Hussain by virtue of the payment of the decree for foreclosure in Raggha Sah's suit. The precise effect of this

decision is a matter in controversy in the present case.

4—1—1927—The present suit was filed.

The substance of the plaintiffs' case is that by virtue of the absolute decree of foreclosure dated 17th May 1924, passed by the Court of the Subordinate Judge of Sitapur they are the owners of the nine annas share of the village of Ranni, which share was not the subject matter of the appeal decided under the judgment of this Court dated 7th January 1926, and that they have acquired the rights of Raja Tasadduq Rasul Khan in the decrees for foreclosure which he had obtained on 30th March 1914, on the foot of the mortgages of 4th January 1898, and 22nd September 1903, in consequences of the payment of the decree dated 13th April 1923. Several defences were raised to the plaintiffs' claim. In the end the learned Subordinate Judge has held that the plaintiffs are not the owners of the nine annas share and that they are not entitled to the relief for foreclosure but that they are entitled to a decree for sale in respect of the entire village of Ranni with the exception of one plot of land No. 388, and in a certain contingency also with the exception of 33 bighas of land held by the defendants 6 to 9, Parbhu and others. From this decree the two cross-appeals now being decided are preferred.

Having regard to the points discussed at the hearing of the appeals it is not necessary to state all the pleas taken in defence of the plaintiffs' claim. All matters in controversy in the lower Court were either agreed to or abandoned at the hearing of the appeals except such matters as we shall now proceed to state and decide in this judgment.

The plaintiff's appeal was resisted in so far as the relief for a decree for foreclosure in respect of the 7-annas share was concerned and by Parbhu and others in respect of the 33 bighas of land. It was agreed that subject to the last mentioned exception the plaintiffs were entitled to a declaration that they were the owners of the 9-annas share of the village of Ranni by virtue of the decree of 17th May 1924.

The argument on behalf of the plaintiffs is that by reason of the payment of the foreclosure decree of 13th April

1923, which comprised the money due to Raja Tasadduq Rasul Khan under his mortgages of 4th January 1898, and 22nd September 1903, and of Nathu Mal under his mortgage of 17th December 1910, the plaintiffs have acquired the same rights as were possessed by the said mortgagees under their respective mortgages. That right was a right of foreclosure which has already resulted in the plaintiff's becoming the owners of the 9-annas share and the object of the present suit is to bring about the same result in respect of the remaining 7-annas share. As already stated, no contest was made before us in respect of the plaintiffs' title as to the 9-annas share but the first answer given to their claim in relation to 7-annas share is that the effect of the payment made by the plaintiffs gives them only a charge on the 7-annas share of the property under S. 95, T. P. Act, 1882, as against Wajid Ali and Parbhu and his cosharers and the right of foreclosure against Iftikhar Hussain and his cosharers and no more but that the enforcement of both the claims is barred by 12 years' rule of limitation under Art. 132, Lim. Act, reckoning 12 years from the date of the expiry of the period fixed for re-payment in the three mortgages respectively and the authority of the decision of their Lordships of the Judicial Committee in the case of *Muhammad Ibrahim Hussein Khan v. Ambika Pershad Singh* (1), is cited.

As to the first line of argument, according to our judgment the plaintiffs are entitled to all the rights which Raja Tasadduq Rasul Khan and Nathu Mal possessed under their respective mortgages against all the defendants. We are extremely doubtful as to the applicability of S. 95, T. P. Act, 1862, to the present case. It appears to us that the plaintiffs are not barely "mortgagors" by reason of the fact that they have purchased a portion of the mortgaged property from a previous purchaser of a larger portion. We are of opinion that the principle laid down by their Lordships of the Judicial Committee in numerous cases which we shall presently state is applicable and according to that principle the plaintiffs are en-

(1) [1912] 39 Cal. 527=14 I. C. 496=39 I. A. 68 (P.C.).

titled by right of subrogation to all the benefits of the three mortgages which they have discharged. In the case of *Matireddi Ayyareddi v. Adusamilli Gopalakrishnayya* (2) their Lordships stated the principle in the following words:

"It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. . . . So far, therefore as Pingala or the respondents can be supposed to have brought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee."

Their Lordships proceeded:

"This could hardly be disputed by counsel for the appellant, having regard to the decisions of this Board; *Gokuldas Gopaldas v. Puranmal Premsukhdas* (3), *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (4) and *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh* (1)."

Again in the case of *Mahomed Rahimtulla Hajee v. Esmail Allarakhia* (5), reported in the same volume at p. 236 (of 50 I. A.), their Lordships say:

"They are further of opinion that the mortgagee had an absolute right in the protection of his own property to make the deposit and so to prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the plaintiffs in his favour he had acquired their rights, and the mortgage deed expressly authorizes him to charge on the mortgaged property any expenses which the mortgagee might be required to make for his protection."

In the case of *Ram Charan Lonia v. Bhagwan Das* (6), the facts were that in 1912 a certain karta of a joint Hindu family contracted to sell substantially the whole immovable property of the family. The purchaser obtained a conveyance under a decree for specific performance in 1917 but the sons of the karta were no parties to this decree. The purchaser also obtained possession in 1918. The purchaser discharged the

debt under a mortgage of 1909. The karta's sons then brought the suit to set aside the sale and for recovery of the property which ultimately went in appeal to their Lordships of the Judicial Committee. The sale was set aside. Lord Blanesburgh in delivering the judgment of the Judicial Committee said:

"Accordingly, while their Lordships are of opinion that the contract of 3rd September 1912, was not binding upon the plaintiffs, they think that in the circumstances it should now be set aside only upon terms. One of these terms must, they think, be that the appellants have the full benefit of the mortgage of 10th July 1909, as a mortgage carrying compound interest at the rate of 8 1/4 per cent per annum, and that their possession of the property, although unwarranted as purchasers, should not be treated as that of a mortgagee in possession with all the burdens of such a possession. It is just, as their Lordships think, that mortgage should for this purpose be treated as a usufructuary mortgage—and the possession of the appellants be treated as possession thereunder."

The principle is one of equity and is compendiously described by the term of "subrogation." An illustration of the principle will be found in the case of *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.* (7). The decision in that case was affirmed by the House of Lords in *Cunliffe Brooks & Co. v. Blackburn Building Society* (8). From the judgment of Lord Blackburn in that case we would like to quote the following passage:

"Any person, whether the bankers or any one else might pay off the creditors and stand in the shoes of the creditor who is paid off... and either by express or implied bargain purchased the claim of the person who was paid off. He would not be entitled to claim as lender of the money; but he would be entitled to claim as assignee of the creditor whom he had paid off. The Court of appeal, in the present case, held that though there was nothing that amounted to an assignment to the bankers of the claim of those who were paid off by the money advanced, yet if it could be shown that such claims were in fact paid off thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an assignment. This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this house."

On the above grounds we are of opinion that the plaintiffs are entitled to the relief of a decree for foreclosure in respect of the 7-annas share as against

(2) A. I. R. 1924 P. C. 36=47 Mad 190=51 I. A. 140 (P.C.).

(3) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).

(4) [1902] 29 Cal. 154=29 I. A. 9=6 C.W.N. 209=8 Sar. 217 (P.C.).

(5) A. I. R. 1924 P. C. 133=43 Bom. 404=51 I. A. 236 (P.C.).

(6) A. I. R. 1926 P. C. 68=48 All. 443=53 I. A. 142 (P.C.).

(7) [1883] 22 Ch. D. 61=52 L.J. Ch. 92=43 L. T. 33=31 W.R. 93.

(8) [1885] 9 A. C. 857=54 L. J. Ch. 376=33 W. R. 309=52 L. T. 225.

all the defendants provided the relief is not barred by limitation.

We now proceed to consider the plea of limitation. Prima facie the relief whether of sale or of foreclosure having regard to the fact that more than 12 years have expired from the date of repayment fixed in the three mortgages, is barred by limitation under Art. 132, Lim. Act, and the decision in the case of *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh* (1) is an authority for that view. The plea of limitation does not appear to have been raised and argued in the Court below in the form in which it has been presented before us. Had it been so raised the plaintiffs would have been in a position to bring forward more evidence in proof of the facts on which they now rely for the purpose of saving the suit from the bar of limitation. They say that Ram Lal and Raggha Sah, who had obtained the rights of the mortgagee Raja Tasadduq Rasul Khan, by paying off the decree of 30th March 1914, and by purchasing the rights of Nathu Mal on 17th December 1910, were put in possession of the 9-annas share on 13th September 1919, in execution of their decree of 13th April 1917. The receipt of profits of a portion of the mortgaged property by them saves limitation under S. 20, Lim. Act. There can be no doubt that if Ram Lal and Raggha Sah did enter into possession of the 9 annas share S. 20 would apply and the suit would be in time. It is not contended that the receipt of rent of a portion of the mortgaged property will not have that effect though the receipt of rent of the entire mortgaged property will save limitation. We think that it is immaterial what portion of the mortgaged property is in the possession of the mortgagee. Whatever portion it is the receipt of rent of that portion will constitute payment of interest within the meaning of that section and will save limitation in respect of a relief directed against the entire mortgaged property or a portion thereof; vide, the cases of *Vithoba Mahipati v. Balkrishna Sakharam* (9) and *Bama Charan v. Nimai Nandal* (10). Ex. 24 is the warrant for delivery of possession to Ram Lal and Raggha Sah over the 9 annas share of

the village of Ranni in execution of their decree. Ex. 25 is the bailiff's report proving the fact that delivery of possession was made to the decree-holders on 13th September 1929.

The other ground, on which limitation is sought to be saved, is that there have been several acknowledgments made within the meaning of S. 19, Lim. Act. To support this ground reference is made to the following evidence on the record—Ex. 2 is the second deed of mortgage in favour of Raja Tasadduq Rasul Khan dated 22nd September 1903. This clearly acknowledges the previous mortgage of the year 1898. Ex. 14 is the deed of mortgage, dated 15th February 1915, in favour of Iftikhar Husain and his cosharers. In this deed the mortgage of 10th December 1910, in favour of Nathu Mal is specifically acknowledged and it is further stated that the money is being borrowed "for the purpose of paying off the mortgage money of Raggha Sah." The validity of the claim of Raggha Sah comprises within it the validity of the claims of Raja Tasadduq Rasul Khan and Nathu Mal. Further in the details relating to the payment of the mortgage money the liability for a re-payment of the debts of Raja Tasadduq Rasul Khan is clearly stated. Ex. 15 is the application which Iftikhar Husain and his cosharers made under S. 83, Transfer of Property Act for the purpose of paying off the mortgages in respect of which Raggha Sah had obtained his decree. In describing the "details of the money due to Raggha Sah" the payments made by Raggha Sah in satisfaction of Raja Tasadduq Rasul Khan's claims are stated in clear words.

We are of opinion that the acknowledgments mentioned above fully satisfy the provisions of S. 19, Lim. Act—*Jageshar Singh v. Bir Ram* (11). On these grounds we hold that the plaintiffs' suit is not barred by limitation.

The second answer given to the plaintiffs' case is that the relief of foreclosure is barred by res judicata and for this purpose reliance is placed on the judgment of this Court dated 7th January 1926, in so far as the 7 annas share of the village of Ranni is concerned. We do not think that that is the effect of the judgment of 7th January (11) [1920] 23 O. C. 176=7 O. L. J. 451

(9) A. I. R. 1921 Bom. 437=45 Bom. 1903.

(10) A. I. R. 1922 Cal 114.

1926. It is agreed that the decree of the original Court dated 17th May 1924, was a decree absolute of foreclosure in favour of the plaintiffs in respect of the entire village of Ranni and it is further agreed that that decree remained unaffected qua the 9 annas share by the decision in appeal dated 7th January 1926, the reason being that the subject matter in appeal was only the 7 annas share. Our interpretation of the judgment and decree of 7th January 1926, is that in the proceedings, out of which the appeal arose, the plaintiffs were not entitled to dispossess Wajid Ali, the mortgagor, and his mortgagees, Iftikhar Husain and others. The question as to whether the plaintiffs would be entitled to a relief of foreclosure in a suit properly laid for that purpose or not was neither raised for decision nor was it decided. We know that the judgments both of the Court of first instance and of this Court were given in execution proceedings and it is not contended that the remedy of an independent suit was not open to the plaintiffs. We note that the reason which was adduced in the judgment of 7th January 1926, in support of the view that possession could not be granted to the plaintiffs against the mortgagor and the puisne incumbrancer was broadly stated to be that the position of the plaintiffs was no better than that of a co-mortgagor. In the present case, however, we find that apart from their position of a co-mortgagor the plaintiffs have the equity of subrogation in their favour and it is from the finding now arrived at that the relief of foreclosure follows. The title, therefore, which is now being adjudicated was not adjudicated on the previous occasion.

The learned advocate, Mr. K. P. Misra, argued the case on behalf of the defendants, Parbhu and his cosharers, and the substance of his argument was that the 33 bighas of land out of 34 bighas 4 biswas situate in the village of Ranni should be freed from the burden of foreclosure and that subject to this exception he had no objection to a decree foreclosure in respect of the 7 annas share being granted in favour of the plaintiffs. He also agreed that the plaintiffs were entitled to a declaration as to their ownership in the

remaining 9 annas share. Now the 34 bighas 4 biswas of land was purchased by Parbhu and his co-sharers from Wajid Ali on 24th June 1918, and on 7th January 1924, they sold 1 bigha 4 biswas out of the same to the plaintiffs. In the sale deed of the latter date the foreclosure proceedings being taken by the plaintiffs in respect of the entire village are contemplated but provision is clearly made for the exemption of 33 bighas of land from the effect of the foreclosure and of the possession following the foreclosure. This being so we are of opinion that the plaintiffs are not entitled to a decree in respect of the 33 bighas of land.

We now come to the cross-appeal filed by the defendants, Iftikhar Husain and others. There are three grounds in the memorandum of appeal. The first ground is covered by our judgment just now concluded. The other two grounds relate to apportionment of the liability on the basis of rateable distribution. These grounds were not contested by the learned advocate for the plaintiffs and we, therefore, propose to grant the relief covered by those grounds. The situation is as below. The total amount of money paid by the plaintiffs on 9th January 1926, is Rs. 19,320-9-5. The proportion of contribution for which several items of the mortgaged property are liable is as follows :

1. Plot 388 (1 bigha 4 biswas) owned by the plaintiffs under the sale deed of 7th January 1924 Rs. 35-2-0. 33 bighas of land owed by Parbhu and others which are exempted from foreclosure Rupees 965-3-3. 9 annas share of the village of Ranni, for which share the plaintiffs are hereby being declared to be the owners Rs. 10,867-13-3. The remaining 7 annas share which is still held by Wajid Ali and out of which 348 bighas odd is held by Iftikhar Husain and his cosharers in the right of mortgagees Rs. 7,452-6-11.

The result is that we allow both the appeals, set aside the decree of the lower Court and in lieu thereof pass the following decree :

1. It is declared that the plaintiffs are the owners of the 9 annas share of village of Ranni, pargana Muhamudabad, tahsil Sidhauri, District Sitapur.

2. A decree for foreclosure in respect of the remaining 7 annas share of the

said village with the exception of 33 bighas of land already mentioned is passed in lieu of Rs 7,452-6-11 payable first by Wajid Ali within six months of the date of the decree and in default by Iftikhar Husain, Ejaz Husain, Mahmud Husain, Ikram Husain, Mt. Khaliqu-nisa within the next following six months. A decree in terms of O. 34, R. 2, Civil P. C. shall be prepared.

As to costs we think the proper order would be to direct that the parties shall bear their own costs in this Court. As the costs in the lower Court the plaintiffs shall be entitled to their full costs against all the defendants except Parbhu, Hinga, Raghubar and Mathura (defendants 6 to 9), who will be entitled to their costs from the plaintiffs in proportion to the value of the 33 bighas in respect of which the plaintiffs' suit has been dismissed.

R.M./R.K. *Appeal allowed.*

* **A. I. R. 1930 Oudh 184 (1)** ;
WAZIR HASAN, J.

Lal Bhan Partab Singh and others—
Plaintiffs—Appellants.

v.

Rajab and others—Defendants—Res-
pondents.

Second Appeal No. 412 of 1928, De-
cided on 19th April 1929.

* **Limitation Act, S. 5—Memorandum of**
appeal filed in time—Decree and judg-
ment filed two days after expiry of limita-
tion—Time could be extended.

Memorandum of appeal was filed in time
without the judgment and decree of the lower
Court. Two days after expiry of limitation the
decree and judgment of the lower Court was
filed.

Held: that the case was a fit case for exten-
sion of period under S. 5. [P 184 C 1]

K. P. Misra H. for N. Misra—for Ap-
pellants.

H. Husain—for Respondents.

Order.—The plaintiff is the appellant
before me and so he was in the Court
below; but his appeal in that Court
was dismissed on the preliminary ground
that it was barred by limitation. Apart
from the circumstances in which the
copies of the judgment and the decree
of the Court of first instance were filed
in the appellate Court two days after
the expiry of the period of limitation
though the memorandum of appeal
without those copies was filed in time
I think this is a fit case in which an ex-
tension of time under S. 5, Limitation
Act should have been granted to the

appellant. To obtain such an extension
the appellant made an application to
the lower appellate Court but that
Court refused to grant the extension
prayed for. I am not satisfied that
the reasons for refusal are valid. In
my opinion this was a fit case for an
order of extension and I accordingly
make the requisite order.

The result is that the appeal is al-
lowed, the decree under appeal is set
aside and the case is sent back to the
lower appellate Court to be decided ac-
cording to law under O. 41 R. 23, Civil
P. C. The parties will bear their own
costs in this Court; other costs will abide
the event.

v.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 184 (2)

MISRA AND RAZA, JJ.

Khushwaqt Rai — Defendant — Ap-
pellant.

v.

Jagannath Prasad Tandan—Plain-
tiff—Respondent.

First Appeal No. 63 of 1928, Decided
on 25th January 1929.

(a) **Hindu Law—Joint family — Presump-**
tion becomes weaker in proportion to re-
moteness from common ancestor.

The presumption of jointness between parties
one of whom was five degrees removed from
the common ancestor whereas the other was
removed by four degrees would be very weak
indeed. 10 *B. H. C. R.* 444 and *A. I. R.* 1929
P. C. 8, Rel. on. [P 187 C 2]

(b) **Hindu Law—Joint family—Separation**
—Essentials of—Division of interests and
not of property is necessary.

In order to constitute separation it is not
necessary that there should be any partition of
the property by metes and bounds. What is
necessary to establish separation is that there
must be a division of interests and not of the
property itself. 11 *M. I. A.* 75, *Foll.*
[P 187 C 2, P 188 C 1]

(c) **Hindu Law—Succession—Daughter-in-**
law is not heir.

Daughter-in-law is no heir either to her
father-in-law or to her mother-in-law. *A. I. R.*
1927 Oudh 240, Foll. [P 189 C 1]

(d) **Hindu Law—Joint family—No joint**
family of two females.

Under the Hindu Law there can be no joint
family consisting of two females. All that can
happen is that a female can succeed as an heir
in certain cases. [P 189 C 1]

(e) **Possessory title—Not ripened by ad-**
verse possession cannot prevail against true
title.

A decree cannot be given on the ground of
possessory title against a true owner unless
such a title has ripened into complete owner-
ship by adverse possession extending for more
than 12 years. [P 190 C 1]

(f) **Transfer of Property Act, S. 41—Transferee from Hindu widow cannot plead S. 41 against reversioner.**

A Hindu female cannot succeed to any property except in the capacity of a widow or a daughter or a mother and in all such cases she possesses only a life estate. A transferee from a Hindu widow cannot therefore be permitted to plead against the reversioner the bar of S. 41. *A. I. R. 1925 All. 73 Rel. on.*

[P 191 C 1; P 192 C 1]

(g) **U. P. Land Revenue Act (3 of 1901), S. 40—Mutation in favour of widow of last male holder directing husband's reversioners to seek redress in civil Court—Widow does not become ostensible owner within Transfer of Property Act, S. 41.**

Where mutation entry in respect of a grove is made exclusively in favour of the widow of the last holder, and her husband's reversioners directed to go to the civil Court, it cannot be held that mutation of names was effected in favour of the widow with the consent of the reversioner and the widow cannot be treated as ostensible owner holding with the consent of the reversioners. [P 191 C 1]

John Jackson, Suraj Narain Dikshit, Ganga Prasad Bajpai and Balbhadar Prasad Shukla—for Appellant.

Bisheshwar Nath Srivastava, Bhawani Shanker and Mohan Lal—for Respondent.

Judgment.—This is an appeal arising out of a suit for possession of a grove situate in Lakhimpur, District Kheri together with two houses and certain quarters for servants situate in the said grove. The grove stands on a large area of land measuring 43 bighas 5 biswas kham, and is situate in the heart of the town. The suit for possession of the said grove has been brought by one Babu Jagannath Prasad, a resident of the city of Lucknow as a transferee from a lady named Mt. Rajeshwari Debi, the widow of Babu Jugul Kishore, son of Babu Bansi Lal Singh, deceased, also residing in the same city of Lucknow. The allegations on which the plaintiff-respondent brought his suit were that the grove in suit was the property of one Babu Bansi Lal Singh, who originally practised in Lakhimpur, District Kheri, but subsequently shifted to Lucknow in or about the year 1887. Babu Bansi Lal Singh died on 26th July 1908, and his widow Mt. Anarkali Debi came into possession of the said grove after the death of her husband. Babu Bansi Lal Singh had a son Babu Jugul Kishore, who predeceased him leaving Mt. Rajeshwari Debi as his widow. It was alleged by the plaintiff that the two widows, namely, those of

Babu Bansi Lal Singh and of his son Babu Jugul Kishore lived together and were in joint possession of the property and that after the death of the widow of Babu Bansi Lal Singh on 25th September 1913, her daughter-in-law Mt. Rajeshwari Debi came into possession of the property, became the absolute owner thereof, and got mutation effected in her name in respect of the said grove on 23rd January 1922. Mt. Rajeshwari Debi was alleged to have transferred the grove to the plaintiff respondent by a sale-deed dated 13th October 1923. It was further alleged that when Babu Bansi Lal Singh shifted from Lakhimpur to Lucknow, he left the said grove in charge of one Babu Sheo Bakhsh Rai, pleader of Lakhimpur, who died in May 1906. After his death his widow Mt. Man Kuar, defendant 1 in the present suit, remained in possession of the grove as a caretaker, and was in such possession on the date of the aforesaid sale. Soon after the execution of the sale deed a dispute seems to have arisen for the possession of the grove and the parties took the matter to the criminal Court. On 4th March 1924, the Magistrate upheld the possession of Mt. Man Kuar and declared her as entitled to remain in possession of the said grove till ejected in due course of law. Babu Khush Waqt Rai, son of Babu Sheo Bakhsh Rai, is the principal defendant in the case, Mt. Man Kuar being his mother, and he was impleaded as defendant 2. The present suit for possession of the grove was instituted on 28th February 1927.

The defence raised by Babu Khush Waqt Rai is to the effect that the grove in suit had been orally gifted by Babu Bansi Lal Singh to his father Babu Sheo Bakhsh Rai, when the former shifted himself to Lucknow, that since that time his father and his mother had remained in possession of the said grove as owners. He denied that Babu Bansi Lal Singh was its owner at the time of his death or that his widow and his daughter-in-law Mt. Rajeshwari Debi ever became owners thereof. He also denied that they ever remained in possession of the grove in suit. It was also contended by him that even if Babu Bansi Lal Singh be considered to be the owner of the grove at the time of his

death, the title to the property in the said grove had, after the death of his widow Mt. Anarkali, passed to one Babu Bishu Nath Prasad Singh, who was related to Babu Bansi Lal Singh as his nephew and was his next heir. A pedigree was filed to show the relationship between the two. It shows that the great grandfather of Babu Bishu Nath Prasad and the grandfather of Babu Bansi Lal Singh were own brothers. A sale deed dated 1st March 1924, obtained from the said Babu Bishunath Prasad Singh by defendant 1 in the name of one M. Jagannath a clerk of Pandit Suraj Narain, a pleader practising at Lakhimpur, was set up in defence. It was further contended that Babu Sheo Bakhsh Rai had spent a large sum of Rs. 2,029-3-3 in building a kothi and the servants quarters in the said grove and that the defendant had also sunk a well at the expense of Rs. 600. Lastly it was contended that the suit was barred by time.

In reply it was urged on the plaintiff's side that even if Mt. Rajeshwari Debi, the daughter-in-law of the late Babu Bansi Lal Singh, be considered to have no title to the property, she had acquired title by adverse possession of the grove since after the death of her father-in-law and that she was competent to pass title in respect of the said grove in suit to the plaintiff respondent. It is said that Babu Bansi Lal Singh and Babu Bishunath Prasad Singh constituted members of a joint Hindu family there having been no partition effected between them and after the death of Babu Bansi Lal Singh, his widow and after her death his daughter-in-law must be deemed in the eyes of law to be in adverse possession thereof. It was further alleged that Mt. Rajeshwari Debi could in any case be deemed to possess in her a possessory title in respect of the grove, which she was competent to transfer to the plaintiff-respondent, and thus she was entitled to preference against the defendants, who had no title to the property whatever. The benami character of the sale deed dated 1st March 1924, in favour of defendant 1 was denied. Lastly it was urged that since the mutation of names had been effected in respect of the grove in suit in favour of Mt. Rajeshwari Debi and her name was

entered in the khewat, she should be deemed to be an ostensible owner of the grove in suit and that the defendants could not be allowed to challenge the title of the plaintiff-respondent.

It would thus appear from the pleadings that the main points for trial in the case were :

Firstly, whether Babu Bansi Lal Singh had made an oral gift of the grove in suit in favour of Babu Sheo Bakhsh Rai.

Secondly, whether Babu Bansi Lal Singh and Bishunath Prasad Singh constituted a joint family at the time of the death of the former and was the grove in suit the property of the joint family at the time of the former's death or was it separate and self-acquired property in Babu Bansi Lal Singh?

Thirdly, to whom did the title in grove in suit pass after the death of Babu Bansi Lal Singh and after that of his widow?

Fourthly, could the possession of Babu Bansi Lal Singh's widow and after her death that of her daughter-in-law be treated adverse and did it confer title on any one of them?

Fifthly, was the sale deed dated 1st March 1924, benami for defendant 2?

Sixthly, could the plaintiff-respondent get a decree on the basis of possessory title of Mt. Rajeshwari Debi if established?

Seventhly, could the plaintiff-respondent be considered to be a bona fide transferee for value from an ostensible owner?

Eighthly, was defendant 2 entitled to any compensation in case the plaintiff be found entitled to a decree?

The learned Subordinate Judge of Kheri, who tried the case, found that the alleged oral gift by Babu Bansi Lal Singh in respect of the grove in suit had not been proved, that Babu Bansi Lal Singh and Babu Bishunath Prasad Singh constituted a joint Hindu family at the time of former's death and that the title to the property in suit at that time vested in Babu Bishunath Prasad Singh, who was the surviving member of the family, that although the title to the grove in suit passed to Babu Bishunath Prasad Singh after the death of Babu Bansi Lal Singh, yet he never obtained possession and that the latter's widow and daughter-in-law remained in adverse

possession of the property whose title had become perfect by such possession ; and that the plaintiff had by his purchase acquired good title to the grove in suit and was entitled to a decree. As to the sale deed dated 1st March 1924, the finding of the learned Subordinate Judge was to the effect that the benami character of that deed had not been established. He also found that Mt. Rajeshwari Debi was an ostensible owner and the plaintiff-respondent's title as a bona fide transferee for value from her was protected under S. 41, T. P. Act, 4 of 1882. Lastly he decided that the building and the well standing on the grove in suit had been constructed by the father of defendant 2 and himself respectively, and that he was therefore, entitled to compensation. In result he passed a decree on 26th January 1928, in favour of the plaintiff in respect of the grove in suit as well as the building and the well situate thereupon, but allowed defendant 2 compensation to the extent of Rs. 1,500.

It is against this decree that defendant 2 has appealed to this Court. The plaintiff has filed cross-objections in respect of the compensation that has been awarded against him to defendant 2. In appeal, therefore, all the contentions which were raised on either side have been revived and the whole case has been argued before us at length on either side. (After confirming the finding on first point, the judgment proceeded.)

Second point.—Whether Babu Bansi Lal Singh and Babu Bishunath Prasad Singh constituted a joint Hindu family at the time of the death of the former and was the grove in suit the property of the joint family at the time of the former's death or was it separate and self-acquired property of Babu Bansi Lal Singh ?

On the question whether Babu Bansi Lal Singh constituted on the date of his death a joint Hindu family with his cousin Babu Bishunath Prasad Singh we regret we cannot agree with the finding arrived at by the learned Subordinate Judge. Though under the Hindu Law persons closely related are unless shown to the contrary, presumed to be joint, yet it appears to us that in the present case looking to the relationship between Babu Bansi Lal Singh and Babu Bishu-

nath Prasad Singh the presumption is a very weak one, and has been sufficiently rebutted by the evidence produced in the case.

Mr. Mayne in his well known work of Hindu Law (9th Edn.) has given on p. 343 quotation from the judgment of their Lordships of the Bombay High Court, reported in *Moro Vishvanath v. Ganesh Vithal* (1), to the effect that the strength of the presumption necessarily varies in every case and that the presumption of union is stronger in the case of brothers than in the case of cousins and the farther you go from the founder of the family, the presumption becomes weaker and weaker. This principle has very recently been confirmed by their Lordships of the Privy Council in *Yellappa Ramappa Naik v. Tippanna* (2). We have already stated in the earlier portion of our judgment where we recited the pleadings that Babu Bishunath Prasad Singh was five degrees removed from the common ancestor, whereas Babu Bansi Lal Singh was removed by four degrees. The presumption in such a case would in our opinion be very weak indeed. It is also clear from the evidence that for a long time prior to his death Babu Bansi Lal Singh was living either at Lakhimpur or at Lucknow whereas Babu Bishunath Prasad Singh had been living at Benares. Babu Bishunath Prasad Singh was in this case examined as a witness on commission by defendant 2 and his evidence begins on P. R. 40. He proved the pedigree set up in the written statement of defendant 2. He clearly stated on P. R. 41 that Babu Bansi Lal Singh died as a separated Hindu and that he was not joint with him. In cross-examination he, however, stated that the property at Balia and Benares was still joint and so was the money-lending business carried on in Balia. Reliance was placed on this statement but so far as we have been able to gather from it the witness only implied by his statement that so far there had been no partition of the property by metes and bounds. It is now amply settled by authorities that in order to constitute separation it is not necessary that there should be any partition of the property by metes and

(1) 10 B. H. C. R. 441.

(2) A. I. R. 1929 P. C. 8=53 Bom. 213=56 I. A. 13 (P.C.).

bounds. What is necessary to establish separation is that there must be a division of interests and not of the property itself. This rule of law was for the first time laid down by their Lordships of the Privy Council in *Appovier v. Rama Subba Aiyar* (3) and has been repeatedly confirmed in several cases by the Privy Council itself and it is not necessary to refer to them. In our opinion, therefore, the evidence of Babu Bishunath Prasad Singh on this point which has not at all been shaken in cross-examination, must stand.

Mt. Rajeshwari Debi was also examined on commission in this case and she has also given clear evidence on this point. On P. R. 16 she stated that all the property belonging to Babu Bansi Lal Singh at Kheri was his self-acquired property, that there was no sharer in the property acquired by him and that Babu Bishunath Prasad Singh and his father Anant Ram used to live separately from Babu Bansi Lal Singh. She further stated that so far as mess, residence and the estate were concerned, her father-in-law, Babu Bansi Lal Singh and Babu Bishunath Prasad Singh were separate. She is the very lady who has transferred the grove to the plaintiff-respondent and there is no reason why she should speak an untruth on this point.

- We are, therefore, entirely satisfied in our mind that Babu Bansi Lal Singh did not constitute a member of a joint family with his cousin Babu Bishunath Prasad Singh and that he was living as a separated Hindu at the time of his death. Our conclusion receives a great support from the will executed by Babu Bansi Lal Singh on 11th June 1908, prior to his death. It is Ex. B-24 and will be found printed on P. R. 14 of part 3. The tenor of that document leaves no doubt in our mind that Babu Bansi Lal Singh treated himself as a separated Hindu and as the owner of his entire property including that situate in District of Balia. Babu Bishunath Prasad Singh, who was the only person who could challenge the validity of this will has throughout acted upon it as a valid document. His conduct is, therefore, material to show that the case, set up by him in his evidence, namely that

Babu Bansi Lal Singh was separate from him at the time of his death, was a true one. We, therefore, hold that on the evidence on the record it is clearly established that Babu Bansi Lal Singh was at the time of his death a separate member of the family.

Apart from this it is clear from the evidence of Mt. Rajeshwar Debi herself that the grove was planted by Babu Bansi Lal Singh on land which he received in sukрана from Raja Sahib of Oel who was his client and for whom he had won a case (vide P. R. 15). This story is supported by Babu Bishunath Prasad Singh also (vide his evidence on P. R. 41). In view of this evidence the property would be the self-acquired property of Babu Bansi Lal Singh, even though he may have been living jointly at the time of his death with his cousin, Babu Bishunath Prasad Singh.

Third point.—To whom did the title in grove in suit pass after the death of Babu Bansi Lal Singh after that of his widow?

As a result of our findings on points 1 and 2 it is clear that the title to the grove in suit passed on to Mt. Anarkali Debi on the death of her husband Babu Bansi Lal Singh. It is also equally clear that after the death of Mt. Anarkali in September 1913, the title passed to Babu Bishunath Prasad Singh who was at the time according to the pedigree proved in the case the nearest heir of Babu Bansi Lal Singh. That he was the nearest heir has not been contested in arguments by the learned advocate for the plaintiff-respondent.

Fourth point.—Could the possession of Babu Bansi Lal Singh's widow and after her death of her daughter-in-law be treated as adverse and did it confer title on any one of them?

We have already found that Babu Bansi Lal Singh was a separate member of a Hindu family at the time of his death and that he was not in any way joint with Babu Bishunath Prasad Singh. The widow of Babu Bansi Lal Singh would, therefore, be entitled in law to possession of the grove in suit for her lifetime, and that her possession could not be considered to be adverse to the reversioner Babu Bishunath Prasad Singh, since he could not be entitled to the possession of the property till she was dead.

(3) [1866] 11 M.L.A. 75=8 W. R. 1=1 Suther 657=2 Sar. 218 (P.C.).

As to the possession of the daughter-in-law the matter, however, stands on a different position. It is a settled rule of Hindu Law that daughter-in-law is no heir either to her father-in-law or to her mother-in-law. If any authority were required we would merely refer to a decision of one of us in the *Bhinga* case reported in *Krishna Kumari Devi v. Rajendra Bahadur Singh* (4). We are surprised to find the learned Subordinate Judge enunciating a proposition, which cannot be maintained and which the learned advocate for respondent did not think proper to support. It was to the effect that Mt. Anarkali Debi, the widow of Babu Bansi Lal Singh and Mt. Rajeshwari Debi, the daughter-in-law of Babu Lal Singh lived together and constituted a joint family. It is sufficient for us to point out that under the Hindu Law there can be no joint family consisting of two females. All that can happen is that a female can succeed as an heir in certain cases. If Mt. Rajeshwari Debi, therefore, be held to have remained in possession for 12 years after the death of the widow of Babu Bansi Lal Singh, she would no doubt in such a case acquire title by adverse possession. The facts of the case, however, show clearly that she, even if previously in possession ceased to be in possession of the grove on 4th March 1924, when the Magistrate ordered that the possession of the defendants over the grove was to be maintained. Counting from the date of the death of the widow of Babu Bansi Lal Singh which occurred on 23rd September 1913, up to the date of the said order she could not be held to have remained in possession for 12 years and thus perfected her title by adverse possession. It would also be clear from the same fact that during all this time the title in the property vested in Babu Bishunath Prasad Singh, who became the owner of the property on the death of the widow of Babu Bansi Lal Singh. On 1st March 1924 the date when the sale-deed was executed in respect of the grove in suit in favour of M. Jagannath, his title had not become extinguished and the vendee would by virtue of such a sale acquire a valid and good title to the property.

We, therefore, hold that the possession

(4) A. I. R. 1927 Oudh 240=2 Luck. 43.

of the widow of Babu Bansi Lal Singh was merely that of a Hindu widow and that of his daughter-in-law was without any title and therefore adverse but it was not for a sufficiently long time as to confer any title upon her by adverse possession. We also hold that after the death of the widow of Babu Bansi Lal Singh the title vested in Babu Bishunath Prasad Singh and it passed to the vendee under deed dated 1st March 1924.

Fifth point.—Was the sale-deed dated 1st March 1924, benami for defendant 1?

(Their Lordships considered the evidence and concluded by observing to the effect that it was satisfactorily proved that the consideration of the sale-deed was paid by the appellant Khush Waqt Rai after borrowing it from the gentleman, and proceeded.) There is, therefore, left no room for doubt that the sale-deed dated 1st March 1924 (Ex. B-4) is really benami in the name of M. Jagannath for defendant 2 and we hold accordingly.

Sixth point.—Could the plaintiff-respondent get a decree on the basis of possessory title of Mt. Rajeshwari Debi, if established? On the point of possessory title we may state the position stands thus. Mt. Rajeshwari Debi who had transferred the property in favour of the plaintiff-respondent was herself examined as a witness on behalf of the plaintiff in this case. Her evidence will be found to be printed on P. R. 15 and subsequent pages. She stated clearly in her evidence that the grove came into her possession after the death of her mother-in-law, and that after her death she went only twice to Lakhimpur to see the grove. During these two visits she said she had brought certain fruits from the said grove. She had been previously examined in the mutation case and her statement was filed in this case which is marked as Ex. B 2 printed on P. R. 25 of part 3. In that statement she clearly admitted that she had not received any fruits of the grove for the last three or four years. This statement of hers was recorded on 23rd October 1921. It is, therefore, clear that after October 1917, she did not receive any produce of the grove. Her mother-in-law died in September 1913. It is, therefore, clear that she was in possession of the grove at the most only for four years, and that for over nine years.

prior to the bringing of the suit she had not been in possession of the grove at all. We are also unable to hold on the strength of her obtaining fruits of the grove on two occasions only that she had possessory title in respect thereof. It is admitted that she did not live permanently at Lakhimpur for any period of time and that the grove continued to be in actual possession of Mt. Man Kuar the mother of defendant 2 who was a minor at the time. It is quite possible that she might have given a few fruits as the produce of the grove to Mt. Rajeshwari Debi when she went to Lakhimpur because she happened to be daughter-in-law of Babu Bansi Lal Singh. It is not established that Mt. Man Kuar defendant 1 gave a portion of the produce of the grove to Mt. Rajeshwari Debi in recognition of her title to it. There can be no doubt that in law she had no title whatever, and before attributing her receipt of the produce to a title in her we must be satisfied on the point with clear evidence to that effect. We have no such evidence on the record, and in the absence of such evidence we are unable to hold that this is sufficient to establish her possessory title. We are, therefore, of opinion that the plaintiff cannot succeed on the strength of possessory title.

We might also mention that in view of our finding on the question of the benami character of the sale deed it must be held that defendant 2 is the owner of the grove and it is a settled principle of law that a decree cannot be given on the ground of possessory title against a true owner unless such a title has ripened into complete ownership by adverse possession extending for more than 12 years.

Seventh point.— Could the plaintiff-respondent, be considered to be a bona fide transferee for value from an ostensible owner? The learned Subordinate Judge has given a finding on this point in favour of the plaintiff-respondent. After a consideration of all the facts of the case we however, do not find ourselves in a position to agree with his finding on this point. In this connexion the learned advocate for the plaintiff-respondent principally relied upon Ex. 18 which is an application filed on behalf of Babu Bishunath Prasad Singh during the course of mutation proceedings on 16th December 1920. In that application he

referred to the mutation case which was then pending in the revenue Court between Babu Khush Waqt Rai, defendant 2 and Mt. Rajeshwari Debi, the daughter-in-law of Babu Bansi Lal Singh and clearly stated that he was the nephew and the next reversioner of Babu Bansi Lal Singh and was as such entitled that his name should be entered in the Government papers along with that of Rajeshwari Debi. A great deal of reliance was placed upon the request of Babu Bishunath Prasad Singh contained in this application to the effect that mutation in his name was to be made but jointly with Rajeshwari Debi. The argument advanced was to the effect that if in such circumstances the name of Rajeshwari Debi was entered in the papers it must be held that it was done with his express consent and that Mt. Rajeshwari Debi must be considered to be the ostensible owner of the property in suit.

It was pointed out on behalf of the defendant-appellant that this position had subsequently been retracted by Babu Bishunath Prasad Singh and his evidence was referred to in proof of this position. Babu Bishunath Prasad Singh stated in his cross-examination: (vide P. R. 47) that the application referred to above, namely Ex. 18 had been filed by his mukhtar and the request entered therein that this name should be entered in the Government paper along with that of Rajeshwari Debi had been made by him without his instructions. He deposed further that when he came to know of this application he got it amended to the effect that his name alone should be entered. Unfortunately this application is not on the record which if produced would have gone a great way to substantiate his statement. We have, however, on the record an order passed by the Commissioner of Lucknow Division in the appeal brought by Babu Bishunath Prasad Singh. It is a document filed by the plaintiff himself and is marked as Ex. 5 (vide P. R. 35 of part 3). The heading shows that it was an order passed *In re, Bishunath Prasad v. Rajeshwari Debi*, in a claim for mutation of names in respect of land situate in village Rajapur Pargana and District Kheri. It is admitted by the parties that the order was passed in connexion with the mutation proceedings relating to this grove. The order definitely shows the

nature of those mutation proceedings. It shows that the entry was made exclusively in favour of Mt. Rajeshwari Debi and that Babu Bishunath Prasad Singh was directed to go to the civil Courts. Under these circumstances it is futile to urge that the mutation of names was effected in favor of Mt. Rajeshwari Debi with the consent of Babu Bishunath Prasad Singh. It is impossible for us to treat her as an ostensible owner with the consent of Babu Bishunath Prasad Singh. Section 41, T.P. Act, (4 of 1882) runs as follows:

"Where, with the consent, express or implied, of the persons interested in immovable property a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it; provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

It would appear from the terms of the above section that in order to apply S. 41 to the facts of a particular case it must be shown (1) that the person who transfers the property is the ostensible owner of such property with the consent express or implied, of the real owner; (2) that the transfer must have been made for consideration, and (3) that the transferee must have taken the transfer after taking reasonable care to ascertain the title of the transferor and must have acted in good faith.

Applying these principles to the facts of the present case we find that the first element of ostensible ownership of the transferor of the plaintiff-respondent with the consent, express or implied of Babu Bishunath Prasad Singh who is the real owner of the property has not been made out. It is no doubt true that the transfer in favour of the plaintiff-respondent by Mt. Rajeshwari Debi was a transfer for a consideration. We have, however, to see whether the plaintiff-respondent took the transfer after taking reasonable care to ascertain the title of Mt. Rajeshwari Debi and whether he had acted in good faith.

We are unable to hold that the plaintiff-respondent took all the reasonable care to ascertain the title of his transferors as would be expected to satisfy the requirements of law.

The plaintiff-respondent himself went into the witness-box and gave evidence on this point. His evidence will be

found printed on P.R. 28. In cross-examination he admitted that he did not make any other enquiries except seeing the khewats and the order Ex. 4. The khewats no doubt showed the name of Mt. Rajeshwari Debi was entered in the papers as the proprietor of the grove in suit . . . Ex. 4 is, however, copy of the order of the Assistant Collector (First Class) Kheri passed during the course of mutation proceedings on 23rd January 1922. It is printed on P. R. 32. The order itself mentions the claim put forward by Babu Bishunath Prasad Singh. The learned Assistant Collector observes in his order in respect of his claim that he could have none to the grove either as an heir or one holding the possession of the grove. It would also appear from the same order that the will of Babu Bansi Lal Singh had been produced by Babu Bishunath Prasad Singh in support of his title. His title as based upon the will was rejected on the ground that it did not comprise the grove in question. Two things are, therefore, clear; firstly that the plaintiff was taking the transfer from a Hindu female, and secondly, she was no other than the daughter-in-law of Babu Bansi Lal Singh, who is admitted by every body to have been the owner of the grove. Even the plaintiff admitted this in his statement recorded in this case (vide P. R. 20). The plaintiff also admits in his statement that after the death of Babu Bansi Lal Singh his widow Mt. Anarkali Debi became the owner and after her death her daughter-in-law Mt. Rajeshwari Debi became the owner. The plaintiff must be presumed under the circumstances to know that Mt. Rajeshwari Debi could have no title to the grove. A daughter-in-law is not an heir to the property of her father-in-law under the law of Mitakshara prevalent in these provinces. We must, therefore, presume that the plaintiff had notice of the fact that he was taking the transfer from one who was no heir in Hindu Law. At least this much can safely be said that when he was going to take the transfer from a Hindu female he must be expected to take good care to ascertain as to whether the female had title to the property. It is a settled rule of Hindu Law that a female cannot succeed to any property except in the capacity of a widow or a daughter or a mother and in all such

cases she possesses only a life estate. A transferee from a Hindu widow cannot therefore, be permitted to plead against the reversioner the bar of S. 41, T. P. Act. As an authority for this proposition we would refer to a recent case decided by their Lordships of Allahabad High Court and reported in *Shib Deo Misra v. Ram Prasad* (5). We are, therefore, of opinion that the plaintiff-respondent cannot be held to have taken reasonable care to ascertain the title of his transferrer.

We might refer in this connexion to a very pertinent case decided by their Lordships of the Allahabad High Court and reported in *Pateshri Partab Narain Singh v. Nageshar Pershad Pande* (6). In this case a widow succeeded to the property of her husband and on her death a person alleging himself to be next reversioner took possession and he borrowed money on the security of the property and thereby paid the debts of the widow. The title of the alleged reversioner was subsequently challenged by another person who succeeded in establishing his own title in preference to the said alleged reversioner. The transferee from whom the alleged reversioner had borrowed money was also impleaded in the case and he pleaded S. 41, T. P. Act, as a bar to the suit brought against him. The question was whether the transferee could be considered under the circumstances protected by the provisions of S. 41. The judgment of the Court was delivered by Bannerji, J., who in his judgment observed as follows:

"The Court below was of opinion that the mortgage is binding on the appellant inasmuch as Rudra Narain Singh's name was entered in the revenue papers after the death of Rup Kunwari, and he was the ostensible owner of the property. The learned Subordinate Judge apparently relies on the provisions of S. 41, T. P. Act, but he overlooks the proviso to that section, which is to the effect that a transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferrer had power to make the transfer he acted in good faith. There is nothing in this case to show that the plaintiff made any enquiry whatever to ascertain the title of his mortgagor, Rudra Narain Singh. It is true, the name of Rudra Narain Singh was entered in the revenue papers, but if enquiry had been made it would have appeared that at the time when mutation of names was applied for, objections were preferred on behalf of the Raja of Basti and that the name of

Rudra Narain Singh was entered simply because he was in possession. Further enquiry as to Rudra Narain's title would have led to the discovery of the fact that there was a will, by virtue of which the Raja of Basti was the owner of the property after the death of Rup Kunwari. It cannot be said that the name of Rudra Narain Singh was entered as astensible owner with the consent of the real owner, the Raja of Basti. On the contrary, his name was entered in spite of opposition put forward by the Raja. The present plaintiff is a person who has been lending money to the family for a long time. He resides in the same locality and was apparently acquainted with all the circumstances of the families concerned. He cannot, therefore, claim to be a bona fide transferee without notice so as to be in a position to defeat the title of the real owner."

This case was taken in appeal to the Privy Council and the judgment of their Lordships of the Privy Council will be found to be reported in *Nageshar Prasad Pande v. Pateshri Partab Narain Singh* (7). Their Lordships observed that the judgment of the High Court was so satisfactory and sufficient that they did not wish to say anything further. We are, therefore, of opinion, that applying the principle laid down in the above case to the facts of the case before us the plaintiff-respondent is not entitled to the protection provided for under S. 41, T. P. Act.

Eighth point—Was defendant 2 entitled to any compensation in case the plaintiff be found entitled to a decree? In face of our findings on the above issue it is not necessary that we should give any finding on this point. If we were, however, called upon to give our finding on this point we would agree with the finding of the learned Subordinate Judge on issue 9. His finding in respect of this matter is to the effect that the plaintiffs were held to be entitled to this property on payment of Rs. 1,500 to the defendants for compensation on account of the costs of the house and of the servants' quarters that were in the opinion of the Subordinate Judge proved to have been built by Sheo Bakhsh Rai with his own money. We are in entire agreement with this view of the learned Subordinate Judge and, therefore, dismiss the cross-objections with costs. The result is that we allow this appeal, set aside the decree passed by the learned Subordinate Judge and dismiss the suit of the plaintiff-respondent with costs in both the Courts.

M.N./R.K.

Appeal allowed.

(7) A. I. R. 1915 P. C. 103.

(5) A. I. R. 1925 All. 79=46 All. 637.

(6) [1911] 8 A. L. J. 358=10 I. C. 961.

A. I. R. 1930 Oudh 193

MISRA, J.

Ali Khan and another—Plaintiffs — Appellants.

v.

Suraj Bali and another—Defendants — Respondents.

Second Appeal No. 380 of 1928, Decided on 11th January 1929, from decree of Sub-Judge, Malihabad, D/- 21st September 1928.

(a) Oudh Rent Act (22 of 1886), S. 108—Essentials of suit to be cognizable by revenue Court enunciated.

One of the essential requirements for a suit to be cognizable by the revenue Court is that the parties must occupy a certain position in relation to each other. For instance, if the suit relates to the arrears of rent, the suit in order to be cognizable by the Court of revenue must be brought by a landlord against a tenant; if a suit is for recovery of a certain holding it must, if it is to be cognizable by the revenue Court, be brought by a tenant against a landlord; and similarly if a suit is for profits or settlement of accounts, the suit must, in order to be cognizable by the revenue Court, be brought by a cosharer against the lambardar or against the other cosharers. [P 193 C 2]

(b) Oudh Rent Act (22 of 1886), S. 106—Transfer of interest by cosharer and assignment of claim for past profits—Suit for profits by assignee is not cognizable by revenue Court.

Where a cosharer transfers his interest to another person and along with it assigns his claim for the profits accruing before the transfer, the suit by such transferee for the share of the profits is not cognizable by the revenue Court but by the civil Court. [P 194 C 2]

F'gaz Ali—for Appellants.

Girja Saran Lal and S. D. Singh—for Respondents.

Judgment.—This is an appeal arising out of a suit brought by the plaintiffs-appellants for recovery of a certain sum of money as profits for the years 1332 and 1333 fasli due from defendant-respondent 1, who is the lambardar of village Jamalnagar, District Unao, on account of a share situate in the said village. The share originally belonged to defendant-respondent 2 from whom the plaintiffs have purchased it on 17th November 1926. The profits had admittedly accrued to defendant-respondent 1 prior to the sale deed and he has transferred the right to recover those profits to the plaintiffs appellants by the same sale deed. The suit was brought in the Court of the Munsif of Safipur at Unao. The defence with which we are concerned in this appeal is one of jurisdic-

tion. Defendant 1 pleaded that the suit was not maintainable in civil Court and was cognizable only in the revenue Court. This point was decided against defendant-respondent 1 by the learned Munsif, who held that since the plaintiffs were not co-sharers at the time these profits accrued due, the suit could not be maintained in the revenue Court and was cognizable by the civil Court. He went into the merits of the case and decreed the plaintiffs' suit for such amount as he found due on account of the profits.

Defendant-respondent 1 appealed against the decree and one of the contentions raised on his behalf before the learned Subordinate Judge of Malihabad who heard the appeal, was that the suit was cognizable in the revenue Court and not in the civil Court. This contention was accepted by the Subordinate Judge and he allowed the appeal and directed that the plaint be returned to the plaintiffs for presentation to the proper Court. It is against this order that the present appeal has been lodged in this Court.

The main contention urged before me against the order of the learned Subordinate Judge is to the effect that he had erred in holding that the suit was not cognizable by the civil Court.

After hearing the arguments in the case at some length I have come to the conclusion that the order passed by the learned Subordinate Judge cannot be maintained and that this appeal must be decreed.

It appears to me that one of the essential requirements for a suit to be cognizable by the revenue Court is that the parties must occupy a certain position in relation to each other. For instance, if the suit relates to the arrears of rent, the suit in order to be cognizable by the Court of revenue must be brought by a landlord against a tenant; if a suit is for recovery of a certain holding it must, if it is to be cognizable by the revenue Court, be brought by a tenant against a landlord; and similarly if a suit is for profits or settlement of accounts, the suit must, in order to be cognizable by the revenue Court, be brought by a cosharer against the lambardar or against the other co-sharers. This will appear from the frame of S. 108, Oudh Rent Act, 22 of 1886.

The suits cognizable under that Act have been divided into four classes.

Class A.—Suits by a landlord (against a tenant).

Class B.—Suits by an under-proprietor or a tenant (against a landlord).

Class C.—Suits regarding the division or appraisement of produce (by a tenant against a landlord).

Class D.—Suits by and against lambardar, cosharer and muafidar.

It would appear from the above classification that one of the essential ingredients for a suit to be cognizable by a Court of revenue is that it must belong to one of the classes specified above. To make my meaning clear, if the suit is brought by the landlord it must be against his tenant, if it is by a tenant it must be against his landlord; and lastly if it is by a cosharer it must be against the lambardar, and if against a lambardar it must be by a cosharer. If the claim is not brought by any of the individuals specified above against another individual mentioned therein the suit will not be cognizable by the Court of revenue.

It was admitted before me during the course of arguments on behalf of the defendant-respondent 1, that if a claim for profits is assigned by a cosharer to a stranger, the suit cannot be cognizable by the Court of revenue, but must be brought in the civil Court. The obvious reason why such a suit has to be brought in the civil Court is that the assignee does not happen to be the cosharer.

It was, however, contended on behalf of defendant-respondent 1 that the plaintiffs-appellants are not the assignees of only the profits claimed but are also assignees of the share of the village in respect of which those profits have been claimed and the suit is, therefore, cognizable by a Court of revenue. I cannot accept this contention, because it appears to me that the fact that the plaintiffs-appellants have purchased the share also ought not to make any distinction in the situation in which the parties really stand. Whether the plaintiffs-appellants have purchased the share or not appears to me to be a matter, which should not affect the forum of the suit in respect of the claim for profits. So far as that claim is concerned it is clear that the plaintiffs-appellants were not at that time co-

sharers owing to the share in respect on which the profits have been claimed. It was defendant-respondent 1 who was then a cosharer. If the suit in respect of the profits now claimed had been brought by defendant-respondent 2, the suit had been cognizable by the revenue Court. In my opinion the point, which has to be seen in such a case in order to arrive at a correct decision as to jurisdiction, is whether the plaintiff or the defendant occupied the position during the period for which the profits have been claimed, which would make their suit cognizable by the revenue Court. If they did not occupy that position at the time for which the profits are claimed the fact that they now occupy that position would not at all matter.

I am, therefore of opinion that the suit brought by the plaintiffs-appellants for profits is clearly cognizable by the civil Court and not by the Court of revenue.

I, therefore, accept this appeal, set aside the order of the learned Subordinate Judge directing the plaint to be returned to the plaintiffs for presentation to the Court of revenue. The appeal will now be reinstated at its original number and the learned Subordinate Judge will proceed to decide it on the merits according to law. The appellants will have their costs of this Court from the respondents.

V.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 194

STUART, C. J., AND RAZA, J.

Ballabh Das—Applicant.

v.

Puran—Opposite Party.

Revn. Appln. No. 6 of 1929, Decided on 23rd July 1929, from Sm. C. C. Judge, Sitapur, D/- 31st January 1929.

Stamp Act, Art. 5—Entry of Interest payable in future is within Art. 5.

A memorandum of the rate of interest to be payable in future when appended to an acknowledgment of a debt over the signature of the debtor is a memorandum of agreement within the terms of Art. 5. 41 All. 169, *Foll.*

[P 195 C 1]

A. P. Sen—for Applicant.

Judgment.—After having examined the note written in the account we are of opinion that the entry can only be read as a memorandum of agreement.

within the terms of Art. 5, Sch. 5 in the Stamp Act and in the circumstances the Munsif was right in directing it to be stamped with an eight anna stamp and he rightly charged a penalty of Rs. 5. As the stamp duty and the penalty have already been paid the applicant is under no further liability, but his suggestion that the entry is not liable to stamp duty cannot be upheld. The view which we take upon the point is to all intents the same view as the view taken by a Bench of the Allahabad High Court in *Mahadeo Kori v. Sheoraj Rum Teli* (1). The result is that this application is dismissed. The applicant will pay his own costs. The other side has incurred no costs.

R.M./R.K. *Application dismissed.*

(1) [1919] 41 All. 169=52 I.C. 974=17 A.L.J. 19.

A. I. R. 1930 Oudh 195 (1)

STUART, C. J., AND WAZIR HASAN, J.

Mahabir—Defendant—Appellant.

v.

Mt. Mithan—Plaintiff—Respondent.

Misc. Appeal No. 27 of 1929, Decided on 24th April 1929, against order of Pullan, J., reported as *A. I. R. 1929 Oudh 278*.

Oudh Courts Act (4 of 1925), S. 12—No appeal lies from order under O. 43, R. 23, Civil P. C., passed by single Judge in exercise of appellate jurisdiction.

No appeal lies from an order under O. 41, R. 23, Civil P. C., passed by a single Judge of the appellate Court in exercise of his appellate jurisdiction. [P 195 C 1]

Salig Ram—for Appellant.

Judgment.—We are of opinion that the words "order against which an appeal is permitted by any law for the time being in force" in S. 12, Local Act, 4 of 1925, must be read with the previous part of the section and that the Act means that an appeal lies without a declaration, that the case is a fit one for appeal, against an original decree or against an order passed otherwise than on an appeal, if an appeal is permitted against such order by any law for the time being in force. Thus no appeal lies against this order which is an order under O. 41, R. 23, passed by a single

Judge of this Court in exercise of his appellate jurisdiction.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Oudh 195 (2)

RAZA, J.

Nageshwar—Defendant—Appellant.

v.

Taluk Singh—Plaintiff—Respondent.

Execution Decree Appeal No. 50 of 1928, Decided on 18th October 1928, from order of Addl. Sub-Judge, Gonda, D/- 30th January 1928.

(a) **Pre-emption—Decree for—Transfer of property by decree-holder—Right of pre-emption is not lost.**

If a pre-emptor obtains a decree and transfers not the decree but the property which is the subject matter of pre-emption the right of pre-emption is not lost, and the decree can be executed though execution will not be allowed to the transferee : 7 All. 107 and *A. I. R. 1922 Lah. 300, Foll.* [P 195 C 1]

(b) **Execution—Decree binding—Executing Court cannot go behind decree.**

The Court executing the decree has no power to go behind it. It cannot annul the decree or enter into any questions which are beyond the scope of the decree. [P 195 C 1]

Radha Krishna—for Appellant.

S. R. Roy—for Respondent.

Judgment.—This is an appeal from an order of the Additional Subordinate Judge, Gonda, dated 17th April 1928, setting aside an order of the Munsiff of Tarabganj at Gonda, dated 30th January 1928. The facts of the case are as follows:

Hubdar Singh and Jagmohan Singh were the original owners of the property in suit (a certain zemindari share in village Kataha Soleans in the District of Gonda.) They executed a mortgage by conditional sale in favour of Nageshwar and this mortgage was foreclosed in 1921. Taluq Singh then filed a suit for pre-emption and obtained a consent decree on 27th September 1927. Rs. 782-6-0 were to be deposited by the pre-emptor in Court within two months from the date of the decree. Taluq Singh executed a sale deed in respect of the pre-empted property in suit on 22nd November 1927, in favour of the original owners named above for Rs. 800. The sum of Rs. 782-6-0 mentioned above forms part of the consideration money. However, Taluq Singh himself deposited the decretal amount (Rs. 782-6-0) in Court on 26th November 1927. Having thus deposited the money under the de-

decree which was passed in his favour in the pre-emption suit, Taluq Singh applied for possession of the property in suit in execution of the said decree. Nageshwar then filed an objection on the ground that the right of enforcing the decree was lost as Taluq Singh decree-holder had already sold the property to the original owners. He filed this objection on 19th December 1927. This objection was allowed by the learned Munsif of Tarabganj on 30th January 1928. On appeal the order was reversed and the objection disallowed by the learned Additional Subordinate Judge of Gonda on 17th April 1928.

Nageshwar has come to this Court in second appeal. The appellant's learned counsel has contended before me that Taluq Singh decree-holder pre-emptor has lost his right to make the decree final by executing the sale deed mentioned above. In my opinion this contention is not well founded. No final decree was passed in this case. The decree has become final and is to be executed by the Court. Taluq Singh has complied with the directions given in the decree and I see no reason why he should not be allowed to execute the decree which was passed in his favour against Nageshwar and which has now become final. The Court executing the decree has no power to go behind it. It cannot annul the decree or enter into any questions which are beyond the scope of the decree. It should be borne in mind that what has been transferred is not the decree but the property which was the subject of pre-emption. The case of *Ram Sahai v. Gaya* (1) is an authority for the proposition that if a pre-emptor obtains a decree and transfers not the decree but the property which is the subject of pre-emption, the right of pre-emption is not lost and he may execute the decree though execution will not be allowed to the transferee. This case was followed in the case of *Mehr Khan v. Ghulam Rasul* (2). In my opinion the learned Additional Subordinate Judge was perfectly right in allowing Taluq Singh's appeal. I can find no ground for interference and dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 196

MISRA, J.

Saktay Sah and others—Plaintiffs—Appellants.

v.

Mahadin and others — Defendants—Respondents.

Second Appeal No. 321 of 1928, Decided on 13th February 1929, against decree of Sub-Judge, Hardoi, D/- 6th August 1928.

(a) Criminal P. C., S. 345 — Determination of whether or not offence is compoundable depends on offence directly charged in complaint.

In order to determine whether a case can be considered to be compoundable or not the Court has to look to the offence with the commission of which the accused is charged in the complaint, or in any case with which the Court charges him; and, therefore, it cannot be pleaded that though the offence with which the accused is charged is an offence under S. 325, Penal Code, yet the facts in the complaint are such that the accused might well have been charged with an offence under S. 147, Penal Code, which is an offence which could not be compounded and that therefore the settlement between the prosecutor and the accused cannot be arrived at: 20 C. W. N. 946, *Rel. on.*

[P 193 C 1]

(b) Criminal P. C., S. 345 — It is lawful to compound offence allowed by law — Such composition does not stifle prosecution and is not illegal within Contract Act, S. 23.

Where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecutor and the settlement so arrived at cannot be considered to be one, the consideration of which might be considered to be illegal. Where the offence charged is non-compoundable the settlement must be deemed to be invalid, but where the offence charged is compoundable the settlement cannot be deemed to be invalid because the legislature itself allows a settlement of such case and it cannot, therefore, be said that the object of such an agreement is opposed to public policy: 8 A. L. J. 493, *Foll.*; 3 C. W. N. 5; A. I. R. 1923 Bom. 305, *Rel. on.*; 17 O. C. 213, *Ref.*

[P 193 C 2; P 193 C 1]

(c) Contract Act, S. 23 — Court will not assist enforcement of illegal contracts — If parties to contract are in pari delicto Court will not help any one of them.

A Court of law will not assist persons in enforcing the performance of an illegal contract, or assist them to recover back the property which they have given away under such an illegal contract. When the parties to a contract are themselves in pari delicto the Court will not help any one of them. The person in whose favour the agreement has been executed will not be allowed to enforce it, nor will the person, who has paid the money in pursuance of that agreement, be allowed to recover the sum paid thereunder. There can be no distinction in principle between the granting of a relief by way of declaration and the restoring of

(1) [1884] 7 All. 107 = (1884) A. W. N. 224.

(2) A. I. R. 1922 Lah. 300 = 2 Lah. 282.

property given away under an illegal contract :
1 Pat. L. J. 48, Rel. on. [P 199 C 1]

Hyder Husain and G'ulam Hasan—
for Appellant.

M. Wasim—for Respondents.

Judgment. — The present appeal arises out of a suit for cancellation of two deeds and for recovery of Rs. 366 cash, brought by the plaintiffs-appellants against the defendants-respondents, which has been dismissed by both the Courts below.

The facts of the case are that there were certain criminal proceedings taken by the defendants-respondents, who are father and son against the plaintiffs-appellants. The respondents had lodged a complaint under S. 325, I. P. C., against the appellants and two others. The counter complaint under S. 323, I. P. C., was also brought by the appellants against the respondents. A mutual settlement was, however, subsequently arrived at between the parties to this case, under which the appellants agreed to execute two deeds in favour of the respondents, under one of which they agreed to sell a plot of land to the respondents and under the other to remove a latrine from the vicinity of the respondents' house. They also agreed to pay to the respondents a sum of Rs. 366 in cash. In consequence of this settlement applications were filed by both the parties in the criminal Court to get their respective cases dismissed and consigned to records. The appellants' case under S. 323, I. P. C., was dismissed without any difficulty, but there was at first some hesitation on the part of the criminal Court to give permission to the respondents to compound the case, which they had brought against the appellants. The Courts, however, subsequently agreed to give the parties permission to compound the case and the complaint was after such permission allowed to be ultimately withdrawn, and the plaintiffs-appellants discharged of the offence.

After they had been so discharged the two deeds of agreement executed by them were handed over to the respondents and the sum of Rs. 366 mentioned above was also paid. It may be mentioned that the two deeds and the money had remained in the custody of one of the pleaders of Bilgram named Babu Baldeo Prasad and had been

handed over to the respondents only when the Court had granted permission and the compromise was effected as a result of which they were discharged from the criminal Court. The appellants seem to have backed out of the agreement since they refused to get the two deeds registered and the respondents had to apply against them for compulsory registration of the said two deeds, which were registered only under the orders of the District Registrar. After this was done the appellants brought the present suit for cancellation of the two deeds mentioned above and for recovery of the sum of Rs. 366, which had been paid by them to the respondents.

The main allegations on which the appellants brought their present suit were to the effect that they had been compelled to execute the two deeds and to pay the amount in cash under fraud and undue influence, that no consideration had passed to the appellants in respect of the two deeds of agreement and that they were also void on the ground that they were executed with the object of stifling the criminal prosecution and were, therefore, void in law. The defendants-respondents contested the suit on the ground that the two deeds had been executed by the appellants out of their own free will and the money had also been paid by them willingly in order to save themselves from the consequences of the criminal proceedings, which had been instituted by them against the plaintiff, that the said deeds were executed for consideration and were quite binding upon the plaintiffs and that they were estopped from maintaining the present suit.

The learned Munsiff of Bilgram who tried the suit came to the finding that the two deeds had been executed and the money paid by the plaintiffs-appellants without any fraud or undue influence having been exercised upon them and that they had done so out of their free will and pleasure. He, therefore, dismissed the plaintiffs' suit. On appeal the learned Subordinate Judge of Hirdoi has confirmed those findings and dismissed the appeal. In second appeal it is contended before me that the two agreements and the payment in cash were transactions void in law, they being in pursuance of an agreement, the

object of which was to stifle the criminal prosecution and the plaintiff-appellants were entitled in law to obtain the declaration which they had sought for in the present suit.

In my opinion, there is no force in either of these two contentions and I proceed to give my reasons for the same.

As to the contention that the transaction was void being for an illegal consideration, the argument advanced was to the effect that though the offence with which the appellants were charged was an offence under S. 325, I. P. C., yet the facts in the complaint were such that the accused might well have been charged with an offence under S. 147 of the said Code also, which was an offence, which could not be compounded, and that, therefore, the settlement arrived at being for an illegal consideration was void under S. 23, Contract Act 9 of 1872. I regret I cannot accept this contention. In order to determine whether the case could be considered to be compoundable or not we have to look to the offence with the commission of which the appellants were charged in the complaint or in any case with which the Court charged them. In this case it is admitted that the respondents charged the appellants only with an offence under S. 325, I. P. C., and not with an offence under S. 147 of the Code. The Magistrate also did not charge them with an offence under S. 147, I. P. C. In such a case I am of opinion that it could not be held that the offence with which the appellants had been charged was one, which could not be compounded even with the permission of the Court. I am supported in this view by a decision of the Calcutta High Court reported in *Mahomed Ismail v. Samad Ali* (1). The facts of that case were that the Magistrate had, after examining the complainant summoned the accused under S. 325, I. P. C., although the allegations were made in the petition of the complaint as to an offence under S. 147 of the said Code also.

An agreement was in that case entered into between the parties and with the leave of the Court the case was compromised. It was held that it being a case under S. 325, I. P. C., it was com-

poundable with the leave of the Court and the Magistrate having given permission to compound the case, the agreement as to the settlement was not opposed to public policy. Similarly in the case before me it may have been possible for the respondents to charge the appellants with an offence under S. 147, I. P. C., and also for the Magistrate to charge them with that offence, yet the appellants cannot be considered as having been charged with that offence, when the Magistrate issue summons only on S. 325, I. P. C., and gave them permission to compound for that offence. I am, therefore, of opinion that the object of the settlement was not to stifle the prosecution.

It has been held in a large number of cases that where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecutor and the settlement so arrived at cannot be considered to be one, the consideration of which might be considered to be illegal. In *Amir Khan v. Amir Jan* (2), it was held that where the defendant agreed to execute a kabala (lease) of certain lands in favour of the plaintiffs in consideration of the latter's abstaining from taking criminal proceedings against the former with respect to an offence, which is compoundable the contract could not be regarded as forbidden by law or as against public policy and the same could be enforced.

The same view was held in *Chetan Das v. Hari Ram* (3). It was held in that case that the compounding of an offence which the law permits to be compounded is not opposed to the public policy within the meaning of S. 23, Contract Act 1872, and where such a compromise is entered into, the consideration of the agreement could not be considered as illegal, and it was not void. The Bombay High Court has also taken the same view recently in *Ahmad Hasan v. Hasan Mohamed* (4). In *Lachman Das v. Narain* (5), it was pointed out that an agreement to stifle a prosecution in respect of an offence of a public nature was against public policy

(2) [1899] 3 C. W. N. 5.

(3) [1911] 8 A. L. J. 498=10 I. C. 216.

(4) A. I. R. 1928 Bom. 305=52 Bom. 633.

(5) [1914] 17 O.C. 213=25 I. C. 409=1 O.L.J. 553.

(1) [1916] 20 C.W.N. 946=32 I.C. 227.

and illegal and where the consideration for a compromise was to withdraw a criminal prosecution for a non-compoundable offence the compromise could not be enforced.

It, therefore, appears to me to be a settled rule of law that where the offence charged is non-compoundable the settlement must be deemed to be invalid, but where the offence charged is compoundable the settlement cannot be deemed to be invalid, because the legislature itself allows a settlement of such case and it cannot, therefore, be said that the object of such an agreement is opposed to public policy. I therefore, hold that the settlement arrived at in this case was valid and the cash paid and the agreements executed by the appellants in pursuance of such settlement cannot be treated in law to be void.

Apart from this it appears to me to be equally clear that even if the agreement had been held to be void the appellants themselves could not be allowed to take advantage of their own action and to seek the assistance of the Court in obtaining a declaration which they desire to obtain in this case. The settled rule of law with regard to illegal contracts is that a Court of law will not assist persons in enforcing the performance of an illegal contract or assist them to recover back the property which they have given away under such an illegal contract. The principle is that when the parties to a contract are themselves in *pari delicto* the Courts will not help any one of them. The person in whose favour the agreement has been executed will not be allowed to enforce it, nor will the person who has paid the money in pursuance of that agreement be allowed to recover the sum paid thereunder. I am also of opinion that there can be no distinction in principle between the granting of a relief by way of declaration and the restoring of property given away under an illegal contract. I am supported in this view by a decision of the Patna High Court reported in *Bindeshwari Prosad v. Lekh Raj Sahu* (6), Chapman, J., observed in that case as follows :

"Where an illegal portion of an agreement has been carried into effect the whole matter

is outlawed and the Court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other. 'The Courts will not assist an illegal transaction' *Taylor v. Chester* (7). It is a scandal to assist a plaintiff to recover upon the ground that he has joined in breaking the law but this will not prevent the Court from intervening to frustrate the illegal purpose before it has been effected, or, in any event, from giving relief to the innocent. In particular, the Court will not in any case allow a defendant to retain the proceeds of fraud or oppression and the Court cannot refuse protection to those classes of persons whom the law seeks to protect. But in a case in which no such considerations arise if the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate. *Kearly v. Thomson* (8). In the present case the illegal portion of the agreement was the undertaking to withdraw from the prosecution of certain charges which the law says shall not be compounded. This illegal promise had been carried into effect beyond possibility of recall. One side now seeks a relief from the act done in consideration for the illegal promise. All that they can say in excuse of their breach of the law is that they were persons accused in those criminal cases. But '*executio juris non habet injuriam*,' and in the absence of any evidence to suggest that the criminal proceedings were improper it cannot be held that there was any fraud or oppression or that the accused took a more innocent part in the illegal compromise than the complainant. The authorities make it clear that a suit for the recovery of property transferred in consideration for such an illegal promise would not have lain. There is no direct authority that the principle would also defeat a suit which is not for the recovery of property but merely for a declaration that a sale deed executed in consideration for the illegal promise is void, and in America it has been apparently held that a declaratory suit would not be defeated. (Keenner on Quasi Contracts, P. 441). But if it is the scandal involved that defeats suits of this class, then the principle is clearly applicable to a suit for a declaratory decree. For so far as the scandal is concerned there is no difference between a suit for the recovery of property and a suit for a declaration."

I am in full agreement with the observations quoted above. The same view was taken by the Calcutta High Court in *Amjadnessa Bibi v. Rahim Buksh* (9), and by the Allahabad High Court in *Vilayat Hussain v. Misran* (10). I am, therefore, of opinion that the appellants cannot be allowed the relief claimed for by them in the present suit and that it has been rightly dismissed

(7) [1869] 4 Q. B. 309=10 B. & S. 237=38 L. J. Q. B. 225=21 L. T. 359.

(8) [1890] 24 Q. B. D. 742=59 L. J. Q. B. 288=54 J. P. 804=33 W.R. 614=63 L.T. 150.

(9) [1915] 42 Cal. 286=21 C. L. J. 642=28 I. C. 713=19 C. W. N. 383.

(10) A. I. R. 1923 All. 504=45 All. 396.

(6) [1916] 1 Pat. L. J. 48=33 I. C. 711=20 O. W. N. 760.

by the Courts below. I, therefore, dismiss this appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 200

MISRA, J.

Nur Ali—Defendant—Appellant.

v.

Shahzadi and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 104 of 1928, Decided on 9th November 1928, against decree of Addl. Sub-Judge, Hardoi, D/- 23rd May 1928.

Cosharer—Adverse Possession—Cosharer seeking to prove adverse possession against other cosharer must prove denial of latter's title by him and latter's knowledge of such denial

As possession of a cosharer is on behalf of and not adverse to the remaining cosharers, where certain cosharers set up their adverse possession against another it is incumbent on them to prove that they denied the title of such cosharer and that such a denial was brought to the knowledge of that cosharer. Until these two elements are established the case of adverse possession cannot be considered to have been made out: *A. I. R. 1926 Oudh 141* and *A. I. R. 1926 Oudh 258, Rel. on.* [P 201 C 2]

Alaqua Husain—for Appellant.

Mohammad Khalil—for Respondents.

Judgment.—This is an appeal arising out of a suit for possession of a portion of an abadi plot situate in mohalla Unchimani in the town of Bilgram, District Hardoi. The facts of the case are that one Ghulam Muhammad, a Muhammadan resident of Bilgram, was owner of a plot of abadi land 2699-2312 situate in Bilgram, the area of the said plot being 600 square yards sharai. Ghulam Muhammad had four sons, namely, Muhammad Bakhsh, Rustam Ali, Farhatullah, Saadat Ali and one daughter Mt. Ashuran. Saadat Ali had a son Muhammad Hasan and three daughters, named Mt. Ashrafunnisa Begam Mt. Ahmadi Begam and Mt. Amirunnissa Begam. Mt. Ahmadi Begam predeceased Saadat Ali and her entire property was inherited by his son and the two remaining daughters. Mt. Amirunnisa was married to one Zakir Ali and Mt. Ashrafunnisa was married to one Irshad Husain. He (Irshad Husain) was the son of Mt. Ashuran, one of the daughters of Ghulam Muhammad. The plot in dispute being situate in abadi had always a riyay's (tenant's) house situate thereon. The plaintiffs are transferees from

Irshad Husain son and heir of Mt. Ashuran, Zakir Ali, the husband and one of the heirs of Mt. Amirunnisa and from Mt. Ashrafunnisa Begam. The defendants are the transferees from the sons of Ghulam Muhammad. For the purposes of this appeal it is unnecessary to trace the history of these various transfers. The plaintiff claimed 200 square yards sharai or one-third out of the plot in dispute. It is admitted as stated above that the land has been all along in occupation of a riyaya.

The defendants contested the plaintiff's case by raising two principal points in their defence: firstly, that in the town of Bilgram a custom prevails among the Shia Muhammadans living in that town that the female heirs are not entitled to succeed and consequently the plaintiff is not entitled to any share in the plot in suit since he was a transferee from such female heirs or their successors: secondly, that the transferors of the defendants who were the sons of Ghulam Muhammad had been in exclusive possession of the plot in dispute and had, therefore, acquired title to the whole of it by means of adverse possession.

The learned Munsif of Bilgram who tried the suit came to the finding that the custom set up by the defendants had not been established, but the adverse possession of the sons of Ghulam Muhammad in respect of the entire plot in suit had been proved and in this view of the case he dismissed the plaintiff's suit by his decree dated 29th August 1927. On appeal the learned Additional Subordinate Judge of Hardoi took a different view on the question of adverse possession and was of opinion that there were no grounds for holding that such possession had been established. He, therefore, decreed the plaintiff's suit and gave her a decree for 1,355.9 square yards sharai out of the plot in dispute which according to the finding of the learned Munsif was the area to which the plaintiff was entitled on proper calculation. This decree is dated 23rd May 1928.

The defendants have now appealed to this Court and it has again been contended on their behalf that the plaintiff is not entitled to any share out of the plot in dispute, because the sons of Ghulam Muhammad were in exclusive possession of the entire plot in dispute and the

transferrers from whom the plaintiff has taken her share were never in possession of their share in the said plot. As the question relates to the adverse possession of the defendants-appellants' transferrers which is a mixed question of law and fact, and as the determination of this question depends entirely on the construction of documentary evidence, I have heard the parties at great length. In my opinion the view of the learned Additional Subordinate Judge on this question who has written a careful judgment is correct and must be maintained.

The plea of adverse possession is based upon several documents on the record which I now proceed to discuss. The first document is Ex. C-6, which is a certified copy of a kirayanamah executed by one Khairat Hussain in respect of the plot in dispute in favour of Farhatullah, Saadat Ali and Muhammad Bakhsh, sons of Ghulam Muhammad on 22nd December 1886. Khairat Hussain was a riyata and took the plot in dispute for building his house thereon. It was contended on behalf of the defendants-appellants that it clearly showed the adverse possession of the sons of Ghulam Muhammad. I do not agree with that contention. The only thing that the document shows is that the three sons of Ghulam Muhammad had leased out this plot to Khairat Ali. It is not denied that the sons of Ghulam Muhammad were in possession being the male members of the family, but it cannot be assumed that such possession of the heirs was necessarily adverse. They were admittedly cosharers in the property and it is now a settled rule of law that the possession of a co-sharer must be deemed to be possession on behalf of the remaining cosharers and cannot be considered to be adverse. I would only refer to the two recent decisions of this Court, namely, *Mahipal Singh v. Sarjoo Prasad* (1) and *Mahdeo Prasad v. Ram Phal* (2). I am therefore of opinion that Ex. C-6 does not establish the adverse possession of sons of Ghulam Muhammad.

The second document relied upon by the counsel for the defendants-appellants is Ex. C-29, which is a simple mortgage deed, executed by Farhatullah and Muhammad Husain in favour of Kazim Ali on 1st May 1913. As remark-

ed by the learned Subordinate Judge there was no transfer of possession under this deed and there is nothing to show that the transferrers of the plaintiff got any notice of this mortgage deed. It was contended by the learned counsel for the appellants that the deed being a registered deed, it must be presumed that the other heirs of Ghulam Muhammad had notice of it. I am not prepared to accept that contention. The female heirs were admittedly pardana-shin ladies and it would be too much to presume that they had notice of all the documents executed by the male members of the family. In a case like this where certain cosharers set up their adverse possession against another it is incumbent on them to prove that they denied the title of such cosharer and that such a denial was brought to the knowledge of that co-sharer. Until these two elements are established the case of adverse possession cannot be considered to have been made out. The latter element has not been proved and I agree with the learned Subordinate Judge that this transfer does not, therefore, prove the adverse possession of the sons of Ghulam Muhammad.

The next document relied upon is Ex. C-4. This is a statement of Mt. Amirunisa through whom her husband Zakir Ali one of the transferrers of the plaintiffs has derived his interest. This is her statement in an application for objection filed by her in the Court of the Munsiff of Bilgram on 17th June 1914. The application was filed in an execution case as an objection under O. 21, R. 58, Civil P. C., in regard to the attachment made by a certain decree-holder of the property belonging to Farhatullah and Muhammad Husain who were the judgment-debtors in that case. Certain houses and certain lands situate in Bilgram had been attached in execution of the decree. The plot in dispute was not the subject of attachment in that case, but in para. 3 of that application it was stated that her father Saadat Ali had died and that his son Muhammad Husain was his heir and in possession of the assets to the deceased, who had executed a deed of gift in her favour in regard to the plot which had been attached in that case. It was contended on behalf of the appellants that this was evidence of the fact that Mt. Amirun-

(1) A. I. R. 1926 Oudh 141.

(2) A. I. R. 1926 Oudh 253.

nisa or her sisters had never been in possession of the property in suit. I cannot accept this argument for two reasons, firstly that this statement of Mr. Amirunnisa cannot be considered to be binding upon her sisters, who do not claim through her; secondly, this statement does not at all relate expressly to the plot in dispute. The general allegation to the effect that one of the heirs was in possession of the property cannot be considered to mean that he was admitted to have been in exclusive possession or in any case in such possession of the entire property. The statement must be considered to refer only to the property which Mt. Amirunnisa is alleged to have acquired from Muhammad Hussan under the alleged deed of gift. I am, therefore, of opinion that this statement cannot destroy the title either of Mt. Amirunnisa or of her sisters in respect of the plot in dispute.

The learned counsel for the defendants-appellants did not rely upon any other evidence on the record. I, therefore, hold that the adverse possession of the transferrers of the defendants-appellants in respect of the plot in dispute has not been established and the decree of the learned Subordinate Judge in favour of the plaintiff-respondent was correctly passed. The appeal, therefore, fails and is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 202

SRIVASTAVA, J.

Thakurain Haraj Kunwar — Plaintiff—Appellant.

v.

Samad—Defendant—Respondent.

Second Rent Appeal No. 39 of 1929, Decided on 30th October 1929, against decree of Dist. Judge, Rae Bareilly, D/- 11th May 1929.

Oudh Rent Act (22 of 1886), S. 60—Ejectment—Notice of ejectment not contested or upheld in unsuccessful proceedings — Tenancy determines only when tenant surrenders possession or proceedings are taken under S. 60.

When a notice of ejectment is issued against a tenant and the notice is not contested or if a suit is instituted to contest the notice and the suit is unsuccessful and the notice is upheld, in either of these cases the tenancy is determined only when the tenant actually surrenders possession of the holding or when proceedings for actual ejectment are taken

under S. 60. Oudh Rent Act : A. I. R. 1926
Oudh 555, Ref, [P 202 C 2 ; P 203 C 1]

Radha Krishna—for Appellant.

Girja Shankar Srivastava—for Respondent.

Judgment.—This is a second appeal arising out of a suit under S. 127 read with S. 108 Cl. (2), Oudh Rent Act. Ilahi Khan the father of defendant-respondent was originally a tenant of the plaintiff-appellant in respect of land consisting of 21 bighas 11 biswas and 15 biswansis in area carrying a rent of 78-9-6 per annum. The plaintiff-appellant issued a notice of ejectment against Ilahi Khan for the year 1329F. Ilahi Khan brought a suit under S. 108 (3) Oudh Rent Act, to contest the notice of ejectment. On 18th April 1921 this suit was decided by means of a compromise under which the parties agreed that Ilahi Khan should retain 16 bighas out of the land in suit at a rent of Rs. 70-9-6 and should give up the remaining 5 bighas 11 biswas and 5 biswansis which was referred to in the compromise as subject to a rental of Rs. 13-3 per annum. As regards this area of 5 bighas 11 biswas and 15 biswansis the petition of compromise stated that the notice of ejectment would be upheld. The parties are agreed that a decree was passed in terms of this compromise and that the necessary lease was executed on the basis of the new contract settled between the parties in respect of the area of 16 bighas. However, Ilahi Khan did not give up possession of the 5 bighas 11 biswas and 15 biswansis land and it is no longer disputed that Ilahi Khan and after him his son, the defendant, have all along continued in possession of it. On 30th March 1928 the plaintiff instituted the present suit under S. 127, Oudh Rent Act, treating the defendant as a trespasser in respect of this area of 5 bighas 11 biswas and 15 biswansis. Both the Courts below have dismissed the suit on the ground that the defendant could not be treated as a trespasser but must be considered as continuing in possession of the land as a tenant as before. I think the decision of the lower Courts is correct. When a notice of ejectment is issued against a tenant and the notice is not contested or if a suit is instituted to contest the notice and the suit is unsuccessful and the notice is upheld, in

either of these cases the tenancy is determined only when the tenant actually surrenders possession of the holding or when proceedings for actual ejectment are taken under S. 60, Oudh Rent Act. In this case it is admitted that the tenant did not surrender possession of the holding. It is also conceded that no proceedings were taken under S. 60, Oudh Rent Act. It follows that the defendant must be deemed to have continued as a tenant. This view is supported by the decision in *Anporna Kuer v. Ram Ratan Singh* (1). In this case Misra, J., relying upon the Judicial Commissioners Select Case No. 180 and an unpublished decision of the Board of Revenue, held that a tenant cannot be treated as a trespasser until he has been formally ejected from his land or until the actual possession of his holding has been taken by the landlord. It was argued by the learned counsel for the plaintiff-appellant that the present case is distinguishable from the case just referred to inasmuch as a fresh lease was executed in respect of 16 bighas out of the original holding of 21 bighas odd. I do not think that this fact makes any difference in the application of the principle underlying the above decision. It is quite clear from the terms of the compromise that the notice was upheld in respect of 5 bighas 11 biswas and 15 biswansis in suit. The failure of the plaintiff to take proceedings under S. 60 in respect of this land must lead to the inference that the plaintiff allowed the defendant to hold over as before. I, therefore, agree with the learned District Judge that the defendant cannot be considered to be a trespasser and S. 127 does not apply to the case.

Another argument urged in support of the appeal was that even if the defendant was not a trespasser the plaintiff was entitled to have the rent in respect of the land in suit determined under S. 32-B, Oudh Rent Act. This argument proceeds on the assumption that there is no rent fixed in respect of the land but this assumption is without foundation. As I have pointed out before the petition of compromise expressly stated that the land in suit was to carry a rent of Rs. 13-3-0 per annum. S. 32-B has therefore, no application

(1) A. I. R. 1926 Oudh 555.

to the case. Moreover the present suit was one under S. 127 and not under S. 32-B, Oudh Rent Act. I must, therefore, overrule this contention also.

The appeal fails and is accordingly dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 203

WAZIR HASAN, AG. C. J., AND RAZA, J.
Bhajja—Defendant—Appellant.

v.

Chuttan—Plaintiff—Respondent.

Second Appeal No. 324 of 1929, Decided on 13th February 1930, against decree of Sub-Judge, Malihabad, Lucknow, D/- 16th September 1929.

(a) **Easements Act, S. 59—Transferee of land is not bound to respect wish of his transferrer to respect license in favour of third person—He can still withdraw it.**

Under S. 59, the transferee is not as such bound by the term of the license granted by the vendor. The wish expressed by the vendor in the deed of sale in favour of the licensee that license be respected by the vendee has no legal effect and in spite of it, according to the terms of S. 59, it is open to the transferee to withdraw the license. [P 204 C 1,2]

(b) **Civil P. C., S. 11—Suit for ejectment of licensee from predecessor-in-title—Previous suit by predecessor-in-title dismissed—Suit is not barred.**

Since the transferee of a grantor of a license is not bound as such by the license under S. 59, Easements Act, it follows that the transferee is also not bound by the result of a previous litigation between the grantor and the grantee, if the claim of the grantor has failed by reason of his failure to prove the ground on which he sought ejectment. [P 204 C 2]

Mohammad Azhar Ali—for Appellant.

Ali Zaheer—for Respondent.

Judgment.—This is the defendant's appeal from the decree of the Subordinate Judge of Malihabad dated 16th September 1929, reversing the decree of the Munsif, South Lucknow, dated 21st February 1929.

Both Courts are agreed in finding that the piece of land in respect of which the plaintiff claims relief of possession in the suit, out of which this appeal arises, belongs to the plaintiff under a deed of sale dated 3rd January 1925 executed by the former owner, one Darogha Raza Husain. The finding was accepted before us by the learned advocate for the defendant-appellant.

The question in the case is as to whether the defendant has any right to resist the plaintiff's claim for ejectment by virtue of his proprietary title. The

defendant pleads this right mainly on three grounds which were argued before us in support of the appeal :

(1) That the claim is barred by res judicata.

(2) That the plaintiff's title is subject to the terms of an agreement executed by the previous owner in respect of the land in suit ; and

(3) that the defendant has raised a permanent structure on the land in question.

The second plea in defence should be dealt with first as that is the position which it logically occupies.

On 16th July 1896 the defendant executed a document which is produced on the record of this case by the plaintiff. Presumably the plaintiff obtained possession of it from his predecessor-in-interest, Darogha Raza Husain, at the time when the latter sold the land in suit together with other properties to the former. A further presumption on the facts is that the document referred to above must on its execution have been delivered by the defendant to Darogha Raza Husain. The lower appellate Court has construed this document as a license granted by Darogha Raza Husain to the defendant in respect of the use of the land in suit as a wrestling ground. The use is clearly permitted without any consideration for it as the document states that the grant is being made without liability for rent and as a matter of personal favour. It was faintly suggested in the argument before us by the learned advocate for the defendant that the document of 16th July 1896 is not a license simpliciter but it also creates an interest in the land in suit in favour of the grantee. We are unable to accept this suggestion. On a proper construction of this document no other conclusion is possible than that it evidences a mere grant by way of license and does not create any interest in the subject matter of the grant in favour of the grantee.

This being the nature of the right which the defendant holds in the land suit it follows under S. 59, Easements Act, 1882, that the transferee is not as much bound by the terms of the license. The wish expressed by the vendor, Darogha Raza Hussain, in the deed of sale in favour of the plaintiff that the agreement of 16th July 1896 might

be respected by the vendee has clearly no legal effect and in spite of it, according to the terms of S. 59 already referred to, it is open to the transferee, which position the plaintiff occupies, to withdraw the license.

It will now be convenient to dispose of the third point urged in appeal. The lower Court has found that there exists today no structure of a permanent character made by the defendant on the land in suit. The argument therefore fails.

Little need be said on the plea of res judicata. It is true that a claim by Darogha Raza Husain for possession of the plot of land now in suit was dismissed against the defendant in the year 1909 (Ex. A-2). The decision may preclude Darogha Raza Husain from seeking ejectment of the defendant on a subsequent occasion on the same grounds on which he sought the relief of ejectment on the previous occasion and the relief was refused. It will be an open question as to whether Darogha Raza Husain's second claim for ejectment would be barred by reason of the previous decision if the claim were founded on the right of revocation of the license which obviously it was open to him to exercise whenever he chose. It is admitted that the previous suit of Darogha Raza Husain was not founded on that right of his. Be that as it may, if the transferee of a grantor of a license is not bound as such by the license under S. 59, Easements Act, 1882, it seems to us to follow that the transferee is also not bound by the result of a previous litigation between the grantor and the grantee, if the claim of the grantor has failed by reason of his failure to prove the ground on which he sought ejectment.

The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 204

PULLAN, J.

Mahadeo Prasad Bakkal—Plaintiff—Appellant.

v.

Mt. Jamila Khatoon—Defendant—Respondent.

Second Appeal No. 297 of 1929, Decided on 10th January 1930, against decree of Sub-Judge, Gonda, D/- 2nd August 1929.

U. P. Municipalities Act, Ss. 180 and 184
—District Magistrate upholding order of
sanction to build wall given by municipality
—Person aggrieved by such order can ask
for relief in civil Court.

A and B were owners of neighbouring plots. A alleged that one window and one door of his house opened on to the neighbouring plot and that he had a right of way in respect of the door and a right of easement in respect of the window. On an application from B the owner of the neighbouring plot, the municipality gave him permission to build a wall so as to block up the door of A. On appeal from A, the District Magistrate upheld the permission granted by the municipality, observing that "I have to look into the matter only from the municipal point of view" and again "the matter primarily is a question for the civil Court." A then brought a suit in the civil Court but both Courts found that under S. 321, Municipalities Act, the order of the District Magistrate was final and could not be questioned in a civil Court:

Held: that the order of the Board as confirmed by the District Magistrate had nothing to say as to A's right of easement: [P 205 C 2]

Held further: that as the case came under S. 180, it was, therefore, a case where A had a remedy in the civil Court: *A. I. R. 1926 Oudh 413, Dist.* [P 206 C 1]

Ram Prasad Varma—for Appellant.

Haider Husain and Mahmud Beg—for Respondent.

Judgment.—The appellant is the owner of a plot 682 situated in the Municipality of Gonda. The respondent owns the neighbouring plot 700. The appellant states that one window and one door of his house open on to that plot and that he has a right of way in respect of the door and a right of easement in respect of the window. The respondent made an application to the Municipal Board for permission to build on plot 700 so as to block up the door of the appellant. Permission was granted by the Municipal Board, and the appellant appealed to the District Magistrate under the provisions of the Municipalities Act. The District Magistrate passed an order dated 22nd February 1928 in which he accepted the present appellant's appeal, and ordered a pathway three feet wide to be left along the south and west wall of the new house. Subsequently the District Magistrate reviewed this order on the ground apparently that the opposite party had not been represented at the former hearing. He withdrew his order as to leaving a pathway on the ground that it was the back door only of the present appellant which opened on to this plot. In the course of his

order he observed, "I have to look into the matter only from the municipal point of view" and again:

"the matter primarily is a question for the civil Court. The Municipal Board's point is that there is no need to have a lane here and the value of the respondent's property will considerably be reduced if order is given to leave a lane."

The appellant then brought a suit in the civil Court, and two Courts have found that under S. 321, Municipalities Act, the order of the District Magistrate is final and cannot be questioned in civil Court. The learned Subordinate Judge in his order on appeal gives no reason for taking this view, but refers to a decision of this Court reported in *Municipal Board, Bara Banki v. Rajab Ali* (1). That ruling has no relevance to the present suit. It deals only with a case such as frequently arises where a person has been refused permission to build by the Board and tries to carry the matter further into the civil Court. The question between the applicant for permission to build and the Municipal Board is decided finally by the Board and the appellate authority. Once the applicant has failed in the Court of the appellate authority, in this case the District Magistrate, he cannot challenge the order in the civil Court, but this does not conclude the matter as between the applicant to build and a neighbour. It is true that a neighbour being an aggrieved person has right to appeal under the Municipalities Act and in so far as the order passed on that appeal is an order in which final jurisdiction is given by the Municipalities Act, he would be debarred from bringing a suit in the civil Court by S. 321 of the Act, but orders given under S. 180 of the Act, which is the section with which I am concerned in the present case, are subject to the provisions of S. 184 which indicates clearly that:

"A sanction given under S. 180 shall not, beyond exempting the persons to whom the sanction is given or deemed to have been given from any penalty or consequence to which he would otherwise be liable under Ss. 185, 186 or 222, confer or extinguish any right or disability or affect any title to property or have any other legal effect whatsoever."

The order of the Board, as confirmed by the District Magistrate in the present case, has nothing to say as to the plaintiff-appellant's right of way or

(1) *A. I. R. 1926 Oudh 413=29 O. C. 334.*

right of easement. These matters have not been decided. As the District Magistrate himself says he deals with the matter from the municipal point of view only. He finds that the municipality has no objection to the building and, therefore, it may be erected, but he does not say and could not say that the plaintiff-appellant has no right to object to the building on the grounds that have been raised by him in the present suit. Indeed, he expressly observes that the matter is primarily a question for the civil Court. This is not a case which can be dealt with under S. 318 by reference to the High Court. It is a case where the plaintiff-appellant has a remedy in the civil Court from the very first, where no order has been passed denying him his remedy and where, therefore, it is still open to him to seek his remedy in the proper Court, that is to say the civil Court.

I allow this appeal, set aside the decrees of the Courts below and order that the suit be restored to its original number and disposed of according to law. Costs will abide the result.

V.S./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 206

RAZA, J.

Qutbuddin—Plaintiff—Appellant.

v.

Abdullah Khan—Defendant—Respondent.

Second Appeal No. 78 of 1929, Decided on 5th October 1929, from decree of First Sub-Judge, Bahraich, D/- 17th November 1928.

Oudh Rent Act (22 of 1886), Ss. 36, 37, and 53—Mortgage of simple tenancy holding is unlawful and mortgagor is entitled to possession on refund of consideration.

A mortgage of a simple tenancy holding is unlawful and does not confer any right on the mortgagee to hold possession of the holding as such. On refund of the amount advanced the mortgagor in such a case is entitled to recover possession of the holding, but he is not entitled to mesne profits: *A. I. R. 1926 Oudh 270, Rel. on.* [P 207 C 1, 2]

Gulam Hasan—for Appellant.

R. D. Sinha—for Respondent.

Judgment.—These Appeals Nos. 50 and 78 of 1929, arise out of a suit for possession of certain tenancy land in village Pure Dubar Sain in the District of Bahraich. Appeal No. 50 is the defendant's appeal and appeal No. 78, the plaintiff's appeal.

The plaintiff holds the land in suit as a tenant from the talukdar of Nanpara. He brought the suit for possession of the land in question alleging that the defendant was a trespasser.

The claim was resisted by the defendant on various grounds.

The learned Munsiff framed five issues and found as follows:

1. The plaintiff did not relinquish his tenancy rights as alleged by the defendant. The defendant did not acquire any tenancy rights in the land and is not a tenant of the land in suit.

2. The suit is maintainable in the civil Court.

3. The defendant is in possession of the land in suit as a mortgagee from the plaintiff under the deed dated 23rd June 1925, as alleged by him.

4. The plaintiff is not entitled to any damages.

5. The plaintiff is entitled to a decree for possession of the land in suit on payment of the principal money and the interest due on the mortgage deed in question dated 23rd June 1925. The defendant is not entitled to any interest since 1st June 1926, as he has been in possession of the land since that date. The plaintiff has all along been willing to pay the principal and interest due on the deed in question. He will therefore pay the amount due on the deed to the plaintiff.

The result was that the plaintiff was given a decree for possession of the land in suit, on payment of the principal and interest due on the deed in question.

The plaintiff appealed, challenging the finding of the first Court on the question of damages and contending that he was entitled to get possession of the land in suit without payment of the amount due on the mortgage in question. The defendant filed cross-objections, challenging the findings of the first Court on issues 1 and 2. The learned Subordinate Judge, who heard the appeal dismissed the plaintiff's appeal and also the defendant's cross-objections. Thus he upheld the decision of the first Court.

The parties have now come to this Court in second appeal.

In my opinion there is no substance in these appeals.

I take up the defendant's appeal (No. 50 of 1929) first. The finding of the lower Courts that it is not satisfactorily proved that the plaintiff really relinquished his holding as alleged by the defendant, is supported by the evidence on record. It is also in evidence that no lease was granted to the defendant and that he was never recognized by the estate as the tenant of the land in suit. The plaintiff is still the tenant of the land in suit and he is recorded as such in the village papers. The appellant's learned counsel has argued before me that the plaintiff is estopped from alleging that there was no relinquishment and that he was the tenant of the land in suit. The plea of estoppel which has been raised by the defendant in this Court was not raised in the first Court and is not well founded in fact. The fact is that the defendant got possession of the land in suit under the terms of the deed Ex. A-5, dated 23rd June 1925, as held by the lower Courts. The learned Munsiff has construed this deed as a mortgage deed. The learned Subordinate Judge has construed it as a simple money bond. I have examined the deed in question. I agree with the finding of the learned Munsiff on this point. The deed in question purports to be a mortgage deed. It is of course invalid as a mortgage deed. It was executed for Rs. 100 but was not registered as required by law. It is invalid and unenforceable as a mortgage also because a mortgage of a simple tenancy holding is unlawful as held in *Dasrath v. Sandala* (1). The defendant cannot be allowed to hold the land as a mortgagee under the deed in question. The plaintiff's claim for possession of the land in suit was properly decreed by the lower Courts. There can be no estoppel when both parties are aware of the facts and the defendant must be held to have known that the right of tenancy which the plaintiff purported to mortgage was non-transferable. No estoppel can arise from ignorance of law which both parties must be presumed to know.

There is no force in the ground of appeal that the suit is not maintainable in the civil Court. This point was not urged in the course of arguments.

The result is that the defendant's appeal fails and must be dismissed.

Now I take up the plaintiff's appeal (No. 78 of 1929). The plaintiff contends that the relief granted to the defendant in so far as payment under a void mortgage was concerned could not be legally allowed. I am not prepared to accept this contention. The defendant has not sued for recovery of the amount due on the deed in question in this case. The plaintiff has admitted the deed in question. It has been found that the defendant got possession of the land in suit with the permission of the plaintiff under the terms of the deed. The plaintiff appellant's learned counsel has questioned the finding of the lower Courts on this point; but I find that there is evidence in support of the finding. The defendant's evidence shows that he had got possession of the land in suit with the plaintiff's permission, as the plaintiff had failed to pay off the debt under the terms of the deed in question. The plaintiff stated before the first Court clearly that he was ready and willing to pay the amount due on the deed in question to the defendant. I think the learned Munsiff was not wrong in these circumstances in giving the plaintiff a decree for possession of the land in suit on payment of the amount due to the defendant. The appellant's learned counsel informs the Court that the plaintiff has since deposited the money in first Court. He contends that the plaintiff ought to have been allowed damages. In my opinion this contention must be overruled. It has been found that the defendant had got possession of the land in suit with the plaintiff's permission and consent. This finding must be accepted in second appeal. As the defendant had got possession of the land in suit with the permission and consent of the plaintiff, the latter is not entitled to any damages. The plaintiff himself had put the defendant in possession of the land in suit. He is wrong in alleging that the defendant took possession of the land as a trespasser. The fact is that the defendant took possession of the land in suit with the plaintiff's consent under the deed executed by the plaintiff. The defendant of course cannot resist the plaintiffs' claim for possession of the land in suit as the deed is invalid; but no damages can be

(1) A. I. R. 1926 Oudh 270.

allowed to the plaintiff in the circumstances of this case.

The result is that both the appeals fail and must be dismissed. Hence I dismiss these appeals with costs.

V.B./R.K.

Appeals dismissed.

A. I. R. 1930 Oudh 208

SRIVASTAVA AND PULLAN, JJ.

(*Saiyad*) *Abdul Ghani*—Defendant—Appellant.

v.

Mt. Ali Begam—Plaintiff—Respondent.

First Rent Appeal No. 35 of 1929, Decided on 13th January 1930, against order of Assistant Collector, First Class, Unao, D/- 6th June 1929.

(a) *Contract Act, S. 37—Tender of amount less than sum admitted to be due is not legal.*

A tender of an amount less than what the debtor admits to be due from him is not a legal tender at all and the person to whom it is made does not run any risk in refusing it: 41 Cal. 493 (P.C.) and 16 Bom. 141, *Rel. on.*

[P 209 C 2]

(b) *Oudh Rent Act (12 of 1881), S. 108 (15) — Lambardar's charges should be allowed on total amount of collections.*

The charges should be allowed not on the amount of net profits but on the total amount of collections made by the lambardar. P210C1]

A. P. Sen and *S. C. Das*—for Appellant.

Muhammad Wasim—for Respondent.

Pullan, J.—This is an appeal by the defendant against the judgment and decree dated 6th June 1929, passed by the Assistant Collector of Unao. It arises out of a suit for profits under S. 108, Cl. 15, Oudh Rent Act. It appears that the parties are cosharers in village Rewal Mansokhera in the Unao District, the share of the plaintiff *Mt. Ali Begam*, being 14 annas and that of *Syed Abdul Ghani*, defendant, two annas. The latter is also lambardar. The suit was for profits for four years from 1332 F. to 1335 F. The plaintiff claimed Rs. 12 000 on account of profits and interest at 12 per cent per annum for the four years in suit.

The learned Assistant Collector has decreed the claim for Rs. 8,461-3 0 on account of principal, Rs. 2,588-5-0 on account of interest, Rs. 78-12-0 on account of Sewai, total Rs. 11,128-4-0 together with proportionate costs and future interest at 6 per cent per annum on the amount decreed.

The first contention urged on behalf of the defendant-appellant is that he had, before the institution of the suit, made two tenders, one of Rs. 2,000 on 30th October 1926 and another of Rs. 6,000 on 22nd May 1928 and that, therefore, the interest on the amount of profits due on the dates of the tenders should cease from those dates. The learned Assistant Collector has found the making of the first tender proved but held against the defendant in respect of the second tender. The learned counsel for the plaintiff-respondent accepts the correctness of the finding of the learned Assistant Collector in respect of the first tender, so it is no longer in dispute that on 30th October 1926, the defendant made a tender of Rs. 2,000 to *Mt. Ali Begam*, the plaintiff. As regards the second tender, it appears that on 22nd May 1928 the defendant made an application to the Court of the Assistant Collector at Unao saying that he had brought with him Rs. 6,000 and wanted to pay to one *Munshi Kazim Husain*, a general agent of the plaintiff but that the latter was unwilling to receive the money. The defendant, therefore, prayed that the said money be caused to be paid to *Munshi Kazim Husain* or that the applicant be permitted to deposit it in the Government Treasury, payable to the plaintiff.

The Assistant Collector thereupon called upon *Munshi Kazim Husain* to accept payment but as he refused to receive it saying that he had no permission to do so, the Court ordered the application to be consigned to records. The plaintiff has sought to meet this by examining one *Ashiq Hussin* another agent of the plaintiff who deposed that the village the profits of which were in dispute was under his sole charge and that *Kazim Husain* had no permission to accept rent or revenue in respect of a village not included in his circle. He also deposed that when he came to know on 22nd May 1928 that the defendant wanted to pay Rs. 6,000 he consulted his lawyer who advised him to receive payment on account, that he got an application written out expressing his willingness to take over the money but the defendant had in the meantime left Court and the Court had also risen for the day, so the applica-

tion could not be put in. Having examined the evidence carefully, we fail to find any sufficient grounds for supposing that the tender made by the defendant was only a ruse to create evidence in support of a plea to the effect that he should not be made liable for interest. If the story told by Ashiq Husain is correct, we do not see any reason why he should not have put in the application which he says had been prepared on 22nd May, on the day following or on any subsequent day. We are, therefore, of opinion that the fact of the alleged tender of Rs. 6,000 on 22nd May 1928, has been sufficiently proved.

Next the question arises whether these tenders can be considered effective for relieving the defendant of his liability to pay interest from the date of the aforesaid tenders. In this connexion it is important to note that the learned counsel for the defendant-appellant admits that on 30th October 1926 when he sent the money order for Rs. 2,000, the total amount of profits payable by him to the plaintiff for the years 1332 and 1333 F., which had already fallen due, exceeded Rs. 4,000. Similarly it is admitted that on 22nd May 1928 when the defendant made his tender of Rs. 6,000, the total amount of profits payable by him to the plaintiff and which had already fallen due, exceeded the amount of Rs. 6,000. The question, therefore, arises whether under such circumstances, the plaintiff was under any obligation to accept the amount tendered which was less than the amount actually due and payable on that date and whether by refusing to accept the payment, she would in law lose her right to claim interest to which she would otherwise be entitled. In *Durga Prasad Singh v. Rajendra Narayan Bagchi* (1) the facts were that the plaintiff brought a suit for arrears of rent, cesses and interest against the defendants. The defendants pleaded inter alia that the rent had been reduced and that they had tendered the amounts of the reduced rents and consequently that the plaintiff was not entitled to interest in respect of the amounts so tendered. It was held by their Lordships of the Judicial Committee that the defendants had

failed to prove any facts which would entitle them to any abatement of rent and that the tenders in respect of rent and interest upon arrears of rent which the defendants relied upon, having been tenders based on a reduced rent, were therefore not good tenders, either as tenders of rent, or of interest on arrears of rent and were ineffective. In *Haji Abdul Rahman v. Haji Noor Mahomed* (2), Telang, J., held that the rule laid down in *Dixon v. Clarke* (3) that the tender of only a part of a debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered. The soundness of this proposition may be open to doubt but it is unnecessary for us to express any opinion on the point in the present case inasmuch as it is admitted by the learned counsel for the defendant as pointed out above that the amounts due to the plaintiff on the dates when the two tenders were made, exceeded the amount tendered. So even upon the principle laid down by Telang, J., in this case the tenders relied upon by the defendant must be held to be ineffective to relieve the defendant of his liability for interest. In our opinion a tender of an amount less than what the debtor admits to be due from him is not a legal tender at all and the person to whom it is made does not run any risk in refusing it. For the above reasons we are of opinion that interest did not cease to run on the amounts tendered with effect from the date on which the tenders were made. At the same time we feel that the plaintiff's conduct in refusing to receive even in part payment the amounts offered to be paid was not reasonable. Under the circumstances we think that we might well reduce the interest which has been allowed to her by the lower Court. The learned Assistant Collector has allowed the plaintiff interest at the rate of 12 % per annum which amounts to Rs. 2,588-5-0. We think that the justice and equities of the case would be sufficiently met by allowing the plaintiff interest at the rate of 6 % per annum and we reduce the interest accordingly.

The next contention urged on behalf of the defendant-appellant is that the

(1) [1913] 41 Cal. 493=21 I. C. 750=10 I. A. 223 (P.C.).

(2) [1892] 16 Bom. 141.

(3) 5 C. B. 365=16 L. J. C. B. 237=5 D. & L. 155.

learned Assistant Collector is wrong in allowing him collection charges at the rate of 5 % on the amount of net profits only. It is argued that the defendant as lambardar should be allowed collection charges at the rate of 10 % on the amount of collections. It is admitted that the defendant has not given any evidence to prove the amount of actual expenses incurred by him in the making of collections. Under the circumstances we think that the rate of 5 % fixed by the lower Court is quite reasonable but the charges should be allowed not on the amount of net profits but on the total amount of collections made by the lambardar. The matter is so obvious that it has not been contested by the learned counsel for the plaintiff-respondent.

It was also argued that the plaintiff's claim for profits in respect of 1335 F. was premature, and that no interest or costs should have been allowed in respect of profits payable for this year. This argument seems to have been based on a mis-apprehension as regards the date on which the cause of action accrued in favour of the plaintiff in respect of her claim for 1335 F. Under S. 132, Oudh Rent Act, the cause of action arose on the last day of the month of Jeth of the fasli year in which the profits fell due. The last day of Jeth for 1335 F. corresponds to 3rd June 1928. The present suit was instituted on 5th June 1928. We must therefore overrule this contention.

Lastly it was contended that the amount of costs taxed in the decree of the lower Court is incorrect. The learned Assistant Collector had allowed to the plaintiff proportionate costs upon the sum decreed. As regards one item of Rs. 85 in respect of commissioner's fee, the learned Assistant Collector had found that Rs. 77-8-0 out of this amount had been paid by the plaintiff and Rs. 7-8-0 by the defendant. He directed that these costs should be borne by the parties to the extent they had already paid. The grievance of the defendant is that the decree as prepared in the lower Court makes him liable to pay Rs. 77-8-0 which had been paid by the plaintiff on account of commissioner's fee and that the plaintiff has been awarded full costs in respect of all the items other than the item of the costs of

stamps for the plaint. It is conceded that these objections are well founded. We, therefore, direct that the decree should be corrected so as to disallow the plaintiff the amount of Rs. 77-8-0 on account of commissioner's fee and to correct the amount of costs awarded to the plaintiff by taxing the proportionate amount in respect of each of the other items of costs incurred by her.

We, therefore, allow the appeal and modify the decree of the lower Court which should be amended in terms of our judgment. In the circumstances we order that the parties bear their own costs of the appeal.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 210

STUART, C. J. AND SRIVASTAVA, J.

Ram Pal Singh and others—Plaintiffs
—Appellants.

v.

Baldeo Bakhsh Singh and others—
Defendants—Respondents.

First Appeal No. 40 of 1929, Decided on 11th December 1929, from order of Sub-Judge, Fyzabad, D/- 15th January 1929.

Hindu Law—Partition—Partition during life time of father at instance of son—Mother takes equally with sons.

Where a partition is effected in father's lifetime between the father and the sons at the instance of a son, a mother takes a share equal to that of a son: 31 *All. 505, Rel. on.* [P 212 C 1]

Kashi Prasad Srivastava—for Appellants.

M. L. Saksena—for Respondents.

Judgment.—This is an appeal preferred by the plaintiffs against a decree of the learned Subordinate Judge of Fyzabad awarding them a share by partition in certain joint family property. Their case is that they have not been awarded a sufficient share. The family is a family governed by the Mitakshara Law. Sheo Dat Singh had in 1925 at the date of his death three sons Baldeo Bakhsh Singh, Raj Baksh Singh and Beni Madho Singh. Baldeo Baksh Singh had by a wife, who is now deceased, a son Rampal Singh who is plaintiff-appellant 1 and by a wife still alive, whose name has not been disclosed, two sons Kishori Saran Singh, and Kaunshal Kishore Singh. Before the death of Sheo Dat Singh, Rampal Singh on his own admission separated from his father

Baldeo Bakhsh Singh and went to live with his grandfather Sheo Dat Singh. After the death of Sheo Dat Singh his three sons Baldeo Bakhsh Singh, Raj Bakhsh Singh and Beni Madho Singh divided and separated all the property. There was a complete partition both of the immovable and moveable property. In the year 1928 Rampal Singh and his two minor sons instituted a suit for partition against Baldeo Bakhsh Singh, Kishori Saran Singh, Kaushal Kishore Singh, Raj Bakhsh Singh and his sons, and Beni Madho Singh and his sons. It is now admitted that Raj Bakhsh Singh and his sons and Beni Madho Singh and his sons should not have been joined as parties. It is noticeable that in this suit the wife of Baldeo Bakhsh Singh, who is the mother of Kishori Saran Singh and Kaushal Kishore Singh, was not joined as a party. The learned Judge decreed the suit in favour of the plaintiffs but allotted them a one-fifth share only. He considered that under the law Baldeo Bakhsh Singh, his three sons and his wife were each entitled to an equal share. He further found that plaintiff 1 had already received certain moveable property at the time of the partition between his father and his father's brothers and that certain other property which he claimed had been acquired by Baldeo Bakhsh Singh after Rampal Singh had separated from him. The plaintiff's main contest was that under a family custom he as the only son of one wife was entitled to as great a share as the two sons of the other wife. In order to succeed on this he had to prove the existence of such a custom.

We agree with the learned trial Judge that he has absolutely failed to establish the existence of any such custom. The property in question is situated in the villages of Barai Kalan, Mahauli Uprhar, Manja Mahauli and Ram Nagar Dhaurahra in the Fyzabad District and in the villages of Sultanpur, Lilar and Shahpur in the Barabanki District. The only evidence which he has produced in support of this custom is an extract from a *wajibularz* of Shahpur maufi. There is nothing to show that any of the property in suit is situated in Shahpur maufi. The family reside in the Mazarpur hamlet of Shahpur. But apart from that fact there is

nothing in this extract of the *wajibularz* to show that it was verified or accepted by any member of this family. No other evidence of any kind was produced. Rampal Singh, who went into the witness-box, did not state that he had any knowledge as to the existence of such a custom. In these circumstances the learned trial Judge rightly found against the appellants on this plea.

The next point which was taken by the plaintiffs-appellants was that the mother of Kishori Saran Singh and Kaushal Kishore Singh should not have been granted any share.

In the decree she is not granted any share specifically but her share has been calculated in the residue of the property which has not been partitioned. The argument here was that as she was not a party to the suit she should not have been granted any share. There is no force in this argument. The plaintiffs should have made her a party to suit if they had wished to contest her right on the facts. Under the law she was entitled to a share. It has been suggested in argument that she may have lost all right to a share by receiving *stridhan* from her husband Baldeo Bakhsh Singh. As against this it is sufficient to say that neither in the pleadings nor anywhere else was it suggested that she had received anything from her husband. In the trial all that the plaintiffs' pleader said on the subject is this:

"It is also admitted that the second wife of defendant 1 is alive. I do not admit that she is entitled to a share at the present partition."

That is all. There was no evidence. There was no argument. The next point that the learned counsel has taken is that under the *Mitakshara* Law she, as the mother of her sons, should be given a share out of the share of her sons. In other words his case was that Baldeo Bakhsh Singh should receive a 4-annas share, that his clients should receive a 4-annas share and that Kishori Saran Singh and Kaushal Kishore Singh and their mother should receive a 2-annas and 8-pies share each. He has no authority in support of this suggestion, and it appears to us clear from the *Mitakshara* itself that she is entitled to a share equal to the share of her husband. It is not a question of her being the step-mother of Rampal Singh but of her being the wife of Baldeo Bakhsh Singh. In

Colebrooke's Mitakshara, 3rd Edn. of 1867 at p. 261, Chap. 1, S. 2, para.9 it is:

"When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or by their father-in-law, must be made participant of shares equal to those of sons."

Exactly the same principle will be applied in a partition effected at the instance of a son.

This is a case of a partition in a father's lifetime between the father and the sons and in such a case the wives receive an equal share. Although the question was not directly before them the matter was discussed in a Full Bench decision. *Sheo Narain v. Janki Prasad* (1) at pp. 508 and 509 where the distinction between the law regulating partition during the lifetime of a father and the law regulating partition after his demise is discussed. We therefore find that the learned trial Judge rightly calculated that the mother of Kishori Saran Singh and Kaushal Kishore was entitled to a share of one-fifth. The next point taken up is that the finding of fact that Rampal Singh had already received satisfaction in respect of the distribution of the gold belonging to Sheo Dat Singh is incorrect.

We agree with the finding of fact. The next question is as to whether he should receive a share in the cattle purchased by and in the possession of his father Baldeo Bakhsh Singh. The evidence clearly shows that the cattle in question was purchased by Baldeo Bakhsh Singh after Rampal Singh had separated from him. Thus he is not entitled to a share in them. This decision covers all the arguments taken before us in appeal. We dismiss this appeal with costs.

V.B/R K. *Appeal dismissed.*

(1) [1912] 34 All. 505=16 I. C. 88=9 A. L. J. 749.

* A. I. R. 1930 Oudh 212

Full Bench

STUART, C. J., WAZIR HASAN AND
RAZA, JJ.

Bachcha—Defendant—Appellant.

v.

Jamna Das and others—Plaintiffs—Respondents.

Second Appeal No. 428 of 1928, Decided on 22nd July 1929 against decree of Sub-Judge, Rae Bareilly, D/- 24th August 1928.

* Landlord and Tenant—Tenant planting scattered trees—Unless transferable right to land exists right to transfer trees does not entitle transferee to more than timber of trees.

Unless a tenant having scattered trees in the village has a transferable right to the land on which the trees stand, even if he has a right to transfer the trees themselves, such transfer will not entitle his transferee to more than the timber of the trees: *A. I. R. 1927 Oudh 505, Appr. and A. I. R. 1925 Oudh 262, Ref.*

[P 214 C 2]

Radha Krishna—for Appellant.

H. D. Chandra—for Respondents.

Misra, J.—This is an appeal arising out of a suit for possession brought by the plaintiffs-respondents. The suit was for possession of certain trees detailed in the plaint together with land on which they stand. The plaintiff's allegation was that the trees belonged to one Ramanand, who was defendant 2 and who is respondent 6 in the present appeal, but has been discharged by the appellant, and that he had sold them to defendant 1 now the appellant before this Court by a sale deed dated 15th June 1922. The plaintiffs further alleged that according to the custom of the village the trees could not be transferred without the permission of the plaintiffs who were the landlords of the village and since the transfer had been effected without their permission, it was void in law and defendant 1 should be treated as a trespasser and that the plaintiffs had a right to take possession of both the trees as well as of the land on which they stood. Defendant 2 the vendor did not appear to contest the suit. The suit was, however, contested by defendant 1, who denied that any such custom as was alleged by the plaintiffs existed in the village and urged that defendant 2 was fully competent to sell the trees, which belonged to him. He also pleaded that there was a previous mortgage existing on the said trees, which he had redeemed after his purchase, and in case the plaintiffs were given a decree in respect of the trees and the land, the decree could not be passed without directing the plaintiffs to pay to defendant 1 the amount, which he had spent in redeeming the said mortgage.

The learned Munsif of Partabgarh who tried the suit held that there was no mention in the *wajibularz* of the custom alleged by the plaintiffs in res-

pect of the scattered trees and that the plaintiff's had therefore failed to prove the said custom. He therefore held that defendant 2 possessed a right to sell the trees, which admittedly belonged to him and he was fully competent to execute the sale deed referred to above. In this view of the case he dismissed the plaintiff's suit by his decree dated 16th February 1928.

The plaintiffs appealed against this decree and the learned Subordinate Judge of Rae Bareilly, who heard the appeal took a different view of the case. He agreed with the finding of the trial Court that the custom alleged by the plaintiff had not been established and the point was also given up by the counsel for the plaintiffs who had argued the appeal before him on their behalf. On the authority of a case reported in *Mohammad Akbar v. Lachman Prasad* (1) the learned Subordinate Judge, however, held that although defendant 2 had a right to sell the trees and was competent to execute a sale deed in respect thereof, in favour of defendant 1, yet the latter, who was merely a purchaser of those trees, could only acquire by his purchase a right only in the timber of the trees but none to enjoy the trees or the land on which they stood. In this view of the case he accepted the appeal, set aside the decree of the learned Munsif and decreed the plaintiffs' suit for possession of the land directing defendant 1 to remove the trees purchased by him within three months from the date of the decree. In default the plaintiffs were given right to get the trees removed on execution side.

Defendant 1 has now appealed against this decree to this Court. The learned advocate for the appellant contended that since both the Courts below had found that the custom of non-transferability in respect of the trees as alleged by the plaintiffs had not been established, defendant 2 must be deemed to be the full owner of those trees and competent to sell them to defendant 1.

His argument was that the possession of defendant 1 over the trees could not, therefore, be disturbed and he was entitled to remain in possession and enjoyment thereof as long as the trees stood. He further contended that the ruling in *Mahammad Akbar v. Lachman Prasad* (1)

quoted above had laid down the law rather widely.

On a consideration of the law on the subject it appears to me that the rule of law laid down in *Mahammad Akbar v. Lachman Prasad* (1) requires some reconsideration. So far as I am aware the rule of law in Oudh has been that if it is found that a tenant who is in possession of the scattered trees has no right to transfer the said trees without the permission of the landlord, but has a right only to enjoy the fruit of the trees as long as they stand and if such a tenant transfers the trees to another person without such permission the vendee cannot enjoy the fruits of those trees by remaining in possession thereof against the consent of the landlord. In such a case the landlord would be entitled in law to compel the vendee to remove those trees from his land. In case, however, it is established that the tenant has got a right to sell the trees and does so, the vendee must be allowed to remain in possession thereof and to enjoy the fruits thereof. The very essence of possessing a right to transfer is that the person in whose favour the transfer is executed steps into the shoes of the transferer, and the landlord cannot eject him from the possession of the land so far as it is necessary for the enjoyment of the trees nor can he compel the vendee to remove the trees, which have been purchased by him.

The learned Judge responsible for the decision reported in *Mahammad Akbar v. Lachman Prasad* (1) has relied upon his own previous decision reported in *Azmatunnisa v. Ganesh Prasad* (2). I do not think the facts of that case were such that it could be relied upon for the proposition enunciated in the case reported in *Mohammad Akbar v. Lachman Prasad* (1). The facts of the case reported in *Azmatunnissa v. Ganesh Prasad* (2) were that it had been established in that case on the strength of the wajibularz of the village that a non-sharif riaya (tenant of low caste) had no right to sell his house or the site on which it stood. One Mt. Radha owned a house in the village in capacity of such a tenant and executed a sale deed in favour of one Jalpa Prasad represented in that case by his two sons Ganesh Prasad and Rajjan Lal. On the strength

(1) A. I. R. 1927 Oudh 505.

(2) A. I. R. 1925 Oudh 262=28 O. C. 113.

of the custom recorded in the *wajib-ul-arz* the trial Court had come to the conclusion that the alienation effected by Mt. Radha was invalid and that the landlord the appellant in that case was therefore entitled to recover possession of the site of the house by directing the respondents to remove the materials of the house, which they had purchased. It will appear from the facts stated above that the custom as to non-transferability had been established in that case, whereas in the present case no such custom has been established. I am therefore of opinion that the case reported in *Mohammad Akbar v. Lachman Prasad* (1) should be reconsidered by a Full Bench. The point involved is one of general importance and is likely to affect a large number of tenants in the province of Oudh. The point which I would, therefore, refer to a Full Bench for decision under S. 14, Cl. (1), Oudh Courts Act 1925, is as follows :

Where it has been established that a tenant having scattered trees in a village has a right to sell them and sells such trees, is the landlord entitled to compel the vendee to remove the trees and not to allow him to enjoy the fruits of those trees as long as they stand ?

Opinion

Stuart, C. J.—The following point has been referred to a Full Bench for decision under S. 14, Cl. (1), Oudh Courts Act of 1925 :

“Where it has been established that a tenant having scattered trees in a village has a right to sell them and sells such trees, is the landlord entitled to compel the vendee to remove the trees and not to allow him to enjoy the fruits of those trees as long as they stand?”

This question was referred by the late Mr. Misra. I regret that I am unable to answer it by an affirmative or a negative. I have first to explain the circumstances in which the question arose and then my view of the law upon the facts. Here an agricultural tenant had planted trees in various plots of land, if not with the express permission of the taluqdar, at any rate without any opposition on his part and had continued to enjoy the fruits of those trees (in instances in which they bore fruit) until he mortgaged the trees with possession. He mortgaged the trees with possession and the mortgagee then used the trees in the same manner in which he had used them himself. He sold the right to

redeem to Bachcha, the present appellant. Bachcha redeemed the mortgage. The taluqdar then instituted the present suit for the ejectment of Bachcha from the plots on which the trees stood and from the trees themselves. The suit for his ejectment from the plots appears to have been misconceived as it does not appear that he had been in possession of those plots and it would appear that the decree of the lower appellate Court ejecting him from the plots had been passed on a misconception of the facts. The real point, however, with which the Court was concerned was this. Does Bachcha's purchase entitle him to the same rights as appertained to his vendor or does it entitle him only to remove the trees or does it entitle him to nothing? It is agreed that in the circumstances of the case he obtained some rights. The question is what are those rights? It is common ground in this case that he must have at least the rights to remove the timber. But has he anything more? In my opinion he has nothing more. There has been no special contract or custom to the contrary. His vendor can only be considered as a licensee of the land on which the trees stood. The vendor had the right to use the land both for the planting of the trees and for the sustenance of the trees while they were alive.

But could he transfer this right? In the absence of custom or contract he certainly could not, for he was only a licensee and such a license as he possessed is not transferable. Therefore when he transferred the trees he could not transfer the right to use the land and once the right to use the land had departed the only benefit that could be left to the vendee was to remove the trees. My view appears to me to be very much the same view that was taken by my learned brother Hasan, J. in *Mahammed Akbar v. Lachman Prasad* (1). I should answer the question that unless a tenant having scattered trees in the village has a transferable right to the land on which the trees stand, even if he has a right to transfer the trees themselves such transfer will not entitle his transferee to more than the timber of the trees.

Wazir Hasan, J.—I entirely agree with the view which the learned Chief

Judge has just now expressed on the question of law involved in this reference. If I may respectfully do so I may add that the legal basis on which the learned Chief Judge has placed this question is the sound basis and it would seem to be implied in my decision in a previous case: *Mohammad Akbar v. Lachman Prasad* (1) to which the learned Chief Judge has referred. In that case I followed the principle of another decision of mine in *Mt. Azmatunnisa v. Ganesh Prasad* (2) and it appears that the principle involved in both classes of cases, that is the right of a tenant in a house without any right in the site of the house and the right of a planter of a tree in the village lands without any right in the soil of the tree, stands on one and the same footing.

Raza, J.—I am in full agreement with the judgment of the Hon'ble the Chief Judge. My answer to the question referred to the Full Bench for decision is the same as that given by the Hon'ble the Chief Judge.

R.K.

Reference answered.

A. I. R. 1930 Oudh 215

RAZA AND PULLAN, JJ.

Hafiz Ali—Defendant—Appellant.

v.

Rani Indar Kuar—Plaintiff—Respondent.

First Appeal No. 68 of 1929, Decided on 25th February 1930, from order of Addl. Sub-Judge, Sitapur, D/- 30th April 1929.

Deed — Construction — Original bequest for life subsequently increased by deed of gift—In absence of evidence proving departure from previous intention and conferring absolute estate, estate does not become heritable.

Where the original intention of the donor is to bequeath by will a life-estate in certain property and he subsequently increases the grant by means of a deed of gift, in default of definite evidence to the effect, that at the time of the deed of gift the donor had departed from his previous intention and decided not only to make an immediate gift of property considerably larger than that bequeathed under the will, but at the same time to confer an absolute title in place of a life-interest, grant will not per se create heritable estate: 23 *All.* 194 (*P.C.*), *Rel. on.*; 3 *O. L. J.* 354 and 11 *Cal.* 121 *Ref.*; 8 *All.* 39; *A. I. R.* 1926 *Oudh* 561, *Expl.*

[P 217 C 2, P 218 C 1]

Aliraza—for Appellant.

Ali Zaheer, Radha Krishan S. N. Srivastava and Azizuddin—for Respondent.

Judgment.—The facts out of which this appeal arises may be briefly stated. Raja Surindra Bikram Singh had no legitimate son but he was the father of a boy by a Mahomedan woman and on 13th August 1884 he executed a deed described as a deed of gift on a stamp of the value of Rs. 100 in favour of this boy Qaim Ali by which he purported to make him a voluntary gift of two thousand bighas in the village of Meondi Chhulha and a half share in the village of Iranpur Sutaui. Subsequently he exchanged the other half share of the village Iranpur Sutaui for the two thousand bighas in the village Meondi Chhulha and Qaim Ali remained until his death in possession of this village of Iranpur Sutaui. Raja Surindra Bikram Singh died in 1902 and Qaim Ali died on 26th April 1927. On his death Qaim Ali's son applied for mutation of his name in place of that of his father in respect of this village. An objection was made on behalf of the widow of Raja Surindra Bikram Singh which was dismissed by the revenue Court and the widow has now filed this suit for possession of the property on the allegation that Qaim Ali had a life-estate only and that on his death the property devolved upon the widow of Raja Surindra Bikram Singh. This suit has been decreed by the Court below and the only question which we have to determine in appeal is whether the deed of gift executed in favour of Qaim Ali conferred upon the latter an absolute and heritable estate or whether it gave a life-estate only. Every document must be construed as whole and we therefore think it proper to reproduce this deed in full. The following is the translation which commends itself to us:

"Whereas Qaim Ali is my son by a concubine and is in every way entitled to maintenance and on this account a will was previously executed on 18th May 1881, in respect of half of village Iranpur Sutaui, Pergana Kondri, but this is not deemed at all sufficient for his maintenance; I have therefore by mutual consent voluntarily gifted in addition two thousand bighas kham land situate in village Meondi Chhulha and hereby, in a sound state of body and mind, without reluctance or compulsion, execute this deed of gift in respect of 10 biswas share i. e., one half of village Iranpur Sutaui, bearing Hadbast No. 34, Pergana Kondri, and only two thousand (2000) bighas (Kham) of land in village Meondi Chhulha, bearing Hadbast No. 478, Pergana Kondri, Tahsil Biswan, District Sitapur, bounded as

below, of which the value is rupees eight thousand (8,000) half of which amounts to rupees four thousand (4,000) in the details given below, in favour of my son Qaim Ali, and I hereby agree and give it in writing, that the donee shall remain in possession of the gifted lands in the same manner as myself. I shall never at any time or under any circumstances have any claim of any kind in respect of the lands gifted and as regards mutation, I give this stipulation in writing that, whereas the village Sutauli is mortgaged with possession to Lala Sita Ram, Bunker of Biswan, I shall within three years, at the time of redemption get mutation according to law effected, in favour of the donee, and at that time mutation in respect of village Meondi Chhulha will be also effected. After mutation the donee shall appropriate to his own use whatever profits, after payment of Government revenue and village expenses, accrue from the gifted property. I shall have no rights existing in the property gifted. If, God forbid, any other person puts forward any claim I shall be responsible to answer the same.

In proof where of these few words by way of a deed of gift are given in writing, in order that the same should be of service when required."

This document read as a whole and by itself would in our opinion be properly construed as an out and out deed of gift and would as such, being a gift made by an instrument, under the Hindu Law be presumed to carry an estate of inheritance. But in construing this document we must consider the circumstances under which it was executed and in particular the person in whose favour it was executed. Qaim Ali was an illegitimate son and as such in accordance with village custom as laid down in the wajibularz of this village he was entitled only to food and raiment and we know that this village custom was in the mind of his father when he executed the will on 28th May 1881 to which reference is made in Cl. 1 of the deed of gift. In the will it is clearly stated :

"that a half share of the village Iranpur Sutauli was bequeathed according to the conditions of the wajibularz for the maintenance of Qaim Ali because a son not born from the lawfully wedded wife gets maintenance allowance as distinct from a legitimate son and although the will (Ex. 2 P. 3 of Part 3 of the printed record) contains a clause to the effect that Qaim Ali shall enter into possession and occupation of half of the aforesaid village like myself after my death and get mutation of name effected in his favour in place of my name through Court,"

we have nothing in the will which we could construe as conferring an absolute heritable estate on Qaim Ali.

When we turn from the will to the deed

of gift we find that the latter is based on the former and purports to extend the property given because the half share of the village was not sufficient for maintenance and when the deed of gift is read in this light it does not appear to give in clear terms an estate of a different nature to that which was bequeathed under the will. It was held by the late Judicial Commissioner of Oudh in the case of *Bunyad Husain v. Mt. Hazirunnisa* (1) that where it is shown that some lands were granted by way of maintenance the presumption is that the grant was made for the lifetime of the grantee and that view is strictly in accordance with the view taken by their Lordships of the Privy Council in the case of *Raja Rameshar Baksh Singh v. Arjun Singh* (2). In the latter ruling their Lordships extended their previous decision reported in *Mahomed Abdul Majid v. Fatima Bibi* (3) and as far as we know there is authority of the Judicial Committee for the view that a gift made as *guzara* can be held to confer a heritable title. At the very least a strong presumption arises from the nature of such a gift that it is a gift of the life-estate only and if that presumption can be rebutted this can only be done by clear and definite proof of the intention of the donor. We have been referred on behalf of the appellants to a ruling of this Court reported in *Ahmad Azim v. Shafi Jan* (4) where the following passage occurs :

"We do not wish to lay down the broad proposition that in no case where the purport of the grant is maintenance the estate conferred can be an absolute estate. This would in our opinion depend on the construction of the particular deed taken as a whole. If the deed stated clearly that the grantee was to have an absolute interest such interest cannot be controlled by the mere fact that the motive of the grant was maintenance but where the terms of the grant are not clear and there are inconsistent conditions in the deed itself pointing to opposite conclusions the safe rule is to construe the document as a whole and not to hold it to confer absolute title merely on the ground that the words used were "as proprietor" and "for ever" and "in perpetuity."

We are not prepared to dissent from

- (1) [1916] 3 O. L. J. 354=35 I. C. 764.
- (2) [1901] 23 All. 194=23 I. A. 1=7 Sar. 804 (P. C.).
- (3) [1886] 8 All. 39=12 I. A. 159=4 Sar. 670 (P. C.).
- (4) A. I. R. 1926 Oudh 561.

that expression of opinion but it does not carry us far in the present case because there is little or nothing in the deed of gift before us which cannot be explained away. There is practically no positive evidence outside the deed itself that an absolute estate was conferred and there is one piece of evidence that an absolute estate was not in fact intended. We are referred to a mortgage deed (Ex. 5) executed jointly by Raja Surindra Bikram Singh and Qaim Ali on the 18th May 1893. In this mortgage deed it is clearly stated that the entire village Iranpur Sutaui was : "owned and possessed by me executant 1" that is to say Raja Surindra Bikram Singh and later : "that half of the village Iranpur Sutaui and land measuring two thousand bighas in Meondi Chhulha has been gifted to me Qaim Ali under the deed of gift as maintenance allowance."

Now if the gift had been absolute the owner would have retained no right and if the words "owned and possessed by me executant 1" have any meaning they must mean that the deed of gift conveyed a life-estate only and that reversionary interest remained with the donor. The words in the deed itself on which reliance is placed are :

"(1) In the same manner as myself,

(2) I shall never at any time or under any circumstances have any claim of any kind in respect of the lands gifted and,

(3) After mutation . . . I shall have no right existing in the property gifted."

But the words "in the same manner as myself" refer only to possession and the two clauses in which the donor gives up his rights may be limited to the period for which the deed is operative and if the deed was intended to convey a life-estate those clauses would not operate after the death of the donees. This is in accordance with the view taken by their Lordships of the Privy Council in *Kali Das Mullick v. Kanhaiya Lal* (5) where a gift was expressed in terms :

"I put a stop to my interest in those taluqs and withdraw all my enjoyment thereof and make them over to you."

It was held that those words must be taken to be limited by the purpose of the gift and that the donor's intention was that the donee should take the property for life only. For the appellant we have been asked to consider

an alleged assertion of title by Qaim Ali against the present plaintiff, when a certain decree-holder attempted to execute a decree against this village. No doubt in the objection made to the execution by Qaim Ali (Ex. A-4) the objector stated that he was the owner of the village and that it had been in his possession and ownership for the last twenty-eight years and as the result of this objection the property was released from attachment but we cannot help noting that the order releasing the property was passed on the very same day on which the objection was filed and there is nothing to show that Rani Inder Kuar had notice of the objection and we doubt whether an assertion by a person who admittedly had a life-estate in the village and was entitled to have it released from attachment that he was owner goes very far to prove that he possessed an absolute and heritable estate.

It appears to us that this is a case in which we must follow the decision of their Lordships of the Privy Council reported in *Raja Rameshar Baksh Singh v. Arjun Singh* (2) to which we have referred above. In that case the evidence before the Court was that of a baz dawa or surrender made by one Sheo Narain in respect of the village Nidhan Kuer Khera which had been given to him for maintenance by his father Daljit and an application made by the successor of Daljit that instead of Nidhan Kuer Khera certain other property should be recorded in the name of Sheo Narain. In this application it was requested that Sheo Narain should be entered as proprietor in perpetuity. But their Lordships held that the presumption raised by the fact that the first village was granted for maintenance only extended to the second and larger grant and even such words as "proprietor" and "in perpetuity" were not enough to rebut that presumption. Thus in the present case where the original intention of the donor was to bequeath by will a life-estate in certain property and he subsequently increased the grant by means of a deed of gift we are not prepared to find in default of definite evidence to that effect that at the time of the deed of gift the donor had departed from his previous inten-

(5) [1935] 11 Cal. 121=11 I. A. 218=4 Sar. 578 (P. C.).

tion and decided not only to make an immediate gift of property twice as much as that bequeathed under the will but at the same time to confer an absolute title in place of a life-interest.

The learned Judge of the Court below has given certain other reasons for supposing that Raja Surindra Bikram Singh was unlikely to give more than a life interest by way of maintenance to his illegitimate son but in our opinion those considerations are outside the scope of this appeal.

We have no knowledge as to what motive may have influenced the Raja in the year 1884 except such as may be derived from the terms of the documents which we have had to construe namely the will, the deed of gift and the subsequent mortgage. After a careful consideration of these documents we feel bound to conclude that the gift was made primarily for maintenance of an illegitimate son and that therefore we must draw a presumption that a life estate only was intended and there is no sufficient evidence either in the documents themselves or elsewhere to rebut that presumption. We accordingly agree with the Court below that the estate conferred upon Qaim Ali was extinguished by his death and that the plaintiff is entitled to succeed in this suit. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 218

PULLAN, J.

Fakiray Singh—Defendant—Appellant.

v.

Mt. Ranjita—Plaintiff—Respondent.

Second Appeal No. 337 of 1929, Decided on 24th January 1930, against decree of Sub-Judge, Lucknow, D/- 29th August 1929.

U. P. Land Revenue Act, S. 233—Civil Court has jurisdiction to give relief against trespasser.

Where there is a suit brought by the landlord against either a trespasser or a person who asserts proprietary title, but is not and has never been found to be a tenant, the civil Court can give relief by means of transferring possession to the landlord. *A. I. R. 1916 P. C. 150; Dist.* [P 219 C 1]

Gaya Prasad—for Appellant.

Rashi Prasad—for Respondent.

Judgment.—This appeal arises from a suit brought by one Mt. Ranjita for

possession of a certain plot and recovery of Rs. 60 as damages. The defendant Fakiray Singh is admittedly a cosharer in the village and he pleads that he has taken this land into his cultivation as his own khudkasht, and that his possession cannot be challenged by another cosharer. The Courts below have found that by private agreement between the cosharers this plot was first of all in the possession of Narpat Singh, subsequently in possession of his son Champa Singh and after the death of the latter in possession of Raghubar Singh whose widow Mt. Ranjita is the plaintiff in this suit. They have also found that Mt. Ranjita made over cultivation of the plot to the defendant on batai, and they have given her the decree which she sought. In appeal it is argued in the first place that a decision in a previous suit decided once for all the question of partition and operates as res judicata, secondly that the matter has been already decided by a revenue Court and cannot be reopened; and lastly that, in any case, the decree of the civil Court should be for declaration only and not for possession.

The first plea relates to a suit for profits brought by the cosharers against, among others, the present plaintiff and the present defendant. The defendants set up a partition in the time of Narpat Singh and his brother Bodhey Singh and the Courts held that partition was not proved and that the cosharers were liable to pay the profits. That decision cannot now be challenged, but all that it proves is that there was no partition in this mahal. It does not show that the cosharers did not make a private arrangement by which each of them held his own khudkasht land separately. On the contrary both the first Court and the appellate Court left this question open in that case and the Judicial Commissioner's Court did not decide the question. In my opinion it is amply proved that the cosharers did make such a division of their khudkasht and the judgment in the previous case did not and could not decide the question and, therefore, does not operate as res judicata. The second objection refers to an application made for correction of the khewat, or more properly the khasra, made by Mt. Ranjita in the revenue Court in respect of this number in 1924.

The decision of the revenue Court was that Fakiray Singh held this number as a cosharer and was, therefore, a finding against Mt. Ranjita but, in the first place, it did not decide the question of tenancy and, in the second place, it was a decision which, under the terms of S. 44, Land Revenue Act, does not affect the right of any person to establish their claim in respect of the same land in civil Court.

The third point argued is that if the civil Court had jurisdiction to decide the conflicting claims of the plaintiff and the defendant, it could go no further and could not give possession. I have been referred to a decision of their Lordships of the Privy Council, *Mohammad Abdul Hasan v. Prag* (1) in support of the view that in Oudh the civil Courts had no jurisdiction to give a decree for ejectment of a tenant. In that case their Lordships pointed out that the Subordinate Judge had found that the defendant had no proprietary or under-proprietary right in the village and was merely a tenant. It was because of this finding that their Lordships held that the landlord could not obtain a decree for ejectment in a civil Court, as it was the ejectment of a tenant to whom Act 3 of 1901 applied, and such ejectment in Oudh is exclusively within the jurisdiction of the Court of revenue. In my opinion that ruling has no application to the present case. There has been no order of the revenue Court which decides that the defendant in the present suit is a tenant.

On the contrary the order referred to finds that he is not a tenant. The civil Court had, therefore, to decide a case in which the landlord states that the defendant is a trespasser and the defendant states that he is himself a cosharer, and I find no authority for the proposition, that where there is a suit brought by the landlord against either a trespasser or a person who asserts proprietary title, but is not and has never been found to be a tenant, the civil Court cannot give relief by means of transferring possession to the plaintiff. In my opinion the lower Courts are correct in finding that this number has been cultivated exclusively by Narpat Singh and his immediate descendants as their khudkasht, and has never been the

khudkasht of the defendant or his ancestors. He has merely attempted to assert a title against a widow who put him in possession of the plot under the impression that he would cultivate as a tenant.

The plaintiff, therefore, was entitled to the decree granted by the Courts below and I dismiss this appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 219

SRIVASTAVA, J.

Har Narain Dass—Plaintiff—Appellant.

v.

Gajraj Singh and others—Defendants—Respondents.

Second Rent Appeal No. 54 of 1929, Decided on 19th February 1930,

(a) U. P. Local Rates Act (1 of 1914), S. 8—Where first part of S. 8 and Cl. (a) apply rate payable under Cl. (a) is in addition to that under first part.

The first part of S. 8 is joined to Cl. (a) of that section by the word "and" which would show that in case Cl. (a) applies, the rate payable under that clause is to be paid in addition to the rate payable under the first part of the section. [P 220 C 1]

(b) U. P. Local Rates Act (1 of 1914), S. 8 (a)—Application.

The application of the clause depends upon the question whether at the commencement of U. P. Act 1 of 1914, the rural police rate payable under the U. P. Local and Rural Police Rates Act of 1906 in respect of the land in suit was wholly recoverable from the defendants under-proprietors, or not. [P 220 C 2]

Mahesh Prasad and Ganga Dayal Khare—for Appellant.

K. P. Misra—for Respondents.

Judgment.—This is the plaintiff's appeal against the decision dated 21st September 1929 passed by the District Judge, Gonda, affirming the decision dated the 26th September 1927 passed by the Sub-Divisional Officer, of Qaisarganj, district Bahraich. It arises out of a suit for recovery of under-proprietary rent including malikana and local rates for the years 1331F to kharif 1334F in respect of three villages Holpara Tajpur and Chilharia. The amount payable by the defendants respondents for rent and for malikana is no longer in dispute. The only controversy between the parties is as regards the amount payable by the defendants on account of local rates. It is the common case of both parties that the first part of S. 8, United Provinces Local Rates Act (1 of

(1) A. I. R. 1916 P.C. 150=20 O. C. 8 (P. C.).

1914) applies to the case. The learned Assistant Collector reduced the rule contained in the first part of S. 8 into the form of an algebraical formula and worked out the amount of local rates for each of the three villages in suit in accordance with that formula. The calculation made by the Assistant Collector was accepted as correct by the learned District Judge. The learned counsel for both parties have admitted before me that the amount payable under the first part of S. 8 as worked out by the trial Court is correct. But the learned counsel for the plaintiff appellant contends that in addition to the amount allowed by the two Courts below under the first part of S. 8, Local Rates Act, the plaintiff is entitled also to the amount payable under Cl. (a) of that section.

The learned counsel for the defendants respondents on the other hand maintains that the plaintiff can claim the rate payable either under the first part of the section or under Cl. (a) but not both. His argument is that as it is the common case of both parties that the first part of S. 8 governs the case, therefore it must be held that Cl. (a) has no application to the case. In my opinion the contention urged on behalf of the plaintiff appellant is correct. The first part of S. 8 is joined to Cl. (a) of that section by the word "and" which would show that in case Cl. (a) applies, the rate payable under that clause is to be paid in addition to the rate payable under the first part of the section. The argument urged on behalf of the defendants-respondents might have had some force if we had the disjunctive "or" and not the conjunctive "and" between the first part and Cl. (a) of the section. The learned counsel for the defendants-respondents also referred to the provisions of S. 17, Local Rates Act, and pointed out that under this section, under-proprietors have been released from their liability to pay for the maintenance of the rural police from the time of the enactment of the Local Rates Act. His argument is that the interpretation sought to be put on behalf of the plaintiff-appellant on Cl. (a) of S. 8, is tantamount to making the under-proprietor liable for the rural police rate in spite of the fact that they have been expressly exempted from the liability of maintaining rural police under S. 17

of the Act. The argument has left me unimpressed. In my opinion the object which the legislature had in view was to make under-proprietors who had been exempted from the liability to pay the rural police rate payable under the United Provinces Local and Rural Police Rates Act, 1906, to pay local rates imposed under S. 8 at a higher rate, namely, the rate prescribed in Cl. (a) in addition to the rate payable under the first part of that section. I am therefore of opinion that if Cl. (a) applies to the case the defendants must be held liable to pay the rates under that clause in addition to the rates for which they have been held liable under the first part of the section.

Next the question is whether Cl. (a) applies to the case or not and if it does apply, the amount of rates payable under that clause. The application of the clause depends upon the question whether at the commencement of U. P. Act 1 of 1914, the rural police rate payable under the U. P. Local and Rural Police Rates Act of 1906 in respect of the land in suit was wholly recoverable from the defendants under-proprietors, or not. S. 14, U. P. Act 11 of 1906 laid down that:

"the rural police rate shall be recoverable, in whole or in part by the landlord from an under-proprietor . . . who is bound by law, decree or contract to provide wholly or in part for the maintenance of rural police."

Exhibit A is an agreement dated 13th February 1866 between Baba Charan Das, predecessor-in-title of the plaintiff and Bhaya Lal Bahadur Singh, the predecessor-in-title of the defendants, which provides that the latter was liable for the salaries of the patwari and Chaukidar in villages Chilharra and Tajpur. Reference to this agreement is to be found also in the wajibularz of these two villages which are Exs. A1 and A3. As regards the third village Holpara, Ex. A 2, the wajibularz of this village, provides that the under-proprietor is liable for the patwari and chaukidari expenses. In this connexion it might also be mentioned that in a previous case between the same parties decided by Babu Shambhu Nath by his judgment dated 20th August 1926, Ex. A-9, it was admitted that the defendants were paying the whole rural police rate before Act 1 of 1914 came into force. I am therefore satisfied that Cl. (a) applies

to the case. As regards the amount payable under this clause I am indebted to the learned counsel for both parties for their making the necessary calculation. They have in agreement with each other stated before me that the amount payable under Cl. (a) for village Holpara works out to Rs. 14-0-11 for village Tajpur to Rs. 2-2-2 and for village Chilharia to Rs. 6-8-6, total Rs. 22-11-7.

The result therefore is that I allow the appeal and give the plaintiff a decree for Rs. 22-11-7 together with interest thereon at 12 per cent per annum from the date of suit and proportionate costs on this amount. The amount decreed above is in addition to the decree passed by the lower appellate Court and that decree will be modified accordingly.

V.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 221

PULLAN AND SRIVASTAVA, JJ.

Thakur Sri Ram Singh—Defendant—Appellant.

v.

Surajpal Singh and others—Plaintiff and Defendants—Respondents.

Second Rent Appeal Nos. 1, 2 and 3 of 1929, Decided on 10th February 1930.

(a) U. P. Land Revenue Act, S. 44—Mere entry in khewat recording members of Hindu family as cosharers does not prove separation so as to raise presumption under S. 44—Onus is on members alleging separation—Hindu Law—Partition.

The entry in khewat recording members of a joint Hindu family as cosharers with or without specification of their shares does not by itself prove separation and no presumption under S. 44 can be drawn that the family is separate. Once this presumption is removed the members are faced with the presumption of Hindu Law that a family once found to be joint remain joint until there is proof of separation and the onus of such proof is on persons alleging separation: 11 O. C. 381, *Ref.* and A. I. R. 1926 Oudh 499, *Dist.* [P 222 C 1,2]

(b) Oudh Rent Act, S. 108 (14)—S. 108(14) refers to suit by cosharer having definite separate share—Members of joint Hindu family cannot sue karta or other members for share of profits.

Clause (14), S. 108, refers to a suit brought by a sharer i.e., a person who has a definite separate share, against a lambardar or cosharer. A member of an undivided Hindu family has no such separate right and cannot sue the karta or other members of the joint family for a share of the profits. [P 223 C 1]

Ishri Prasad, Daya Krishna Seth and Raghbir Sahai Srivastava—for Appellant.

S. C. Das and Raj Bahadur Ashtana—for Respondents.

Judgment.—These three appeals may be decided in a single judgment as, although they refer to separate properties, the questions in dispute are the same. The plaintiffs are the minor sons of one Maharaj Singh, and the answering defendant, who is the appellant before us, is their uncle Sri Ram Singh. The plaintiffs sued for their share of profits in these villages alleging that they are entitled to a separate one-fourth share. The defence set up was that this was a joint Hindu family during the period in suit and that, therefore, no suit lay on the part of the plaintiffs against defendant 1 who was the karta or manager of the joint Hindu family. The Courts below have decided in favour of the plaintiffs and the lower appellate Court has made it clear that he has based his decision on a view of law which he has expressed as follows in the early part of his judgment:

"The plaintiff-respondents 1 to 3 are recorded cosharers of a one-fourth share in each of the three villages and according to S. 44, Land Revenue Act, the entries of their names in the khewats with specified shares raise a presumption that they are proprietors of the said shares and are entitled to maintain suits for profits and the party contesting the suit, setting up the contention that the family is joint, was bound to prove the same as a proposition contrary to the legal presumption provided by S. 44, Land Revenue Act"

and the lower appellate Court relied upon a decision of this Court, *Mt. Thakura v. Mt. Gobinda* (1). Throughout the judgment the learned District Judge has referred constantly to this legal presumption and he has clearly laid the burden of proof upon the defendant to show that the family was joint. We have considered very carefully the question whether there is a finding of fact by the lower appellate Court which would be binding upon us in second appeal but we have come to the conclusion that any such finding that there may be is vitiated by the error made by the learned Judge on the point of law. Thus, after discussing the defendant's evidence and rejecting it, he has said of the plaintiff's evidence that it is not above criticism but as it is supported by a legal presumption under S. 44 it would not be unfair to ignore its defects and accept it as good evidence proving a separation in the family. Similarly where he comes to his conclusion that the family is separate, he has again based that finding on the

(1) A. I. R. 1926 Oudh 499=29 O. C. 115.

previous sentences where he says that it is idle on the defendant's part to put up the plea that the family was joint to meet the legal presumption afforded to the plaintiff-respondents by S. 44, Land Revenue Act.

We have to consider what is the presumption which can be based on an entry in the khewat such as this. It has been held many times that such an entry does not prove separation. It is sufficient for our purpose to refer to the judgment of a Bench of the Judicial Commissioner's Court reported in *Suraj Bakhsh v. Raghuraj Kuar* (2). It was there held that the mere fact that the names of two brothers are entered in the revenue papers as the owners of specified shares does not constitute separation. The judgment of this Court on which the learned Judge of the Court below relied and which has been quoted to us in appeal, does not, in our opinion, prove anything in support of the view taken by the Court below. In that case the dispute was between a widow who claimed an estate on the ground that she owned a certain share as the heir of her husband. She had in her favour an entry in the village papers. The Court found that such entries should be presumed to be true until the contrary is proved, and also found in that case that the contrary had been proved, that the lady's name had been entered for consolation only and that she was not a cosharer. In the present case it is not contended that the plaintiffs are not cosharers and it is admitted that their share in the estate is one-fourth. The question is only what does this entry mean. Constantly we find Hindu joint families in which the names of every single member are entered in the revenue papers with or without a specification of their shares, and it is for this reason that the Courts have held that such entries do not prove separation. The entry does prove that the share given to each member in the revenue papers is the share to which he is entitled in law if and when the family is separated, and in view of the decisions to which we have referred it can mean no more. Thus we cannot say that S. 44, Land Revenue Act entitles us to presume that the family was separate or that the plaintiffs are entitled to bring a suit for profits as separate cosharers of one-

(2) [1908] 11 O. C. 391.

fourth in these villages, and once that presumption is removed, they are faced with the presumption of Hindu law that a family once found to be joint remains joint until there is proof of separation. In the present case it is conceded that this family was formerly joint and apparently that the defendant acted as karta long after the year 1901, when the entry was made on which reliance is placed by the plaintiffs. It is even found by the Court below that the quarrel arose six or seven years ago and it is only then that there was a real separation in spite of the entries of the year 1901. We consider, therefore, that the Court below was wrong in placing the burden of proof of jointness upon the defendants. Rather he should have held that all that could be presumed from the revenue records was that the plaintiffs are entitled to a one-fourth share in this property and that there is no presumption whatever as to whether they are or are not separate members of this family. Thus the burden of proof was on them to rebut the presumption of Hindu Law in favour of jointness and their evidence should have been considered by the Courts below from an entirely different point of view. In our opinion it is impossible for us to decide this matter ourselves and we must accordingly remand these suits for a finding on the following issue :

"Were the plaintiffs separated members of this family during the years 1330 to 1332 Fasli."

The lower appellate Court is directed to return a finding on this issue on the evidence already on the record within two months. Ten days will be allowed for objections on receipt of the finding. (On receiving the finding the following judgment was delivered.)

Judgment. — These three appeals were remanded by this Bench for a finding on the following issue :

"Were the plaintiffs separated members of this family during the years 1330 to 1332 Fasli."

The lower Court following the instructions given by us in our order of remand laid the burden of proof upon the plaintiffs. The plaintiffs relied mainly on the fact that their names were recorded in the revenue papers as owners of a one-fourth share in this property and they also sought to prove a partition in the family at a certain date. We had already

held that the mere entry in the papers is not sufficient evidence that a joint Hindu family has separated and the Court below has held that the plaintiffs totally failed to prove separation at the date alleged by them. We feel bound, therefore, to accept the finding of the Court below that this family is still joint. We have been asked to consider the question whether even though the family is joint members thereof can sue for a share of profits under the Oudh Rent Act. We have been shown a ruling of the Allahabad High Court in which it was held that under the Agra Tenancy Act, 2 of 1901, the revenue Court was bound to presume that a person recorded as having a proprietary right had such a right and that the words "shall presume" in S. 201, Cl. (3) of that Act mean an irrebuttable and conclusive presumption. This is a finding based upon the wording of the Agra Tenancy Act, and we are unable to apply that finding to the Oudh Rent Act which contains no such provision. This case comes under S. 108, Cl. (14) of the Act, and this clause, in our opinion refers to a suit brought by a sharer, that is a person who has a definite separate share, against a lam-bardar or cosharer. We consider that a member of an undivided Hindu family has no such separate right and cannot sue the karta or other members of the joint Hindu family for a share of the profits. We, therefore, allow these appeals with costs, set aside the order of the Court below and we dismiss all three suits with costs.

R.M./R.K.

*Appeals allowed.***A. I. R. 1930 Oudh 223**

STUART, C. J. AND RAZA, J.

Ali Qader and others—Appellants.

v.

Secy. of State—Respondent.

First Appeal No. 59 of 1929, Decided on 21st January 1930.

**Land Acquisition Act (1 of 1894), S. 23—
"Market value"—Meaning explained.**

The market value, which under the provisions of S. 23, should be given is the potential value of the property at the time of acquisition which would be paid by a willing buyer to a willing seller when both are actuated by the business principles prevalent in the locality at that time. [P 224 C 1]

*Ali Zaheer, Mohammad Ayub and Wasi Ahmad Akhgar—for Appellants.**G. H. Thomas—for Respondent.***Judgment.**—This is an appeal

against an award made by the District Judge of Lucknow on a reference made to him under S. 18, Land Acquisition Act (Act 1 of 1894). The facts are these: There is in the Wazirganj quarter in the Lucknow city a police station which has been in existence for many years. The acquisition in question was made by the Crown to take up land on the other side of the road from that police station, in order to construct residential quarters for police officers serving in the station. The plot in question is a triangular plot 6 biswas 9 biswansis and 19 kachwansis in area, that is to say, roughly about 6½ biswas. The Crown offered the appellants who were the owners of the plots, Rs. 1,104 as compensation. They claimed Rs. 18,000. The Crown not increasing its offer the appellants applied for a reference under S. 18, Land Acquisition Act. On that reference the learned District Judge has awarded them, Rs. 1,265. Being dissatisfied with this award they have appealed to this Court. Here, however, they have only claimed Rs. 5,000 more than the amount already awarded. In the trial Court the case set up for the appellants was that the land was valuable as a building site for shops and that one person had offered Rs. 18,000 for it and that two persons had offered Rs. 10,000 for it but that their predecessor-in-interest had refused to sell the land even for the higher price as he thought it was worth more. We have no difficulty in determining the quality of this plot. The learned trial Judge adopted the sensible course of seeing the plot for himself and has described what it looks like. It is a triangular plot of land in an untidy condition and it is not level. Upon it is standing a mound and the land is full of depressions. There were found upon it five persons, artisans and others, who have constructed their own mud huts where they have been living for a considerable period. For the use and occupation of the land these persons have been paying the following rent. Two have paid Rs. 2 a month each. One has paid Rs. 1-12-0 a month. One has paid Re. 1 a month. One has paid 12 annas a month.

The total income from this source of the appellants in the past has thus been Rs. 7-8-0 a month equal to Rs. 90 a year. It is to be noted that the Crown

has compensated separately these persons for their removal from the site. The appellants as far as these tenants are concerned will lose the amount of rent that they received from them. But they further allege that they will lose the value of the services which these persons rendered them without payment as a part consideration for the occupation of the land. The learned District Judge has valued these services at Rs. 20 a year and has accordingly fixed the income at Rs. 110. He has capitalised the compensation on the basis that the income is Rs. 110. The learned counsel for the appellants questions this decision on the following grounds. His case is that the compensation should be based not on a capitalisation of the present income but on the potential value that the land would have as a building site. We agree with him that the calculation should be made on the potential value. As we understand it the market value, which under the provisions of S. 23, Act 1 of 1894, is the value that should be given under the Act, is the potential value of the property at the time of acquisition which would be paid by a willing buyer to a willing seller when both are actuated by the business principles prevalent in the locality at that time. But on this view we find that the potential value has been rightly calculated on an annual valuation of Rs. 110. The suggestion that any sensible person would have paid from Rs. 10,000 to Rs. 18,000 for this site is one which cannot be regarded seriously after having paid such a sum to remove the mound, to level the site and then to construct shops upon it would be to court disaster, for it is clear to us that any such attempt would involve a heavy loss. We do not believe the evidence that suggests that such offers had ever been made. We are convinced that if any man had been foolish enough to make such an offer the offer would certainly have been accepted. We next have to consider whether, taking the land as it is a piece of irregular bad land containing a few hovels, there is any reason to suppose that in years to come it is likely to become more valuable than it is at present. We can find no reason to suppose this. There has been considerable development in Lucknow City in the course of last thirty years

but this land has remained exactly the same. No attempt has been made to improve it or to utilise it in a more ambitious manner and we are of opinion that if the land were allowed to remain in its present state 30 years hence it would still be containing a few hovels and the occupiers would still pay the same small amount of money for the use of the ground. So we accept two of the views of the learned Judge. One is that the actual income is Rs. 110 a year. We find that this is not only the actual income but the potential income. We further find that the market value should be determined on a capitalisation of the annual income. The learned Judge has awarded applying the principles laid down in para. 477, Chap. 15, Board of Revenue Manual, ten times the gross annual rent. We do not accept these principles and we do not consider that this is a fair capitalisation. There is no question here between gross annual rent and net annual rent, for the occupiers constructed their own hovels and made their own repairs. Thus Rs. 110 represents the net income of the appellants. It is only fair that they should receive a compensation which will give them in the future Rs. 110 a year. We arrive at the compensation in this manner. In Lucknow at the present moment any man may expect to lend out money at 6 per cent. simple interest annually on good security. He will always be able to obtain that rate. He may obtain more. We consider that the appellants should have no difficulty in investing the compensation they obtain to secure them a return of six per cent. Thus they are entitled to sixteen and two-third years' purchase. Sixteen and two-third years' purchase of Rs. 110 comes to Rs. 1,833-5-4. Fifteen per cent. as compensation for compulsory acquisition on Rs. 1,833-5-4 amounts Rs. 275. Thus the compensation that we award is Rs. 2,108-5-4. We thus allow this appeal to the extent of Rs. 843-5-4. As the appellants claimed Rs. 5,000 they are not entitled to full costs. As, however, we consider that they were obliged to come into Court we consider that they deserve something more than proportionate costs on which they will lose and direct that the costs in both the Courts be borne by the parties.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 225

PULLAN AND SRIVASTAVA, JJ.

Bisheshar Bakhsh Singh and another
—Defendants—Appellants.

v.

Jang Bahadur Singh—Plaintiff—Respondent.

First Appeal No. 9 of 1929, Decided on 10th December 1929, against decree of Sub-Judge, Bahraich, D/- 22nd December 1928.

(a) Hindu Law—Alienation—Widow—Construction of temple and ghats by widow is conducive to spiritual benefit of deceased husband's soul.The construction of a temple and ghats is regarded by Hindus as an act of high religious merit and that the constructions if made by a Hindu widow with that object, would be conducive to the spiritual benefit of her deceased husband's soul. 2 *Luck.* 713, *Ref.* [P 227 C 1]**(b) Oudh Estates Act (1 of 1869), Ss. 11 and 22 (7)—Intention—Alienation by widow of Hindu taluqdar is not valid beyond her lifetime—Any pecuniary liability incurred by her cannot be enforced against reversioners.**The intention of S. 11 read with the terms of Cl. 7, S. 22 and the definition of "heir" given in the Act, seems clearly to be that the widow should not be competent to make any transfer of the whole or any portion of the estate beyond her lifetime. The words "for her lifetime only" seem clearly intended to provide that while she is to be allowed full enjoyment during her lifetime yet she must leave the estate unimpaired for the reversioner. Any pecuniary liability incurred by her cannot be enforced against the estate in the hands of the reversioners after her death: *A. I. R.* 1922 *P.C.* 403; 18 *O. C.* 289; 1 *O.D.* 264; *A. I. R.* 1927 *Oudh* 278, *Ref.*; 18 *Cal.* 111; 25 *All.*; 478; *A.I.R.* 1922 *P. C.* 403; *A. I. R.* 1928 *P. C.* 87, *Dist.*
[P 230 C1,2]**(c) Hindu Law—Widow—Powers of widow to contract debts binding on her husband's estate discussed.**Hindu widow fully represents the estate for the time being. This being so, she must by the nature of circumstances from time to time enter into transactions for the proper management of the estate. If she incurred a debt for lawful purposes or entered into any transaction giving rise to pecuniary liabilities in respect of which she could validly create a charge upon the estate, there seems to be no reason why the creditor should not be allowed to recover his debt or to enforce his claim against the estate in the hands of the reversioners. To hold otherwise would lead to obvious inconvenience and hardship and would create unnecessary difficulties in the path of the widow's making proper management of the estate. It should, however, be borne in mind that the position in a case in which a Hindu widow incurs a liability personal to herself or borrows money on her personal security and not as representing the estate, would obviously be different. 6 *Cal.* 36 and 35 *Mad.* 108, *Rel. on.*
[P 233 C 1,2]**(d) Oudh Estates Act (1 of 1869), Ss. 11 and 22 (7)—Widow if taluqdar incurring debt for construction of temple for spiritual benefit of her husband—Creditor can enforce claim against non-taluqdari property,**Where the widow of a taluqdar enters into a transaction for the construction of a temple not personally on her own behalf but for the spiritual benefit of her husband she must be deemed to have entered into the contract as representing the estate and if amount of expense incurred by her on account of construction is not excessive having regard to property inherited by her, creditor claiming costs of construction is entitled to enforce his claim against the non-taluqdari property left by the widow after her death.
[P 233, C 2]*A. P. Sen* and *M. H. Qidwai*—for Appellants.*K. N. Katju* and *Ali Zaheer*—for Respondent.**Judgment.**—Babu Jang Bahadur Singh, plaintiff, instituted the suit which has given rise to this appeal on the allegations that he carries on business as a building contractor; that village Karmullahpur alias Bhagarwa which is one of the principal villages of the Gangwal estate is situate on the banks of the river Sarju; that a bathing fair takes place in the said village in the months of Kartik, Chait and Magh every year; that there was a temple of Ram Janki in the said village: which was in a very dilapidated condition; that Raja Suraj Pargash Singh, taluqdar of Gangwal had intended to rebuild the temple and to construct a ghat but he could not carry out the intention in his lifetime; that Rani Itraj Kuar who succeeded her husband Raja Suraj Pragash, with the object of conferring spiritual benefit on her deceased husband, resolved to construct a temple in place of the old temple of Ram Janki referred to above and to construct separate bathing ghats for males and females; and that the Raja Sahib of Mankapur, a near relation of Rani Itraj Kuar and manager of the Gangwal estate, acting on behalf of the Rani and with her approval and permission, in 1918, gave a contract to the plaintiff for constructing the necessary buildings in accordance with plans prepared by the overseer of the estate. It was averred that the agreement made with the plaintiff was that he would be paid according to the prevailing and proper rates, local difficulties and the nature of the work being taken into consideration and that during the pro-

gress of the construction advances would be made to the plaintiff on account and that the balance would be paid to him on the completion of the work. The plaintiff's case was that in pursuance of the above contract he started work in 1919, that he was paid Rs. 1,27,250 from time to time until December 1924 when the work of construction had almost reached completion, that under the orders of the Rani and her manager, the above mentioned Raja of Mankapur, he submitted his final bill on the 2nd January 1925, that it was checked by the overseer of the estate and was approved by the Rani but before any payment could be made, the Rani died on the 23rd March 1925. According to the plaintiff's case the cost of the entire work done by him amounted to Rs. 26,530-15-6 out of which he had received Rs. 1,27,250 and a balance of Rs. 79,280-15-6 was due to him and remained unpaid at the time of the Rani's death. The plaintiff also claimed interest by way of damages from April 1925 at the rate of 1 per cent mensem which amounted to Rs. 2,662-11-0. Thus the total amount claimed by the plaintiff amounted to Rs. 1,05,443-10-6.

It appears that on the death of Rani Itraj Kuar there were several claimants to the Gangwal estate and other properties left by her and a suit was instituted in respect of them on the original side of the Chief Court. In that suit Raja Bisheshar Bakhsh defendant 1 was held entitled to the taluqdari estate and a decree was passed in his favour in respect of it and defendant 5 Chandi Prasad Singh was held entitled to the stridhan and non-taluqdari properties. Lal Harihar Partab Singh defendant 2, Dulhin Jadunath Kuar defendant 3 and Mahabir Singh defendant 4 were other claimants in that litigation. There is an appeal against the decision of the Chief Court pending before their Lordships of the Privy Council and so the plaintiff, Jang Bahadur Singh, impleaded all the above named five persons as parties-defendants in the case. He also alleged that defendants 1, 3, 4 and 5 were in possession of part of the properties left by the Rani.

Defendants 1 and 3 alone filed written statements and contested the suit. Proceedings against the other defendants were ex parte. The contesting defen-

dants denied the whole claim. Their main defence was that Rani Itraj Kuar was in possession of the Gangwal estate as the widow of a taluqdar and, therefore, could not create any charge on the estate nor contract any debt which could affect the estate after her death. They also pleaded that the construction of a temple by a widow could not be considered to be an act for the spiritual benefit of her husband, and that Raja Suraj Pragash Singh never intended to construct any such temple and that the Rani was in no case justified in constructing buildings at such a heavy cost. For all these reasons they pleaded that they, as reversioners, could not be made liable for the plaintiff's claim.

The learned Subordinate Judge framed the following issues:

1. Did the Raja of Mankapur on behalf of Rani Itraj Kuar with her consent and in consultation with her give a contract to the plaintiff for building a temple and other buildings appurtenant to it and ghats as alleged in para 8 of the plaint?

2. Are the defendants and the Gangwal estate bound to pay the costs of the said buildings and ghats as alleged by the plaintiff?

3. Is the suit barred by limitation?

4. To what amount, if any, is the plaintiff entitled?

He found issue 1 in the affirmative. His finding on issue 2 was that defendant 4 Mahabir Singh was not liable as he had given up his claim to all the properties left by Rani Itraj Kuar. As regards the other defendants he found that defendant 1 was liable to the extent of the taluqdari estate for which he had obtained a decree in his favour and defendant 3 to the extent of the moveables in her possession and defendant 5 to the extent of the stridhan and non-taluqdari properties left by Rani Itraj Kuar. He also held that the liability of defendants 2 and 3 would be to the extent of any properties that may be decreed to them in case of their success in the appeal pending before the Privy Council. On issue 3 the learned Subordinate Judge held that the suit was within time and on issue 4 he held that the plaintiff was entitled to get Rs. 79,280-15-6 in respect of principal and Rs. 13,081-5-6 for interest by way of damages, making a total of Rs. 92,363-5-0.

He decreed the plaintiff's claim accordingly.

Raja Bisheshar Bakhsh Singh defendant 1 and Bhaya Chandi Prasad Singh defendant 5 have come here in appeal. The learned counsel on their behalf has taken his stand mainly on the ground of law that the defendants-appellants as reversioners are not liable for the plaintiff's claim arising out of a contract entered into by Rani Itraj Kuar who was in possession only as a taluqdar's widow. He has also assailed the finding of the lower appellate Court about the constructions in question having been made for the spiritual benefit of the husband and has questioned the correctness of the amount decreed in the plaintiff's favour.

It would be convenient to dispose of the question of fact before entering into a discussion of the question of law. The first contention is that Rani Itraj Kuar started building a new temple and the ghats in suit in such grand style and at so much expense not for any spiritual benefit of the husband but for her personal aggrandisement. It was said that her husband Raja Suraj Pragash Singh died in 1899 and that she did not think of making any such constructions until 1918. The argument was that if her motive had been to confer a spiritual benefit upon the husband one would have expected her to take up the constructions much earlier. We do not think that the contention has any force. It is no longer disputed that the construction of a temple and ghats is regarded by Hindus as an act of high religious merit and that the constructions, if made by a Hindu widow with that object, would be conducive to the spiritual benefit of her deceased husband's soul. But the argument is that in this case the Rani was not influenced by any such considerations. We are not aware of any rule of Hindu law prescribing any time limit for religious acts done by a widow with the object of conferring spiritual benefit on her deceased husband, and have not been referred to any authority in support of any such time limit. Moreover the delay in the present case is accounted for by the fact that Raja Suraj Pragash Singh died indebted and Rani Itraj Kuar was not able to pay off the debts before 1914.

These facts are proved by the statement of Raja Raghuraj Singh examined on commission who deposed that "Raja Suraj Pragash Singh left behind him a great debt amounting to about 4½ lakhs," and by the statement of D. W. 2 Mahdeo Prasad who proved that all debts were paid off in 1914 and that there was a surplus of Rs. 25,000 per annum since that year. Under the circumstances Rani Itraj Kuar acted with great prudence in not undertaking this large programme of constructions until she had paid off the debts left by her husband.

Next it was pointed out by reference to the shankalnama, Ex. 6, that Raja Suraj Pragash Singh and his ancestors had left no less than ten temples and therefore there was no necessity for the Rani undertaking the construction of such a magnificent temple and ghats. This argument also seems to us to be without force. If the construction of temples and ghats on the banks of sacred rivers is a meritorious act according to the Hindu religion, as is conceded by the learned counsel for the defendant-appellants, then we should think that the more such temples and ghats are constructed the greater would be the reward earned. The learned counsel for the appellants has not cited any authority for the argument that because other temples existed therefore the Rani was not justified in constructing the temple and ghats in question. It has also to be borne in mind that these temples and ghats stand on a special footing. It is admitted on all hands that the river Sarju is regarded as a sacred river by the Hindus, that it runs through village Karamullahpur which is one of the important villages forming part of the Gangwal estate and that a bathing fair takes place in the said village. Further it is not denied by the defendants-appellants that there was a temple of Ram Janki situate in the said village. It is immaterial whether the temple in question had been built by Raja Suraj Pragash Singh or by any of his predecessors. The evidence of Raja Raghuraj Singh and of Mahabir Singh, P. W. 7, clearly shows that the old temple of Ram Janki was in a dilapidated condition, and Jagannath Singh one of the defendants' witnesses also admits that "during the time of

Rani Itraj Kuar the old thakurdwara was in a tottering condition." The statement of Mahabir Singh, P. W. 7, also shows that Raja Suraj Pragash Singh intended to have the old temple reconstructed. He stated that :

"Raja Suraj Pragash Singh intended to construct a splendid building but he was unable to do so on account of his being indebted. He said that he would build it as soon as he was free from debt."

It would be quite natural for Raja Suraj Pragash Singh to have expressed such a desire. A Hindu taluqdar of his position could hardly have considered it creditable to allow a temple of this importance to remain in a dilapidated condition. The learned Subordinate Judge who heard the evidence of the witnesses referred to above, has believed them and we can see no reason to disagree with him. We therefore hold in agreement with him that the old temple was in a dilapidated condition when Rani Itraj Kuar undertook the construction of the new temple and that Raja Suraj Pragash Singh in his lifetime had intended to reconstruct the said temple in a manner befitting his position but had been unable to do so. We have it also in evidence that Rani Itraj Kuar was of a religious turn of mind and this fact is borne out by the shankalapnama (Ex. 6) executed by her soon after her husband's death. We should also remember that according to Hindu beliefs, marriage is a sacrament and the union between husband and wife subsists even after the death of either partner. In fact they are considered to be part and parcel of one body. It follows from this and is a well recognized principle of Hindu law that religious acts, which are considered as meritorious, if done by a Hindu widow, benefit her own soul as also that of her husband. We might refer in this connexion to *Indar Bux Singh v. Sheo Naresh Singh* (1), in which case the late Misra, J. observed as follows :

"It is also a well known principle of Hindu law that the husband and wife are considered to be a part and parcel of one body. According to Vrihaspati the husband and wife participate in the effects of good and evil action and this mutual relation is not dissolved by the death of either partner. It is, therefore, a well established religious belief amongst the Hindus of this country that the erecting of a temple and making an endowment for

its up-keep is considered to be an act of high religious merit, and as one which, if done by a widow, would benefit not only her soul but also the soul of her husband."

Under the circumstances we have no hesitation in coming to the conclusion that the constructions made by Rani Itraj Kuar should be regarded as constructions intended for the spiritual benefit of her husband.

It was also contended that in any case the amount spent for the constructions was far in excess of the necessity of the occasion and could not be considered to be reasonable in the circumstances of the case. We must overrule this contention also. Defendant 1 in para. 25 of his written statement admitted that the annual income of the Gangwal estate was about two lakhs. We have already referred to the importance of the temple and found that it was in a dilapidated condition. Rani Itraj Kuar undertook the constructions after she had paid up the debts of her husband which amounted to about Rs. 5,00,000. It will also be seen that the constructions were started in 1918 and were carried on until the death of Rani Itraj Kuar which took place on 23rd March 1925. Further it is admitted that Rani Itraj Kuar from time to time during this period advanced no less than Rs. 1,27,250 out of her current income towards the expenses of construction. All these facts show clearly that the construction was carried on slowly and the Rani, if she had lived a little longer, would have been able to settle the plaintiff's claim and would have met the entire cost out of her savings from the income of the estate. It is in evidence that defendant 1 was present on the occasion of the foundation stone laying ceremony of the new buildings and also at the time when idols were removed from the old thakurdwara and installed in the new one. He has not come into the witness-box to say that he made any protest or to support any of the defences of fact raised by him. Having regard to all the circumstances and in view of the fact that the estate is so large, we are not prepared to hold that the amount of expense incurred by the Rani over the construction in question was excessive or out of proportion to the extent of property possessed by her.

(1) A. I. R. 1927 Oudh 450=2 Luck 713.

Lastly the learned counsel for the defendants-appellants questioned the finding of the learned Subordinate Judge in respect of issue 4 about the amount due to the plaintiff. He frankly admitted that the finding was fully supported by the evidence led by the plaintiff. His only grievance was that the learned Subordinate Judge improperly refused him opportunity to have the accounts checked by an expert, and then to examine such expert as a witness. We are of opinion that the defendants were entirely at fault in this matter and have no just cause for any complaint. The plaintiff produced Ex. 1, a copy of the measurements of the ghat and the temple and Ex. 2, a copy of the plaintiff's bill submitted for the work done by him in Court on 14th March 1928, the date when the issues were framed in the case. The Raja of Mankapur was examined as a witness on his behalf on commission during July and August 1928. The plaintiff's evidence in Court commenced on 1st November and continued till 26th November 1928. The defendants started with their oral evidence on 28th November 1928, and closed their evidence on 30th November. Thus Exs. 1 and 2 which contain full details of measurements etc., were in Court and available to the defendants for necessary check and examination for over eight months but no steps were taken by them for the purpose. It was only on 30th November 1928, after the defendant had closed their evidence in Court that an application was made asking the Court to appoint some certified overseer or engineer in the service of the Government Engineering Department, for checking the aforesaid papers. The learned Subordinate Judge rejected the application with the remark that:

"it has been made at a very late stage after the parties' evidence has been closed' and its object seems to be simply to unnecessarily prolong and delay the proceedings."

We are in entire agreement with the learned Subordinate Judge and can see no substance in the appellants' complaint against the rejection of their very belated request. Defendant 1 has obtained possession of the taluqa and is presumably in possession of all the estate papers. We think that he never seriously intended to question the correctness of the plaintiff's account and the

object of this application was merely to prolong the proceedings or to create a ground for objection in appeal. As the defendants-appellants have not challenged the finding on its merits it is not necessary for us to enter into a detailed examination of it. It is sufficient to say that Exs. 1 and 2 are fully proved by Kundan Lal retired sub-overseer and Government pensioner who made the measurements and prepared the bill. P.W. 4 Abdul Ali, overseer of the Gangwal estate who used to supervise the construction, proves that he had checked the bill and the measurements and had found them correct. The evidence of this witness is corroborated by the statement of the Raja of Mankapur and also by the statement of the plaintiff Jang Bahadur Singh. This evidence has been believed by the learned Subordinate Judge and we can see no reason to disagree with his estimate of the evidence. We therefore accept and uphold the finding of the learned Subordinate Judge on issue 4. This disposes of all the arguments urged on behalf of the defendants-appellants in respect of the questions of fact arising in the case.

Next, as regards the ground of law which constitutes the appellants' principal ground of attack. The argument is two-fold: It is contended, in the first place, that Rani Itraj Kuar came in possession of the taluqdari estate as a taluqdar's widow under S. 22, Cl. 7, Oudh Estates Act, and, therefore, any pecuniary liabilities incurred by her in her lifetime could not be enforced after her death against the estate in the hands of defendant 1, Raja Bisheshar Bakhsh, who had succeeded as a reversioner to her husband. The second contention is that the non-taluqdari and other properties left by Rani Itraj Kuar which were held by her as a Hindu widow, cannot in the hands of defendant 5, Chandi Prasad Singh, the reversioner under Hindu Law, be made liable after the widow's death, inasmuch as the liabilities incurred by her even though they might be for legal necessity, were not secured by any mortgage or charge on the property.

As regards the first line of argument the reply made by the learned counsel for the plaintiff-respondent is that a Hindu taluqdar's widow should be deemed to hold the taluqdari estate subject

to all the rights and liabilities of a Hindu widow. It is admitted by both parties before us that Rani Itraj Kuar on the death of her husband Suraj Pragh Singh, succeeded to the taluqdari estate as the widow of a taluqdar under Cl. 7, S. 22, Act 1 of 1869, which corresponds to Cl. 6, S. 22, Amended Act, now in force. It is also agreed that she did not hold the estate as an "heir" of a taluqdar because the definition of "heir" given in the Act expressly excludes a widow from that category. Cl. 7, S. 22, provides that the widow of the taluqdar succeeds "for her lifetime only." Now what is the significance of the use of these words in Cl. 7, S. 22, and of the exclusion of a widow from the category of an "heir"? Clearly, one object of these provisions was that the widow should not constitute a fresh stock of descent. We think that another object was that she should not be allowed to make any transfer which would affect the estate after her death. S. 11, Act 1 of 1869, provides that every taluqdar and every heir and legatee of a taluqdar:

"shall be comptent to transfer the whole or any portion of his estate or of his right and interest therein during his lifetime, by sale, exchange, mortgage, lease or gift and to bequeath by his will to any person the whole or any portion of such estate, right and interest."

It further provides that:

"a married woman may make a bequest under this Act of any property which she could alienate by her own act during her life."

The intention of this section read with the terms of Cl. 7, S. 22 and the definition of "heir" given in the Act, seems clearly to be that the widow should not be competent to make any transfer of the whole or any portion of the estate beyond her lifetime. It is to be noted that the legislature has not used the terms "life-estate" or "tenant for life" which are technical expressions to indicate a form of estate well recognized in law. The words used in Cl. 7, S. 22, seem to have been chosen deliberately for the reason that the estate conferred upon the taluqdar's widow was not a life-estate in the technical sense. An estate for life carries with it an estate in remainder whereas under the Oudh Estates Act, the reversioners have no more than an expectancy and their position is quite different from that of a remainderman. It was so

decided by their Lordships of the Judicial Committee in *Har Nath v. Indar Bahadur Singh* (2). As remarked by the Judicial Commissioner of Oudh in *Babu Abdul Karim Khan v. Babu Hari Singh* (3), S. 22, Act 1 of 1869:

"follows neither the Hindu nor the Muhammadan nor the English Law but borrowing something from each of them, lays down a peculiar line of succession applicable to the estates of those taluqdars and grantees dying intestate whose names are to be found in the second, third or fifth of the lists prepared under S. 8 of the Act."

The taluqdars of Oudh comprise among them Hindus, Mussalmans, Christians and Sikhs. The section was enacted to lay down a complete scheme of succession applicable to all taluqdars irrespective of their religious faith. The words "for her lifetime only" seem clearly intended to provide that while she is to be allowed full enjoyment during her lifetime yet she must leave the estate unimpaired for the reversioner. If this view is correct and the taluqdar's widow holding under Cl. 7, S. 22, cannot make any alienation beyond her lifetime, then it would follow that any pecuniary liability incurred by her cannot be enforced against the estate in the hands of the reversioners after her death.

The opinion which we have formed about the nature of the estate possessed by a taluqdar's widow is also supported by the course of decisions which has prevailed in this province. In *Ghisa Singh v. Gajraj Singh* (4), a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Lindsay, J., (afterwards Sir Benjamin Lindsay) and Stuart, J. (afterwards Sir Louis Stuart) held:

"that the estate taken by the widow of a taluqdar under Cl. 7, S. 22, Oudh Estates Act (Act 1 of 1869) is not the same estate as that of a Hindu female under the Hindu Law" because:

"the widow not being an heir according to the definition contained in S. 2 of the Act, has no power of disposal under S. 11 of the Act."

In *Krishna Pal Singh v. Sriraj Kuar* (5), which was tried by King, J., on the original side of the Chief Court, the learned Judge observed as follows:

(2) A. I. R. 1922 P. C. 403-45 All. 173=25 O. C. 228=50 I. A. 69 (P.C.).

(3) 1 O.D. 264.

(4) [1915] 18 O. C. 289=33 I.C. 37:=3 O.L.J. 45.

(5) A. I. R. 1927 Oudh 273.

"The position of a 'talukdar's widow' is not identical with the position of a 'Hindu widow' and the incidents of the estate of a talukdar's widow are not governed by the rules of Hindu Law applicable to the estate of a Hindu widow, even though the talukdar's widow may be a Hindu. A talukdar's widow who is a Hindu, is in the same position as a talukdar's widow who is a Muhammadan or a Christian, and the rules of Hindu Law would not apply to her simply because she happens to be a Hindu. The estate of a talukdar's widow is created by statute and is the same for all such widows irrespective of the personal law applicable to persons of their religion or tribe."

This decision has been confirmed on appeal by a Bench of this Court, but the Bench did not find it necessary to express any opinion on this point.

On the other hand the learned counsel for the plaintiff-respondent has relied on the cases of: *Dewan Ran Bijai Bahadur Singh v. Rae Jagatpal Singh* (6); *Lal Sheo Pertab Bahadur Singh v. Allahabad Bank Limited* (7); *Harnath Kuar v. Indar Bahadur Singh* (2) and *Raghuraj Chandra v. Subhadra Kunwar* (8), in support of his argument that the rights of a Hindu talukdar's widow, even in regard to the talukdari estate, must be determined by reference to her personal law. In our opinion none of these cases support the broad proposition enunciated on behalf of the respondent. The argument based upon the decision of their Lordships of the Judicial Committee in *Dewan Ran Bijai Bahadur Singh v. Rae Jagatpal Singh* (6) is that in that case a plea was raised about the plaintiff Jagmohan being excluded from inheritance in consequence of insanity, and it is said that as the Oudh Estates Act does not lay down insanity as a ground of exclusion, the decision should be regarded as an authority for making the rules of the personal law applicable, when the Act is silent upon any particular point. We think that the case cannot be regarded as an authority for any such proposition, firstly, because their Lordships found as a fact that the ground of insanity has not been established and, therefore, there was no occasion for applying any rule of exclusion to the case, and secondly because the case was

one which arose under Cl. 11, S. 22, which provided that 'succession was to be regulated by the ordinary law. In *Lal Sheo Pertab Bahadur Singh v. Allahabad Bank Limited* (7), the facts were these: One Kablas Kuar was the talukdar whose name was entered in lists 1 and 2 prepared under S. 8, Oudh Estates Act. After her death in August 1872, disputes arose as to the succession to her property and it was ultimately decided by their Lordships of the Judicial Committee that Kablas Kuar had a permanent, heritable and transferable right in the estate and that on her death it passed to her daughter Janki Kuar under Cl. 11, S. 22, Oudh Estates Act. This decision of their Lordships is reported in *Brij Indar Bahadur Singh v. Janki Kuar* (9). Janki Kuar made a mortgage of the property in favour of the Allahabad Bank and the Bank instituted a suit after her death to enforce the mortgage deed against the reversioner who had succeeded to the estate. It was held by their Lordships of the Judicial Committee that Janki Kuar had only a qualified and not an absolute estate and was not competent to make an alienation of it. This case too is distinguishable inasmuch as Janki Kuar also had succeeded under Cl. 11 according to the ordinary law.

In our opinion cases of succession under Cl. 11, S. 22, cannot afford any guidance in determining the question under consideration. A person who succeeds according to the ordinary law under Cl. 11 must be deemed to possess the estate subject to the incidents of the ordinary law. But Cl. 7, S. 22, does not make any reference to the ordinary law and is quite independent of it. The case of *Harnath Kuar v. Indar Bahadur Singh* (2) also can be of no help. In that case the only question decided by their Lordships was that under the Oudh Estates Act, the succession to collaterals opens on the death of the widow just as under the ordinary Hindu Law. It does not decide anything as regards the estate possessed by the talukdar's widow and no inference in respect of it can be drawn from this case. The language of the clauses following Cl. 7, S. 22, clearly indicates that none of the persons who

(6) [1890] 18 Cal. 111=17 I. A. 173=5 Sar. 590 (P.C.).

(7) [1903] 25 All. 476=30 I. A. 203=8 Sar. 535 (P.C.).

(8) A. I. R. 1928 P. C. 87=3 Luck. 76=35 I. A. 139 (P.C.).

(9) [1880] 5 I. A. 1=1 C.L.R. 318=3 Suther 474=3 Sar. 763 (P.C.).

are to come in after the widow have been given any vested rights under the Act. Their position in this respect is no doubt similar to that of reversioners under the Hindu Law, but this cannot make the estate possessed by a taluqdar's widow, a Hindu widow's estate. Lastly in *Raghuraj Chandra v. Subhadra Kunwar* (8), the question arose as regards the meaning of the word "brothers" in Cl. 5, S. 22. Their Lordships of the Judicial Committee held that in interpreting the relationships mentioned in S. 22, the personal law of the parties is to be taken into account, save where a contrary intention appears. The reason for this, as remarked by their Lordships, was :

"Words of relationship in connexion with a law of inheritance differ in their signification and content, according as their context is an inheritance in one community or an inheritance in another. Legitimacy, adoption and lawful wedlock all of which involve legal conceptions, are terms which will vary in meaning according to the law of the community, with which in the given case the Act is concerned, and although to some extent the Act lays down express prescriptions on these subjects, this is not always so."

It is clear that in the case before us no question arises about the interpretation of any relationship.

Now, let us test the soundness of the respondent's contention in the light of the consequences which would logically follow from it. If the nature of a Hindu taluqdar's widow's estate is to be determined by reference to her personal law, there can be no reason for giving the widow of a Mahomedan taluqdar any estate less than what she is entitled to get under the Mahomedan Law. It cannot be denied that a widow under the Mahomedan Law succeeds as an absolute owner to a share in her husband's estate. On this principle it would follow that the widow of a Mahomedan taluqdar should be allowed full powers of alienation with regard to the estate held by her. This would make the words "for her lifetime only" used in Cl. 7, wholly nugatory. In answer to a question put by us in the course of arguments, the learned counsel for the plaintiff-respondent was constrained to admit that he could not claim that the widow of a Mahomedan taluqdar had any power of transfer beyond her lifetime, by reason of her personal law giving her an absolute estate. We are,

therefore, of opinion that Rani Itraj Kuar was not competent to alienate the estate beyond her lifetime. It follows and it is not denied that if any transfer made by her could not be effective after her death, the plaintiff can have no right to enforce his claim against the estate in the hands of Raja Bisheshar Bakhsh Singh, defendant 1.

The second line of argument is that as regards the non-taluqdari properties which were held by Rani Itraj Kuar as a Hindu widow, the reversioners are not liable for debts incurred or contracts made, giving rise to pecuniary liabilities, if the widow did not make a transfer or create a charge in respect of such debts or liabilities. The argument is that the estate in the hands of the reversioners who succeed after the death of a Hindu widow can be liable only for debts or liabilities secured by a mortgage or a charge on the estate and not for any debts or liabilities which were not so secured. It appears that there is a conflict of opinion amongst the different High Courts in this country on this point. The learned counsel for the defendants-appellants has referred to *Hurry Mohan Rai v. Ganesh Chunder Dass* (10) and *Bhagwantrao Abaji v. Ramanath Kaniram* (11) in support of his argument. In the former case a daughter who had succeeded to the estate of her father ordered a quantity of lime for the purpose of making repairs to certain houses on the estate. The repairs were completed but the lady died before the debt contracted by her for the lime had been paid off. After her death a suit was brought by the creditor against the reversionary heirs of her father's estate asking, inter alia, for a decree against the estate in the hands of the reversioners. The opinion of the majority of the Full Bench was that such contracts could be enforced against the reversioners if they were of such a nature that a prudent owner in managing his estate found such a contract necessary for the due preservation of the estate. The learned counsel for the defendants-appellants, however, relies upon the reasoning of the dissenting Judges who were of opinion that there was no reason why Hindu widows should be in

(10) [1884] 10 Cal. 823 (F.B.).

(11) A. I. R. 1923 Bom. 310=52 Bom. 512.

any different position to ladies of any other nationality who have a life-interest in immovable property. They thought that tradesmen and others who deal with such persons, know perfectly well that the person with whom they are dealing has only an estate for life and are content to run the risk of it and so there was no reason why persons who deal with Hindu widows should be placed in any different position. In *Bhagwantrao Abaji v. Ramanath Kani-ram* (11) it was held that under Hindu Law, property in the hands of a reversioner was not liable to satisfy a personal debt, not secured on such property, which a widow while enjoying a widow's estate had properly incurred in the course of management of the property.

The learned counsel for the plaintiff-respondent has on the other hand relied on *Ramcoomar Mitter v. Ichamoyidasi* (12) and *Maharaja of Bobbili v. Kaminayani Bangaru* (13). In *Ramcoomar Mitter v. Ichamoyidasi* (12) a Hindu widow borrowed a sum of money for the purpose of defraying the marriage expenses of a granddaughter, the child of a son who had predeceased his father. It was held that although such a sum could not be considered a charge on the grandfather's estate, yet it was one which was legally recoverable from the heirs, who on the death of the widow succeeded to the possession of such estate. In *Maharaja of Bobbili v. Kaminayani Bangaru* (13), it was held that unsecured debts contracted by a limited owner would be binding on the estate if incurred for purposes which would justify a charge on such an estate. We are of opinion that the view taken by the Calcutta and Madras High Courts in the cases relied upon by the plaintiff-respondent is based on sound reasoning and should be followed. It is now well settled that a Hindu widow fully represents the estate for the time being. This being so, she must by the nature of circumstances from time to time enter into transactions for the proper management of the estate. If she incurred a debt for lawful purposes or entered into any transaction giving rise to pecuniary liability

ties in respect of which she could validly create a charge upon the estate, there seems to be no reason why the creditor should not be allowed to recover his debt or to enforce his claim against the estate in the hands of the reversioners. To hold otherwise would lead to obvious inconvenience and hardship and would create unnecessary difficulties in the path of the widow's making proper management of the estate. We should, however, make it clear that the position in a case in which a Hindu widow incurs a liability personal to herself or borrows money on her personal security and not as representing the estate, would obviously be different.

In the present case we have no reason to suppose that Rani Itraj Kuar entered into the transaction in suit personally in her own behalf. On the contrary according to the findings recorded by us above, she did so for the spiritual benefit of her husband and must be deemed to have entered into the contract with the plaintiff as representing the estate. We have also found that the amount of expense incurred by her on account of the constructions was not excessive, having regard to the large extent of the property inherited by her from her husband. We, therefore, agree with the learned Subordinate Judge that the plaintiff is entitled to enforce his claim against the non-taluqdari property in the hands of Bhaya Chandi Prasad Singh, defendant 5.

At the conclusion of arguments in the appeal the learned counsel for the plaintiff-respondent drew our attention to the fact that appeals were pending before their Lordships of the Privy Council in which the right of Raja Bisheshar Bakhsh Singh, defendant 1, as regards the taluqdari estate and of Bhaya Chandi Prasad Singh in respect of the non-taluqdari property is being challenged. He also stated that it is being contended in these appeals that the property which has been held by the Chief Court to be taluqdari property is not so and that the entire estate is non-taluqdari. He, therefore, asked that the decree passed by us should make necessary provision to enable the plaintiff to follow the property which may be considered liable for his claim, in the hands of any of the defendants, in case

(12) [1881] 6 Cal. 36=6 C. L. R. 429.

(13) [1911] 35 Mad. 103=21 M. L. J. 593=8 I. C. 860=(1911) 1 M. W. N. 101.

it changes hands under the decision of their Lordships of the Privy Council.

The result of the findings arrived at by us is that the plaintiff is entitled to the decree for Rs. 92,363 and interest at six per cent per annum from the date of suit till realization as decreed by the Court below. But the plaintiff is not entitled to enforce his claim against the taluqdari estate. He can enforce the decree only as against the non-taluqdari properties left by Rani Itraj Kuar. The question as to which of the properties are taluqdari and which of them non-taluqdari, as well as the question as regards the person entitled to the non-taluqdari properties and against whom the plaintiff is entitled to enforce the decree, will be determined according to the final decision of their Lordships of the Privy Council in the appeals pending before them.

As regards costs our order is that the plaintiff will get his costs of both the Courts and will be entitled to realize them from the non-taluqdari property, but not personally from any of the defendants. Raja Bisheshar Bakhsh Singh is allowed costs of the appeal against the plaintiff-respondent. In other respects the decree of the lower Court will stand.

We, therefore, allow the appeal and modify the decree of the lower Court accordingly.

V.B./R.K.

Appeal allowed.

* A. I. R. 1930 Oudh 234

PULLAN, J.

Sobha Singh and others—Plaintiffs—Appellants.

v.

Kesho Singh and others—Defendants—Respondents.

Second Appeal No. 18 of 1930, Decided on 12th February 1930, against decree of Addl. Sub-Judge, Hardoi, D/- 7th October 1929.

*** Hindu Law — Debts — Son's liability—Decree against father cannot be challenged merely on ground of unconscionable rate of interest—Execution—Decree binding.**

As a Hindu son cannot challenge his father's transaction merely on the ground that it was not for legal necessity, and since the question as to rate of interest falls under the head of legal necessity, once a decree has been passed against a Hindu father, his son cannot challenge it on the ground of its being unconscion-

able to save the family property from sale A. I. R. 1924 P. C. 50; A. I. R. 1926 Oudh 321; 17 O. C. 318; Rel. on.; 4 O.L.J. 157, *Diss. from* [P 235 C 2]

H. N. Misra—for Appellant.

Ali Zaheer and Ghulam Imam—for Respondent 1.

Judgment.—The appellants before me are the sons of one Dulha Rai Singh who executed a mortgage of joint family property on 11th September 1918. He subsequently agreed to a compromise decree being passed against him by which he was bound to pay off the decree-holder in instalments. He failed to pay those instalments and the decree-holder applied for the sale of the joint property. The property has now been sold and the plaintiffs come forward to challenge the transaction on the ground that the original mortgage should not be held to bind the estate. The reason which they alleged is that the terms of the mortgage are usurious and cannot be deemed to be for legal necessity. They obtained a decree in the first Court but in the first appeal the learned Additional Subordinate Judge has found that they have no right now to challenge the terms of this mortgage as they do not allege that it was executed for an illegal or immoral purpose. As far as the facts are concerned the terms of the mortgage are certainly unduly onerous. The mortgagee advanced a sum of Rs. 25 on the security of property which has been sold at an auction sale for Rs. 285 and the rate of interest was nine pies in the rupee per month compoundable with six monthly rests, a rate of interest which is equivalent to 56 per cent per annum and far in excess of the rate which the Courts in this province would usually uphold in the case of a mortgage of landed property where they had power to act under the Usurious Loans Act. In appeal I have been referred to a judgment by the Judicial Commissioners of Oudh reported in *Chaudhri Sadho Charan Prasad v. Lala Ram Ratan* (1) which dealt with a case of this kind. In that case the learned Judicial Commissioners gave the plaintiff-appellant relief to this extent. They cut down the rate of interest which in that case was only 24 per cent compoundable quarterly and permitted the plaintiff to pay the amount which they

(1) [1917] 4 O. L. J. 157.

held to be due by a certain date, and ordered that if he did so the decree to which he was not a party was not to be executed against the family property. This is the relief which the plaintiffs-appellants seek in the present suit. It does not appear that that ruling has been considered in later decisions in similar cases. Since that date their Lordships of the Privy Council delivered their judgment in the case of *Brij Narain Rai v. Mangal Prasad* (2) in which they laid down inter alia the following proposition:

"If he is the father, and the reversioners are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt."

It would appear from this dictum that where a decree has been passed their Lordships are not prepared to allow a Hindu son to challenge his father's transaction merely on the ground that it was not for legal necessity. Legal necessity may be challenged first on the ground that the transaction itself was not for legal necessity and secondly on the ground that the transaction in that form was not for legal necessity. Thus a question as to the rate of interest falls under the head of legal necessity and if the sons cannot challenge the transaction on the ground of legal necessity there is no other way in which they can raise the question of the rate of interest. This Chief Court has laid down the law in these terms in the case of *Nand Lal v. Umrai* (3):

"Where a mortgage decree is passed against the father the sons and grandsons cannot escape liability under the decree when they fail to prove that the mortgage debt was contracted for immoral or illegal purposes."

In that judgment they affirmed a judgment of the Judicial Commissioner's Court reported in *Gur Narain v. Gulzari Lal* (4) which laid down that:

"Where a decree has been obtained against the father upon the mortgage executed by him of joint family property, whether or no there has been a sale of the joint family property in execution of that decree, it is for the sons who come into Court to escape liability thereunder to prove that the debt was contracted for immoral or illegal purpose or that the debt was of an illusory character."

This may be a hard case. Joint

(2) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).

(3) A. I. R. 1926 Oudh 321=29 O. C. 260.

(4) [1914] 17 O. C. 318=25 I. C. 917=1 O. L. J. 503.

family property has been sold as the result of an unconscionable transaction where a small sum had been borrowed on ample security at usurious terms, and where a father entered into a compromise permitting a decree to be passed against him for sixteen times the amount which he borrowed to be paid off in monthly instalments of half of the amount of the original loan; but in view of the authorities I cannot find that once the decree has been passed the sons are able to challenge it to save the family property from sale. I find therefore that the law has been correctly stated by the Court below and I dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 235

STUART, C. J. AND RAZA, J.

B. Kanhaiya Lal and others—Defendants—Applicants.

v.

Syed Hamid Ali—Plaintiff—Respondent.

Second Appeal No. 213 of 1929, decided on 3rd January 1930, from decree of Dist. Judge, Hardoi, D/- 29th April 1929.

(a) Landlord and Tenant—Custom (Oudh)—Right to transfer site or construction standing on site—Burden of establishing title.

There is no general rule of law which can be invoked against the occupier's right to transfer in a town. Whether that right of transfer be in respect of the site, or in respect of the constructions standing on the site, it is for the person who asserts a superior title to establish it and unless a title which prohibits the transfer can be established the transfer will stand good: A. I. R. 1928 Oudh 438, *Rel. on.* [P 239 C 2]

(b) Wajibularz—Binding effect.

A wajibularz is as effective in a town as it is in a village. [P 240 C 2]

(c) Acquiescence—Application of acquiescence as bar to exercise of man's legal rights—Principle guiding Court enunciated.

The acquiescence which will deprive a man of his legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The elements or requisites necessary to constitute fraud of that description are, in the first place that the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not neces-

sarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendants, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but nothing short of this will do: *Willmott v. Barber* (1830) 15 Ch. L. 96 at p. 105, *Rel. on.* [P 241 C 1]

(d) Landlord and Tenant—Ejectment—Tenant without transferable right in site making endowment of same to third person—Endowment amounts to abandonment.

Where a licensor who has no transferable right in the site executes a deed of endowment of land and building standing on it in favour of a third person or an idol the act of endowment amounts to abandonment of license and the third person or idol is liable to ejectment by the proprietor of land.

[P 241 C 2]

(e) Transfer of Property Act, S. 51—Trespasser building or expending money on land does not acquire any right to prevent proprietor from ejecting him.

In every case of trespasser he is supposed to know the extent of his interest and if he expends money on the land which he is occupying as such trespasser he does not thereby acquire any right to prevent the proprietor of the land from taking possession of the same: 21 All. 496 (P. C.), *Ref.* [P 241 C 2]

(f) Landlord and Tenant—Custom (Oudh)—Raiyat has no right of transferability of sites in villages in absence of contract or custom.

In agricultural villages of Oudh the principle of non-transferability was enforced from the earliest times, and has become in absence of contract or other custom a part of the customary law of the agricultural villages.

[P 242 C 1]

Tej Bahadur Sapru and S. C. Das, K. N. Tandon, Mohan Lal, Raghubir Sahai, A. B. Tandon, Sunder Lal Gupta and Raghubir Dayal Bajpai—for Appellants.

S. Hasan Imam, Ali Zaheer, Nazee-ruddin and Ali Jawad—for Respondent.

Judgment.—This is a second appeal by the defendants against a decree awarding the plaintiff-respondent pos-

session over a small plot of land 20 feet by 20 feet situated in Pihani in the Hardoi District and directing the defendants-appellant to remove the structures standing thereon.

The Hardoi District Gazetteer describes Pihani as a "considerable town" (p. 236). The description continues that it contains the tomb of Nawab Sadr Jehan the celebrated minister of Akbar, the tomb of his son Badri Alam and a "grand old mosque." It also contains the remains of a fort. The town has been in existence for more than three hundred years. It contained in 1901 a population of seven thousand six hundred and sixteen persons. It was formerly administered as municipality but is now administered as a notified area. The trial Judge found that Pihani was a town. The Judge of the lower appellate Court did not arrive at a decided finding as to whether it was a town or a village. The learned counsel who have appeared before us in this appeal agree that Pihani is a town and we have no hesitation in finding that it is not a village and that it is a town. The determination of this question is necessary before the law bearing on the case can be applied. The plaintiff Hamid Ali is a minor ten years old, under the guardianship of his grandmother Mt. Zakia Begam. He claims to be the sole proprietor of the mahal Mohsin Ali in Pihani Khurd (or "little Pihani") where the land in dispute is situated. Although Pihani is a town the soil has always been owned by certain proprietors. The claim of Hamid Ali to be the sole proprietor of this mahal was questioned in the course of this case. But it is now agreed between the learned counsel that whether he is, as he asserts, the sole proprietor, or, as the defendants assert one of the proprietors, he has a right to institute this suit.

The case set out in the plaint is that the plot of land in question, which bears a certain number was the property of the superior proprietor. This fact is admitted. The plaint continues that it was formerly occupied by a Kori, that is a Hindu weaver, called Ichha who constructed a dwelling house upon it, where he lived. Ichha died about 1887. On his death his

sons Ghirrao and Auseri continued to reside in the house. Auseri died about 1897. His sons Ram Din, Ganesh and Kalua continued to reside with Ghirrao. Then Ganesh and Kalua died childless, and about 1920 Ghirrao died childless. There remained the son Ram Din who left Pihani.

The defendant Kanhaiya Lal is an advocate practising in Hardoi. The defendant Debi Dayal is his brother. He resides in Pihani where he carries on money lending business. It appears that Ghirrao executed on 22nd July 1898, a mortgage of the house standing on the plot in question in favour of a certain Ram Dayal and subsequently proceeded to enter into an agreement to take the same house on rent. That agreement was dated 13th August 1898. On 5th June 1916 Ghirrao and Ram Din executed a deed of mortgage with possession of the land and house in question in favour of the defendant-appellant Kanhaiya Lal. Some alterations appear to have been made to the house before 1924. In 1924 the defendants began the construction on the plot in question of a thakurdwara, a Hindu temple dedicated to Radha and Krishna. This temple was completed in 1927. It is an elaborate masonry building constructed at an admitted cost of between forty thousand and fifty thousand rupees. A permanent pujari is employed upon it. The defendants assert that the temple is a private temple. They state that they permit the Hindu public to worship there but they contend that they reserve to themselves the right should they so desire to close the temple to public worship. At one time there was some sort of an assertion that the building in question was a private house containing a shrine. It is impossible, however, to suggest this plea now in view of the fact that the defendants' counsel stated before the trial Court on 5th June 1928 as follows :

"We are simply proving that the building in dispute is a private thakurdwara. It is not a permanent residential house. We do not attempt to prove that it is a permanent residential house."

We thus have it that the building in question is a private Hindu temple in which the public have previously enjoyed the privilege of worship. We are not concerned for the purposes of

the decision of this appeal with any restrictions that it was possible to enforce against the public right of worship. On 12th December 1927 the present suit was instituted in the Court of the Munsiff of Shahabad. The plaintiff asserted that the plot in question had been abandoned by the Kori family, who originally had the right of occupying it some time in 1920, that the buildings upon it were levelled to the ground and that the plot had reverted to him. He stated that a few months before the suit was instituted it had been brought to the notice of his guardian and himself that the thakurdwara was in the course of construction. He claimed to eject the defendants as trespassers and demanded the demolition of the building.

The contest in the case has been exceptional. A very large number of witnesses have been called, eminent counsel have been engaged in appeal and a considerable time has been taken both in the original hearing and in the appeals. This is not surprising in view of the fact that the prayer for the relief included a prayer for the demolition of a very valuable building.

The complexion of the suit was materially altered by the execution of a deed Ex. 57 on 11th January 1928, which was registered on 13th January 1928. The written statement was filed on 11th January 1928. On the same date Behari the son of Ram Din Kori (Ram Din having died) executed a deed of endowment Ex. 57 in favour of "Thakurji" that is to say the Gods of the thakurdwara under the guardianship and trusteeship of Shiam Sundar Lal and Babu Sahib. He had previously on 4th January 1928 executed for Rs. 50 a deed of further charge on the premises in question in favour of Krishna Kumar the son of the defendant-appellant Kanhaiya Lal. Under this deed Ex. 57 he transferred the whole of his rights, whatever they might be, including what he called his proprietary rights and his right of redemption in the mortgages, to the Gods of the temple and divested himself of all claims to the land or the constructions upon it. After this deed had been executed and brought to the notice of the Court the plaintiff applied for the amendment of the plaint by adding the

Gods as defendants. The defendants opposed this amendment. The trial Judge refused to allow it. The learned counsel for the plaintiff then said :

"My case is that even if Behari be proved to be the son of Ram Din, his rights in the property have been extinguished as he executed a deed of wakf in favour of Sri Thakurji on 13th January 1928, and along with him the interest of the defendants, if any, have been extinguished."

The Court noted :

"The defendant's pleader does not oppose this application except on the ground that the plea that no thakurdwara was built was open to the defendants on the date of issue."

The Court then passed the following order :

"I allow the amendment sought, for, the plea is simply a legal one and was not by mistake taken on the date of issues. So far as other amendments are concerned defendants have no objection to it."

He then added two issues :

"(9) Did Behari execute a deed of wakf in favour of Sri Thakurji on 13th January 1928, as alleged? If so, what is its effect?

"(10) Have the defendants no right to construct the thakurdwara in place of a residential house without the plaintiff's permission?

After such evidence had been recorded the learned Munsif decided the suit. He found that Behari was one of the heirs of Ram Din, but not the sole heir of Ram Din. He found that the house in question was partly a thatch construction, and partly a non-thatch construction. He found that the Kori family in question had transferable rights. He found that the plaintiff had constructively acquiesced in the erection of the thakurdwara. He, therefore, dismissed the suit. An appeal was filed to the learned District Judge of Hardoi. He decided that the defendants had no rights and decreed the suit. The matter then came here in second appeal. On the date when it came on for hearing on 28th September 1929 this Court remitted the case to the lower appellate Court for the determination of certain additional issues. Findings on those issues having been received, an opportunity having been allowed for objections upon them, objections having been filed and further arguments having been heard, the Court now proceeds to determine the appeal.

We have to note first certain findings which are clear. The first finding is that Pihani is a town and not a village. We have already discussed this question.

The next finding is a finding of fact by the lower appellate Court in the decision of the 29th April 1929, that Behari is the sole heir of the Kori family in question. The learned Munsif arrived at the conclusion that there are other heirs, but the lower appellate Court has decided that Behari is the only heir and representative of that family. The finding that Behari is the only heir is a finding which cannot be questioned in second appeal.

The next finding of the lower appellate Court is that the house which originally stood on the site and which was owned and occupied by the Kori family was a "khasposh" house, that is, a thatch. The learned Munsif did not arrive at that conclusion. The conclusion of the lower appellate Court, which is also embodied in the decision of 29th April 1929, that the house in question was a "khasposh" house or a thatch is a finding of fact which cannot be questioned in second appeal.

We have now to examine the rights of the plaintiff-respondent in respect to the plot. Pihani is a town and not a village. Thus the general rule which has been accepted in Oudh, ever since the British Courts have been in existence, to the effect that in absence of special contract or custom no raiyat, whether an agriculturist or a non-agriculturist has any rights in the inhabited area of an agricultural village except a right of occupation without a right of transfer, does not apply to the land in question. This rule is based on a series of decisions with which we are not concerned at present. It is in accordance with the circumstances of agricultural villages. Many of the agricultural villages in Oudh owe their origin to an early settlement by individual proprietors of cultivators upon the lands. The proprietors reserved a portion of the village area as an inhabited site and allotted thereon plots for residence and other uses, for the tethering of cattle and the carrying on of village industries to their agricultural tenants, to village artisans, to village menials and to village shopkeepers. If these persons has been permitted to transfer even the right to residence certain newcomers who were actually workers in the village might have found it impossible to take up their residence for the purposes of their work

owing to sites having been transferred to non-workers. Thus the principle of non-transferability was enforced from the earliest times, and has become in absence of contract or other custom a part of the customary law of the agricultural villages.

But in towns the same circumstances do not arise. The rights of proprietors in town, however, very greatly. Where, as apparently is the case in Pihani, a town has been founded by an individual the rights of the occupiers of residential sites are apt to be restricted considerably. We say apparently for, as the Gazetteer will show in the passage which we have already indicated, it is not certain how the town of Pihani came into being. According to one tradition it was founded by a certain Abdul Ghafoor in the 16th century. The law as to transferability of sites in towns was the subject of decision by the Chief Court in *Mohammad Ali Khan v. Badrunnisa* (1). This is a decision of the late Misra, J. This decision was a subject of appeal under the provisions of S. 12, Oudh Courts Act, before a Bench of this Court. The appeal was decided on 17th April 1928.* The decision in appeal is not reported. As we are largely basing our findings on the law upon that decision we quote it in full:

"This is an appeal under the provisions of S. 12, Oudh Courts Act, against the appellate decision of a single Judge of this Court. The facts are simple. In Malihabad there is a mohalla known as Mirzaganj. Upon a site in this mohalla masonry house was constructed by a Military Officer called Baz Khan. Mushir Ahmad Khan purchased without apparently any objection on behalf of the zamindar. Subsequently Mushir Ahmad Khan executed a deed of usufructuary mortgage of the house in question in favour of Mt. Badrunnisa defendant-respondent. The plaintiff-appellant, who is one of the proprietors of Malihabad, instituted a suit demanding the ejectment of both Mt. Badrunnisa and Mushir Ahmad Khan from the house in question to be effected by demolition of this masonry house. The Courts below have refused him relief and he appeals before us. It is established very clearly that Malihabad is a town and not a village. According to the Gazetteer of Lucknow it possessed the last census a population of 7,554 inhabitants and it is administered under Act 20 of 1853. It contained 1,935. It is thus clearly a town. As it is a town any presumptions which are in Oudh applicable to the rights of landed proprietors in agricultural villages have no application: but we have a *wajibularz* which

lays down the special rights of the proprietors of the town and of the occupier in houses in Malihabad and specially in Mirzaganj. We find it clear that Mushir Ahmad Khan was what is known as a superior *riyaya* and that Baz Khan was also a superior *riyaya*. The site of the house is the property of the plaintiff-appellant. The position between the plaintiff and Mushir Ahmad Khan is the position of licensor and licensee. Under the terms of the *wajibularz* the occupier pays no ground rent and is at liberty to remove the materials of his house. If he were of the inferior *riyaya* he would have to pay to the plaintiff one-quarter of the price of the materials as *haq chaharum* under the terms of the *wajibularz*, but being one of the superior *riyaya* he is permitted to retain the whole of the proceeds of such materials himself. So long as the license exists the only benefit that the plaintiff could really gain would be if the occupier died without heirs. In these circumstances the materials would escheat in part to the plaintiff-appellant. At the same time, however, a licensee has no power of transfer of his rights as a licensee, but the fact that he has made such a transfer does not give the licensor a right of re-entry. Thus the suit has been rightly dismissed and we see no reason to grant any relief; but we note at the same time that the mortgage made by Mushir Ahmad Khan in favour of Badrunnisa can have no effect as against the rights of the plaintiff-appellant as licensor as given in the *wajibularz*, remote as these rights maybe. We accordingly dismiss this appeal with costs."

According to the view taken therein, such a question as the one before us relating to a town and not to a village has to be decided in the following manner. There is no general rule of law which can be invoked against the occupier's right to transfer in a town. Whether that right of transfer be in respect of the site, or in respect of the constructions standing on the site, it is for the person who asserts a superior title to establish it, and unless a title which prohibits the transfer can be established the transfer will stand good. How does the case stand here? The plaintiff has established his title as the owner of site. It is not suggested that the site has been transferred by himself, or by his predecessors-in-interest. He has established the conditions under which the sites are held by proving the *wajibularz* of Pihani Ex. 5. This *wajibularz* was prepared at the time of the first regular settlement, that is to say about 1866. It is accepted that the first occupier of this land was Ichcha. He died in 1887. We thus arrive at the conclusion that the plot in question was held according to the rule laid down in the *wajibularz*. We should not call the rule a custom. It would appear to us rather

(1) A. I. R. 1928 Oudh 92.

* *Mahomed Ali Khan v. Mt. Badrunnisa*, A. I. R. 1923 Oudh 438.

to be a rule under which the proprietors allotted sites for the purpose of occupation. The wajibularz divide the sites in Pihani into two main classes. There is a special class of occupiers, consisting of Saiyads of their own community, and Hindus and Mahomedans of the higher classes, who had actually purchased sites and constructed thereon what are called their ancestral houses. Those persons had the right to transfer not only the houses and the materials, but also to transfer the land itself. The remaining class consisted of all others. It did not only include persons of low status; it included persons of all classes who had not purchased the sites, and it is laid down distinctly that such persons had no right to transfer the land. Ichcha clearly fell under the latter category.

He had no transferable rights in the site. The next question is as to the right to transfer the materials of the houses. Here a distinction is made between the thatched houses or "khasposh" and houses other than thatched houses. Occupiers who had constructed only thatched houses had no right to sell the materials. The only privilege that such an occupier had was that if with the consent of the proprietor he transferred his residence from one site to another he could take with him the materials of his thatch and re-erect them on the new site. But he had no right, if he vacated the old site, to sell the thatch. If the materials were other than thatch, on vacating the site the occupier had a right to sell the materials but then had to give one-fourth of the sale proceeds to the proprietor. There were other rules as to giving betel-nuts and two pice at the time of digging the foundations and a money payment when the door frame was placed in the house and the house was completed but we are not concerned with those. As we have already said there is a final finding of fact that the house occupied by these Koris was a thatched house. Thus on vacating the village (as they clearly did vacate it some years ago) they had no right to sell the thatch or even to remove it. They were only permitted to remove it if they settled on a new site in the village with the proprietor's consent. We agree with the learned Judge of the lower appellate Court that this wajib-

ularz will govern the case unless it is controverted and rebutted. Sir Tej Bahadur Sapru, who represented the defendants-appellants before us, has argued that the wajibularz has no effect because Pihani is a town. We find against this view. A wajibularz is as effective in a town as it is in a village. This particular wajibularz is not according to our view so much a record of custom as a proof of the conditions governing the grant of residential sites in Pihani, and, as such, is effective to establish that Ichcha had no right of transfer in the land, and that when the land was vacated the family had not even the right to sell the thatch of which, on the finding of fact, their house was composed. A mass of evidence was produced by the defendants-appellants to establish the existence of a custom in contravention of the wajibularz. We considered it advisable at the previous hearing to send back the case for a finding as to the value of the evidence upon this alleged custom. We have now received the careful and considered decision of the learned Judge of the lower appellate Court, which is to the effect that the evidence falls far short of establishing even the assertion of a right to transfer khasposh houses by unprivileged tenants. But apart from that in our opinion it would be impossible to establish a custom against what to us is a grant. It is not a question of evidence as to two conflicting customs. The wajibularz lays down the conditions on which these sites were granted. The fact that the grantors in the past permitted infringements of the grants would in no way affect the validity of the conditions. Sir Tej Bahadur Sapru did not lay great stress on the evidence as to custom. His case was rather that, as Pihani is a town it was for the plaintiff-respondent to prove a custom of non-transferability. We find that it was for the plaintiff-respondent to prove that under the conditions under which Ichcha received the land he had no power to transfer. But as we have already stated we find that the plaintiff-respondent has succeeded in proving that Ichcha and his successors had no power to transfer.

According to the view of the Bench in *Mohammad Ali Khan v. Badrunisa* (1) which we have already quoted,

the execution of the usufructuary mortgage by Ghirrao and Ram Din would not have given the plaintiff-respondent a right of re-entry. According to the view taken by a Bench of the Allahabad High Court in *Basamal v. Ghayasuddin* (2) a tenant who converted the thatched shed in his courtyard into a masonry mosque without the permission of the zamindars forfeited thereby his right of occupation and gave the zamindars a right of re-entry. The decision in question does not cover the present case exactly as it related to a village and not to a town, and the reasoning would be somewhat different. We need not, however, pursue the question as to whether the construction of the Thakurdwara in itself gave the plaintiff-respondent a right of re-entry, and we need not discuss the ancillary question as to whether the Thakurdwara was a public temple, or a private temple to which the public had full right of access, or a private temple in which the public could worship by permission which was liable to revocation, for in the view which we take of the case the right of the plaintiff-respondent to re-enter has come into being owing to the abandonment of his license by Behari, the present successor in interest of Ichcha.

If the position had remained as it was before the execution of Ex. 57 the defendants-appellants could have rested a strong argument on the fact that the Kori family not having abandoned their right of occupation, and the plaintiff-respondent not having under the *wajib-ularz* or any proved contract or agreement a right of re-entry, the suit must fail according to the principles laid down in *Mohammad Ali Khan v. Badrunnisa* (1). The situation has been completely changed by the execution of Ex. 57. Sir Tej Bahadur Sapru has argued that as this deed was executed after the suit was instituted its effect cannot be considered in arriving at a decision. But apart from the fact that the defendants-appellants appear to us to have acquiesced in the decision to consider the effect of this deed upon the situation, we consider that the plaintiff-respondent had a right to use the existence of this deed

and its effect for the purpose of obtaining decision. The plaintiff-respondent in effect said in his plaint that he had found the defendants-appellants occupying a site in Pihani which was his property without his permission. We shall consider later whether they had his permission. If they had his permission his case would undoubtedly fail. But his case was that they did not have his permission. He desired to eject them as trespassers. They asserted that they had obtained right to occupy the premises by the consent of his licensee. He questioned the right of the licensee to give that consent. If the situation had remained as it was when the suit was instituted the defendants-appellants might have contested with success on the ground that although the licensee had no power of transfer the licensee had nevertheless still the right to occupy the premises, and as long as there was a licensee in existence, who had not abandoned his rights as a licensee, the plaintiff-respondent, having no power of re-entry, could not succeed. But directly afterwards the licensee Behari executed Ex. 57. We can only construe Ex. 57 as having the following effect. After its execution Behari had no right of occupation left. He had abandoned his right of occupation. His family had previously given up the right of possession by the execution of the deed of usufructuary mortgage of 1916. Behari had, however, still the right to redeem. He has now given up that right to redeem and having given up the right to redeem he has no interest left in the matter. The defendant-appellants thus stand as trespassers in possession of a plot which had formerly been held under a license. The license has now disappeared as the licensee has abandoned all his rights and in these circumstances the defendants-appellants remain as trespassers liable to ejection unless they can prove a permission to occupy the site based upon an acquiescence of the proprietor. We now proceed to consider whether they have obtained such permission.

The allegations of the defendants-appellants to the effect that the plaintiff-respondent acquiesced in the construction of the thakurdwara and is thus not in a position to enforce its demolition are based not on any allegation of

(2) [1904] 27 All. 356=2 A. L. J. 27=(1904) A. W. N. 276.

explicit acquiescence but on evidence produced as to the conduct of the minor plaintiff, certain of his relatives, and in particular as to the conduct of a certain Zahid Ali, a relative of the plaintiff-respondent who is alleged by the defendants-appellants to have been his manager. These allegations are determined finally to a certain extent by the finding of fact of the learned District Judge in his decision after remand of 4th November 1929. He has found that the evidence of those witnesses who have deposed that the minor plaintiff-respondent, Zahid Ali, Sharafat Husain and Abbas Hussain were present at the ceremony of laying the foundation of the thakurdwara is unreliable. This finding of fact cannot be impugned in second appeal. It is thus found that none of these persons was present on that occasion. The learned Judge has found that in the circumstances of the case it is a reasonable conclusion that the plaintiff-respondent and his agent must have been in the position to know that the building was in the course of construction, but he finds that nothing more than that is established in respect of the plaintiff-respondent himself and the persons representing him. The case of Zahid Ali is to be considered separately.

In the first place it has to be seen who Zahid Ali is. He is a Saiyed of Pihani who is an Honorary Magistrate and President of the Notified Area of Pihani. Mt. Zakia Begam the guardian of the minor plaintiff-respondent is his father's sister. He has deposed that during her absence in Karbala in the year 1924 he looked after the work of the Ziladars of the estate and signed receipts for rent received during that period, on behalf of the minor plaintiff-respondent. But he has deposed distinctly that he was never the manager of the plaintiff-respondent's property. He admitted that one time he acted as Muntazim of that property. His statement on this point is as follows :

"I have never told any one that I was 'manager' of Saiyed Hamid Ali's property. I have stated in Court that I was the 'Muntazim' of Hamid Ali's property. This statement was correct at the time when I made it. I am no longer 'Muntazim' of his property. I was 'Muntazim' of Hamid Ali's property on 22nd March 1926. I was 'Muntazim' of Hamid Ali's property in so far as I supervised the work of managers and Karindas. I remained

Muntazim 'from October or November 1925 to January 1927."

We asked what was the word which is recorded as 'Manager' in the note of his deposition which is in English, which he used in vernacular. We were instructed by one of the learned counsel for the defendants-appellants, who was present in Court when the deposition was made, that the witness had used the word 'Manager' in English. He apparently said something of this kind in Urdu : *hamne kisi se kabi nahin kaha ki ham Saiyed Hamid Ali ki jaedad ke 'manager' the, ham ne a'la'at men kaha ki ham Hamid Ali ki jaedad ke muntazim the.* The word 'muntazim' is translated in Fallon's dictionary as a "manager" or a "superintendent." The literal meaning of the word is the person who makes the intizam. Intizam is a word of many meanings. Fallon translates it:

"arrangement, adjustment, organisation, regulation, management, disposition, etc."

We are not here concerned with the meaning that a lawyer would give to the word Muntazim but the meaning which the witness would give to it. He clearly does not suggest that he was in any sense the manager of the property. His suggestion is that during the absence of the lady he, as a relative and friend, exercised a general power of supervision. We find that he was no more than that. Upon this finding he would have had no authority to bind the plaintiff-respondent in respect of transfer of property or the like. Thus his acquiescence would not assist the defendants-appellants. When we look into the nature of the acquiescence the acquiescence alleged on behalf of Zahid Ali is not his acquiescence in his personal capacity but his acquiescence as President of the Notified Area Committee. Ex. A-5 shows that on 30th May 1924, the defendants-appellants applied to the Notified Area Committee for permission to build a house along with a balcony platform and out-houses for servants. This is Ex. A-5. There is nothing in this application or the plan accompanying it to show that they intended to construct the present building which is three storeyed or that they intended to utilise the building as a thakurdwara. Upon the application itself there is nothing to show that it refers to the property in question. But

the evidence of Mr. Lachmi Narayan Tandon, Honorary Magistrate, D. W. 67 establishes sufficiently that permission in question was desired in respect of the property in question. He is the member of the Notified Area Committee who made the report recommending permission. All he says in the report which is dated 30th May 1924, is this :

"Inspected the locality. There is no harm in building pucca instead of kacheha on the old foundation and erecting four doors but the servants' houses should not be allowed to exceed the boundary of Lala Radha Kishan's servants' houses and the drain and the height should be such as to permit cleaning the drain easily."

When the matter came before the Notified Area Committee permission was granted by the committee, Zahid Ali signing it as President, Ex. A-6. That is all. We are unable to find that this could possibly be read as a permission given by Zahid Ali to construct a thakurdwara three storeys high.

Even if there had been evidence of direct acquiescence we do not see how it can help the defendants-appellants. On the view which we have taken of the law there we need not consider the need for acquiescence so long as the defendants-appellants remained mortgagees in possession. While they were mortgagees in possession the plaintiff-respondent had ordinarily no right of re-entry. They could alter the building as they wished for residential purposes. It is not necessary to discuss whether the construction of a public temple would have given the plaintiff-respondent a right of re-entry if a public temple had been made, for on the view we take, the matter turns upon the abandonment of the license. So long as the defendants-appellants remained mortgagees in possession and the Kori family remained mortgagors the plaintiff-respondent had to make out a right of re-entry. But when the Kori family gave up their license, the situation changed. The principles which should guide a Court in applying acquiescence as a bar to the exercise of a man's legal right have been stated very clearly in *Willmott v. Barber* (3) (at p. 105) by Fry, J. We give the quotation :

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true pro-

position. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What then are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant the possessor of the legal right must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights. Lastly, the defendant the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment nothing short of this will do."

We consider that the principles laid down by that learned Judge are the principles which should be applied in cases in India, where the plea of acquiescence is raised and upon the facts we find that applying these principles there has been no such acquiescence on the part of the plaintiff-respondent as can be asserted by the defendants-appellants in defence in this suit.

As we consider this case of considerable importance we propose to summarize the learned arguments addressed to us by Sir Tej Bahadur Sapru on behalf of the appellants. His case was that Pihani is a town and that inasmuch as Pihani is a town there could be no finding that the Kori family had no right of transfer unless the plaintiff-respondent was able affirmatively to establish that they had no right of transfer. His second point was that as the thakurdwara was a private temple its construction as a private temple afforded no cause of action to the plaintiff-respondent as his right as proprietor remained unaffected by the construction. The next point that he argued was that the execution of the deed Ex. 57 in no way affected the case. He argued that if the Kori family could not make a valid transfer their position remained unaffected as riyats or tenants of house-

property whatever they did. The transfer according to him made by Ex. 57 was at its worst an invalid transfer. If it were so, the Kori family's rights remained, and the alienation not being a good alienation there could be no escheat. He argued that the Court should not take Ex. 57 into consideration. He finally argued that on the facts an acquiescence had been made out which debarred the plaintiff-respondent. We have with the exception of one plea, dealt with the remaining pleas already but for convenience we summarise our conclusions. Pihani is a town and the burden was on the plaintiff-respondent to establish his right to eject the defendant-appellants. But according to our view he has discharged that burden by production of the *wajibularz* and other evidence which establishes that Ichcha was a non-privileged licensee, who had the right only to retain the premises for the purpose of his own occupation with no right to transfer. Ichcha's rights were hereditary. If the family died out or if the family abandoned their rights the site reverted to the proprietor. It was not a case of escheat but a case of termination of the license.

The thakurdwara is according to our finding a private temple to which so far the public have been allowed access for purposes of worship.

We have discussed in a sense the value of the next argument but it will be better to state our decision more clearly in reference to it. We do not consider that a transfer by Ichcha's successors-in-interest, even if invalid, would necessarily give the proprietor cause for recovery of possession. As we have already stated the fact that the defendants-appellants obtained a mortgage with possession would not ordinarily justify their ejection so long as any member of Ichcha's family was alive and retained the right of re-entry on the property. But the case has been completely altered by the execution of Ex. 57. The family have now abandoned all rights, and on this abandonment the position remains that the defendants-appellants are in unauthorised occupation of the land in question. Ex. 57 was rightly admitted in evidence as proof of the abandonment.

We have already considered the question of acquiescence and found that there has been no acquiescence which would bar the plaintiff-appellant from exercising his legal rights. Much has been made both in the Courts below and before us of the hardship of compelling the destruction of this valuable property. We fully appreciate the arguments upon the point. We suggested when the appeal first came before us to the parties the advisability of entering into an amicable arrangement by which the plaintiff-respondent should receive compensation and the construction should be allowed to remain. We are given to understand that Mr. Hasan Imam, the learned counsel who appeared for the plaintiff respondent, has endeavoured to persuade his client's guardian to enter into an amicable arrangement, and that the learned counsel, Mr. A. P. Sen, who appeared for the defendants-appellants, at the previous hearing, has also endeavoured to bring the matter to an amicable conclusion. Unfortunately their efforts have failed. We do not consider that under the law we have power to refuse the relief which the plaintiff respondent deserves. We base our view in particular upon the decision of their Lordships of the Judicial Committee in *Lala Beni Ram v. Kundan Lal* (4). That, it is true, was a case as between landlord and tenant. But the principles appear to us to have application in the present appeal. At p. 64 their Lordships quoted as applicable to India the rule laid down by the Lord Chancellor (Lord Cranworth) and a majority in the House of Lords in *Ramsden v. Dyson and Thornton*:

"It follows as a corollary from these rules, or perhaps, it would be more accurate to say it forms part of them, that any tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest and it was his folly to expend money upon a title which he now would or might soon come to an end."

We conclude by taking the grounds in appeal and the objections in remand and stating shortly our decision on each. Upon the first ground we find that the execution of Ex. 57 constituted

(4) [1893] 21 All. 493=26 I. A. 58=7 Str. 523 (P. C.).

an abandonment which gave rise to a right of re-entry in favour of the plaintiff-respondent. We do not consider that it was a case of escheat. On the second ground we find that there is nothing gained by distinguishing a wakf from the sale. Ex. 57 evidences an abandonment. On the third ground we find that the thakurdwara is a private temple to which the public have so far had a right of access for the purpose of worship. On the fourth ground our decision is that we are not utilising the decision in *Basa Mal v. Ghayasuddin* (2). Our decision turns upon another point. The fifth ground has already been disposed of. Our decision is that there having been an abandonment by the licensee the defendants-appellants are in the position of trespassers who can show no title. The sixth ground raises a question of limitation. We find that there can be no limitation in this matter as the cause of action for re-entry arose when Ex. 57 was executed. On the seventh ground we find that the Courts were right to consider Ex. 57 as proving an abandonment. The finding of fact as to Behari being the sole representative of the Kori family is final and we cannot reopen it.

The eighth ground is covered by our decision in the seventh ground. On the ninth ground we find that the original decision that the original building was khasposh is a finding of fact which is final in second appeal. But the point is immaterial in view of our finding on the question of abandonment. The tenth ground is covered by our decision on the ninth ground. On the eleventh ground we find that the question of the exclusion of female heirs is immaterial. We have already accepted the view that the plea of acquiescence was a material plea and remitted the case for a finding upon this point. The twelfth ground is covered by our decision that there was no acquiescence. On the thirteenth ground we have already found that Pihani is a town and we have discussed the question of custom and arrived at a decision upon it. The fourteenth, fifteenth and sixteenth grounds are immaterial. On the objections against the remand finding there is little to say. We have found that burden was upon the plaintiff-respondent to establish that he had a right

of re-entry. We have considered the law, the value of the wajibularz and the other points raised in these objections.

As a result we dismiss this appeal. The effect is that the defendant-appellants must vacate the premises and must remove the structures thereon. We allow them six months from the date of this decree within which to remove the structures. If they fail to remove these structures within six months the plaintiff-respondent will have the right to remove those structures and to charge the cost of the removal to the defendants-appellants as costs in the case. The materials will be handed over to the defendants-appellants. The defendants-appellants will pay the whole of the costs of this appeal and also the costs incurred by the plaintiff-respondent.

V.B./R.K.

Appeal dismissed.

* A. I. R. 1930 Oudh 245

SRIVASTAVA, J.

Abdul Ghafoor — Defendant—Appellant.

v.

Rahmat Ali and others—Plaintiffs—Respondents.

Second Appeal No. 345 of 1929, Decided on 12th February 1930, from decree of Addl. Sub-Judge, Lucknow, D/- 30th September 1929.

(a) Mahomedan Law—Wakf—Creation of.

It is well settled that a wakf may, in the absence of direct evidence of dedication be established by evidence of user. [P 246 C 1]

(b) Mahomedan Law—Wakf—Creation of—Evidence of user to present day is not necessary.

In order to establish that a piece of land is a public wakf on the ground of user, it is not necessary that there must be evidence of user up to the present day. [P 246 C 2]

(c) Mahomedan Law—Wakf once established, is permanent.

Once a wakf is established either by evidence of dedication or by evidence of user, it is of the essence of the wakf that it should be permanent. [P 247 C 1]

* (d) Mahomedan Law—Wakf—Alienation—Cemetery once established always remains so unless land becomes unfit and cannot be alienated.

Once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery, unless for any reason the land turns out to be unfit for use as a cemetery and consequently is incapable of alienation. *Oudh First Appeal No. 15 of 1921 Expl.* [P 247 C 1]

Ali Zahcer and Ramapat Ram—for Appellant.

Mubashir Husain Kidwai—for Respondent.

Judgment.—This is a defendant's appeal. It arises out of a suit for a declaration that a plot of land 374 situate in Mohalla Nayagaon, Lucknow, is a public graveyard and that the defendant is not entitled to make any constructions on the aforesaid plot, other than those contemplated by the wakf. The defendant denied the existence of the alleged public graveyard and set up title in himself by adverse possession.

The trial Court held that the plaintiff had failed to prove that the plot in suit was a public graveyard and dismissed the suit accordingly. On appeal the learned Subordinate Judge has disagreed with the finding of the trial Court and held that it was sufficiently proved both by documentary and oral evidence that the plot in suit is a public burial ground. He has also found that the defendant has failed to establish any title in himself and has accordingly given the plaintiff the declaration claimed.

The learned counsel for the defendant-appellant has questioned the correctness of the finding of the lower appellate Court about the land in suit being a public graveyard on two grounds. He has pointed out that admittedly the graveyard in question was closed to the public under orders of the Municipal Board about 40 years ago and that no burials had been made in the said land during the last 40 years. His first contention is that in these circumstances the land cannot be regarded as a public graveyard. His argument is that if any land is to be held as a public graveyard on the ground of user, the user must be proved to have continued up to the time when the controversy arises. His second contention is that as the land has admittedly ceased to be a graveyard, it must be deemed to have lost its character of a public wakf and should now be regarded as private property which could be the subject of transfer. In my opinion both these contentions are without force. It is well settled that a wakf may, in the absence of direct evidence of dedication, be established by evidence of user. The land in suit was recorded at the time of the first regular settlement as a qaburistan but there is no direct evidence to establish the dedication. In the lower Court

emphasis was laid upon the entry of the name of one Wazirunnissa in the settlement khasra in the column containing the names of persons owning the property. The learned Subordinate Judge has discussed this entry, at considerable length and in the light of the evidence of a number of witnesses examined on behalf of the plaintiffs, whose evidence he has believed has come to the conclusion that the Mahomedan public used the land as their burial ground until the Municipal Board prohibited further interments in that land about 40 years ago. Thus in the present case the finding about the land in suit being a public graveyard is based upon the evidence of long user. The learned counsel for the appellant has failed to cite any authority for the proposition that in order to establish the land as public wakf on the ground of user, there must be evidence of continued user upto the present day. The rule which allows evidence of user to take the place of dedication is a rule of necessity. In the case of old wakf it is not possible to secure direct evidence of dedication and so it has been ruled that even in the absence of such direct evidence, a Court can hold a wakf to be established on evidence of long user. In the case of a wakf like the present in which interments were stopped under the orders of the Municipal Board no less than 40 years ago, it is very difficult to secure direct evidence of dedication, and if there is evidence to establish long user continuing right up to the time of the prohibition made by the Municipal Board I fail to see any reasons for rejecting this evidence in proof of the wakf. In the absence of any authority in support of the contention, I must overrule it.

Next as regards the argument that the land no longer retains the character of a public wakf because it has ceased to be used as a graveyard, reliance is placed upon a decision of the late Court of the Judicial Commissioner of Oudh in *Mt. Bismilla Khanam v. Abdul Hasan Khan* (1). In this case Mr. Daniels, First Additional Judicial Commissioner remarked as follows:

"There is one interesting point raised by counsel for the appellants which it is perhaps unnecessary to decide and that is the

(1) First Appeal No. 15 of 1921.

effect of the land having ceased to be capable of being used as a burying ground. There is a passage from Baillie's Digest reproduced in Amir Ali's Mahomedan Law, Edn. 4, Vol. 1 p. 406 to the following effect:

"When a woman has made a cemetery of part of her land, divesting herself of the property and has buried her son in it, but the piece of land is unfit for a cemetery by reason of an overflow of water upon it, and she wishes to sell the land, if it be still in such a state that people desire to bury their dead in it, she cannot sell it, but if they have no such desire she may." The effect of this appears to be that if the land has become incapable of being used as a burying ground and no one any longer desires to use it as such it becomes capable of alienation. The particular circumstance which renders it unfit for such use, whether an overflow of water as in the example given or the fact of its being in the inhabited part of a populous city, is immaterial."

The remarks contained in the first sentence of the extract quoted above would show that they were unnecessary for the decision of the case. Apart from this the passage quoted from Amir Ali's Mahomedan Law refers to a case of land which was unfit for use as a cemetery. It is a case in which the object of the wakf had failed. This is very different from a case like the present in which the land has been used as a cemetery for a long period and has been closed to the public under orders of the Municipal Board presumably because there was no vacant land left for further interments or because for considerations of the health further interments in that locality were considered undesirable. It may be useful to point out that the passage from Baillie's Digest which has been reproduced in this judgment is preceded by another passage which runs as follows:

"And being asked with regard to a cemetery, in a village where it had gone to decay and there remained in it no traces of the dead, not even bones, whether it was lawful to sow the land and take its produce, answered "No" for in legal effect it is still a cemetery."

This seems to show clearly that once land has been dedicated for the purpose of a cemetery it must always be regarded as a cemetery unless for any reason the land turns out to be unfit for use as a cemetery. Once a wakf is established either by evidence of dedication or by evidence of user it is an essence of the wakf that it should be permanent. I am not therefore prepared to hold that the land can be regarded as private property because it has ceased to be used for purposes of a graveyard now.

Lastly, it was also contended that the plaintiff was not entitled to the declaration granted to him by the lower appellate Court as he had not asked for consequential relief, namely demolition of the building and possession of the land. This is a new plea which was not raised in the pleadings or in any of the two Courts below. The reply made by the learned counsel for the plaintiff is that he did not ask for a decree for possession because the constructions have been made by the defendant during the pendency of the suit. He has pointed out, by reference to para. 2 of the plaint that the foundations of the house were dug by the defendant on 8th July 1923 and that he instituted a criminal complaint on the day following, namely, on 9th July 1923. The present suit was instituted shortly after on 14th July 1923. There is no evidence before me to show that the defendant's house was in existence at the time when the present suit was instituted. In the absence of such evidence it is not possible for me to hold that the plaintiff was entitled to ask for any consequential relief in relation to the said building at the time when the present suit was instituted. I must therefore overrule this contention also.

The result therefore is that the appeal fails and is dismissed with costs.

J.M./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 247

PULLAN, J.

Ramai Ahir—Appellant.

v.

Narain Dei and others—Respondents.

Second Appeal No. 17 of 1930, Decided on 12th February 1930, against decree of Addl. Sub-Judge, Fyzabad, D/- 7th October 1929.

Wajibularz—While considering right of daughters and daughter's sons to inherit, entry in **wajibularz** prohibiting inheritance in any case should be looked into—**Hindu Law—Succession.**

Where a clause in **wajibularz** recording a custom with regard to inheritance to Hindu daughters and daughter's sons records that daughters obtained no share by inheritance in any case where there is or is not male issue the custom so recorded should be interpreted to mean, that daughters and their sons do not inherit whether there are sons or not of their father, but that if there are no collaterals they will come in under the provisions of the

Hindu Law and succeed to a life-estate :
A. I. R. 1923 P. C. 70 (P.C.), *Rel. on.*

[P 248 C 2]

Radha Krishna—for Appellant.

Bhawani Shankar—for Respondent 1.

Judgment.—The facts which give rise to this second appeal are as follows. Ganesh Upadhyaya was the owner of certain property by way of shankalap. He died leaving a widow and four daughters. The widow Mt. Dhiraja was entered as owner of the property on his death. She died in the year 1913 and mutation was effected in favour of her four daughters in equal shares. The daughters have remained in possession up till now. One of the daughters Lal Dei sold her one-fourth share to one Ramai on 26th June 1928. Another daughter Narayan Dei brought the present suit to contest that transfer. The decision of the case depends on whether the daughters have inherited the property of their father Ganesh Upadhyaya. Under the Hindu law they would have succeeded to a life estate on the death of their mother but in this village there is a record of custom which appears to exclude daughters altogether from inheritance. This record is prepared in the form of question and answer. The question dealing with the rights of daughters and daughter's sons is defective but apparently it was to this effect, namely : What rights have daughters and their sons where there is or is not any male issue ? The answer appears in full, and it is that the daughter obtains no share by inheritance in any case. I am asked on behalf of the transferee to hold that by virtue of this custom the four daughters have no right to inherit the property, that Lal Dei had no right to transfer it and that Narain Dei had no right to object to the transfer. This view was accepted by the first Court but the lower appellate Court considered that this was a wrong construction to place upon the record of custom. He pointed out that in all Hindu families there was a desire to keep the property in the family and for this reason daughters in certain cases were excluded from inheritance as against the male collaterals, but the learned Subordinate Judge does not consider it possible that a Hindu family could record a custom by which their property would escheat to the Crown in preference to descend-

ing to their own daughters. He would therefore interpret the custom to mean that daughters and their sons do not inherit whether there are sons or not of their father, but that if there are no collaterals they will come in under the ordinary provisions of Hindu law and succeed to a life-estate. A somewhat similar clause in a *wajibularz* was considered by their Lordships of the Privy Council in the case of *Balgobind v. Badri Prasad* (1) and their Lordships held that the words must be construed literally and on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance whether he has left sons or not. But their Lordships went on to say :

"How such a custom would operate in cases in which an owner died leaving no relation but a daughter who could inherit it is not necessary how to consider."

In my opinion the view taken by the Court below is correct and there is no authority to the contrary. There is a finding of the Courts that there was no collateral relation of Ganesh Upadhyaya living at the time of Mt. Dhiraja's death and a further finding that there is no one in existence against whom they can be said to have taken adversely. I find therefore that the collateral branch has failed and the succession must under the Hindu law revert to the four daughters for their lives as it cannot be held that the custom intended to permit the estate to revert to the Crown in the lifetime of the daughters of the deceased proprietor. In this view of the case the plaintiff who is entitled to a life-estate in her sister's share in the event of her being predeceased by the latter, can bring a declaratory suit to avoid alienation as against herself. I find that the decree of the lower appellate Court is correct and I dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

(1) A. I. R. 1923 P. C. 70=26 O. C. 217=15
All. 413=50 I. A. 196 (P.C.).

* A. I. R. 1930 Oudh 249

PULLAN, J.

Wali Mohammad—Appellant.

v,

Emperor—Opposite Party.

Criminal Appeal No. 59 of 1930, Decided on 27th February 1930, from order of First Addl. Sess. Judge, Lucknow, D/- 12th January 1930.

(a) Criminal Trial — Evidence — First information report by itself is not convincing.

By itself a first information report can hardly be regarded as evidence of a convincing nature. [P 249 C 2]

* (b) Evidence Act, S. 32—Deceased dying of independent malady after assault and hurt—Dying statement as to cause of death is not admissible in evidence against assaulter in trial under S. 324, I. P. C.

Where a person dies in a hospital after being assaulted and hurt, not of the injuries but of a malady independent of such injuries, such for example as pneumonia, the dying statement of such person is not admissible in evidence in a trial of his assaulters under S. 324. [P 249 C 2]

Matiuddin—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—This is an appeal from the judgment of the First Additional Sessions Judge of Lucknow at Bara Banki preferred by one Wali Mahomed, who has been convicted of an offence under S. 325, I. P. C., along with two other persons who have not appealed. There is no dispute now as to the facts of the case. Nanhey, who was a Fakir by caste and who was a relation of the two accused Ittada Bakhsh and Farzand, had abducted the wife of the latter. Farzand was forced to take proceedings to get his wife back, and having done so he enticed Nanhey into his house and gave him a severe beating. Apart from numerous bruises Nanhey sustained a compound fracture of the right leg. The nature of the injuries shows that they were not intended to cause death and it is the finding of the learned Judge that they did not cause death. Nanhey was taken to the police station where he made a report on the morning of 8th September in which he named Khader Bakhsh, Farzand and Wali Mohammad as his assailants together with another person whose name he did not know. He was removed to hospital, where he became seriously ill. On 15th September his dying statement was taken. In that statement he repeated the first information report but

added that there were fifty or sixty persons concerned in the assault. As his condition became critical he was removed to King George's Medical Hospital, Lucknow, where he died of pneumonia on 3rd October 1929. The Judge accepts the statement of Dr. Modi, who conducted the post-mortem examination, that the cause of death was pneumonia and that there was no reason to connect the onset of pneumonia with the injuries inflicted. The Judge agreeing with the assessors found all the three accused guilty of an offence under S. 325 and it is for me to consider only whether the evidence was sufficient to justify the conviction in the case of Wali Mohammad. No doubt the appellant is mentioned in the first information report and in the so-called dying declaration. The first information report in itself can hardly be regarded as evidence of a convincing nature, and the dying declaration is open to a legal objection that it is not strictly speaking admissible under the Evidence Act.

In order to be admitted under S. 32, para. 1, Evidence Act, it should be made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Now the cause of death came into question although it has been found that the injuries were not the cause; but once it has been held that the cause was pneumonia it cannot properly be held that the statement made by the deceased showing that he had been severely beaten is a statement made as to the cause of his death. Thus I am doubtful whether the learned Judge was right in laying stress on the statement as against the three accused. The Judge has said that the evidence of the two eye witnesses Bashir and Puttu fully corroborates the information report and the dying declaration. Bashir was not an eye witness. He came up after the assault had been committed and it is not stated that he saw Wali Mohammad although he knows him. Puttu made conflicting statements as to what he saw so much so that in my opinion his evidence is of little or no value. At least he only stated that he recognized Wali Mohammad by his voice and he never committed himself to saying that

Wali Mohammad took any part in the assault. Thus the so-called corroboration of the first information report and the dying declaration is of little value. Further the Judge has observed that the accused themselves alleged that the deceased came to their house in order to commit theft but Wali Mohammad made no such statement and he does not live in a house near that of his co-accused. The connexion of Wali Mohammad in the affair said to have been a liaison between him and the widowed daughter of Khuda Baksh and sister of Farzand. The Judge appears to have some misgivings in convicting him as he fails to see why a person behaving in the manner that Wali Mohammad behaved should join in in assault on another person for an immoral connexion with a woman in the same family. In my opinion, however, the question of motive is immaterial; possibly it was sufficient to induce Wali Mahommed to join in the affair but I am not satisfied that the evidence justifies the conviction. The learned Judge in my opinion lays too much stress both on the dying declaration and on the evidence of the two witnesses Bashir and Puttu whom he describes as eyewitnesses. Puttu it may be observed has been engaged in litigation with Wali Mohammad and this may have been one of the reasons why the man was named. I give the appellant the benefit of the doubt and allow the appeal, set aside his conviction and sentence and order that he be set at liberty.

V.B./R.K. *Conviction set aside.*

A. I. R. 1930 Oudh 250

PULLAN, J.

Emperor

v.

Madho and others—Accused.

Criminal Ref. No. 6 of 1930, Decided on 27th February 1930, made by Addl. Sess. Judge, Gonda.

(a) Cattle Trespass Act (1 of 1871), Ss. 11 and 24 read with Railways Act S. 125 (4)—Cattle passing over regular track at place where there is no fencing to railway line—Unless there is damage conviction under S. 24 cannot be sustained.

In order that an offence may be established under S. 24, Cattle Trespass Act, the seizure of the cattle must be legal and consequently driving heads of cattle across the railway line at a place where there is no fence and where there is a regular track does not constitute any

offence under S. 24 in the absence of any damage to the line: 43 I. C. 445; 1 P. L. T. 176 and 23 C. W. N. 387, *Rel. on.* [P 250 C 2]

(b) Cattle Trespass Act (1 of 1871)—Conviction not justified under law and fine arbitrary—Conviction can be set aside—Criminal P. C., S. 439.

Where a conviction was not justified under the Cattle Trespass Act and especially where the fine was arbitrary, High Court interfered and set aside the conviction. [P 251 C 2]

H. K. Ghosh—for the Crown.

Bhagwati Nath Srivastava—for Accused.

Judgment.—Four persons have been convicted of an offence under S. 24, Cattle Trespass Act (Act 1 of 1871) and S. 125, Cl. (2), Railways Act in a summary trial and fined Rs. 100 each under the former section and Rs. 20 each under the latter. The case has been referred to this Court by the learned Additional Sessions Judge of Bahraich on the ground that the conviction under S. 24, Cattle Trespass Act is illegal, but the learned Judge is of opinion that the conviction and sentence under S. 125 (2) Railways Act can be maintained. I am not concerned with any injuries that may have been inflicted in this case on the person of any railway servant as no charge was framed under any sections except those to which I have referred, and I have merely to consider whether the evidence in this case justifies a finding that these persons were guilty either of an offence under S. 24, Cattle Trespass Act, or of an offence under S. 125 (2), Railways Act. The four persons were driving ten head of cattle across the railway line at a place where there was no fence and where, according to the Magistrate, there was a regular track. They were stopped by a railway employee who tried to seize the animals with a view to taking them to the pound, and they forcibly opposed the seizure. In order that an offence may be established under S. 24, Cattle Trespass Act, the seizure of the cattle must have been legal, that is to say, the animals must have been liable to seizure under S. 11 of the same Act. S. 11 authorises persons in charge of public roads, which under the provisions of S. 125 (4), Railways Act, includes railways, to seize any cattle doing damage or straying. Cattle which have been driven across a railway line by their owner cannot be said to have strayed and damage must be proved. In this case it was not even alleged that

the cattle were doing any damage, and it is not easy to say what damage could have been caused by them while they were merely being driven over the line. The Magistrate in his explanation says that when he inspected the locality on 24th September 1929, that is to say eight weeks after the alleged offence, he found that some ballast kankar had been scattered, an earthen embankment had been fissured and worn out and some grass nibbled; but he does not profess to believe that this damage was caused only by the cattle in the present case, and such a view would be untenable in face of his own judgment where he says that a regular track had been worn across the land at this place. I must therefore find that the cattle caused no damage and this being so they were not in my opinion liable to seizure. Whether the railway employees could or could not order the owners of the cattle to remove them and refuse them a right of passage need not be considered. S. 24 refers only to those who forcibly oppose the seizure of cattle liable to be seized. In my opinion the cattle were not liable to be seized and no penalty can be imposed under the Cattle Trespass Act upon the owners for forcibly opposing the seizure. I have already stated that no charge was preferred against them under the Indian Penal Code for causing hurt or assault and I find therefore that the reference as to the conviction and sentence under S. 24, Cattle Trespass Act should be accepted. I am not referred to any ruling of this Court on this point but there are two rulings of the Patna High Court reported in *Criminal Law Journal Reports* both of which insist on the fact that damage must be proved before a conviction under S. 24, Cattle Trespass Act can be sustained: see *Sukhnandan Rai v. Emperor* (1) and *Dassi-Guala v. Sardar Mahton* (2). The same view was held by the Calcutta High Court in *Manik Chandra Roy v. Ismail Kalu* (3).

I would, however, go further than the learned Judge and find that the conviction under S. 125 (2), Railways Act is also unsustainable. That section applies if cattle were wilfully driven on any railway otherwise than for the purpose

of lawfully crossing the railway. In order that these persons should be convicted under that section it must be proved that their purpose was not lawful. Now there is no provision in the Railways Act by which the public is forbidden to cross railway lines or drive animals across them at places other than level crossings, and if the railway erects no fence the public will continue to cross the line and drive their animals across it until they are stopped. I find no section in the Act under which the public can be stopped. It is not obligatory on railway companies to provide fences unless they are directed to do so by the Governor General in Council: but where they do not choose to erect fences they cannot in my opinion prevent persons crossing the railway line at will. They have their remedy where the cattle are found to commit damage or to stray without owners on the railway ground but the mere crossing of the railway is not unlawful. Thus on general grounds I am of opinion that the conviction under S. 125 (2) should be set aside. There is also a special ground for so doing. The section lays down that the fine may extend to Rs. 10 for each head of cattle to be recovered from the owner. There is no finding in this case as to the number of cattle owned by each of the accused. An arbitrary fine of Rs. 20 each should not have been inflicted. It is true that this may be considered to be a more or less trivial point but it is an additional reason for interfering in a case where the conviction is not justified by the law, under which the Magistrate purported to act. I, therefore, accept this reference as to the conviction under S. 24, Cattle Trespass Act and I also accept the request made on behalf of the accused as to their conviction under S. 125 (2), Railways Act, and I order that both the sentences and convictions be quashed and the fine, if paid, be refunded.

V.B./R.K.

Convictions quashed.

A. I. R. 1930 Oudh 251

STUART, C. J.

Emperor

v.

Mohammad Hanif—Applicant.

Criminal Ref. No. 2 of 1930, Decided on 11th February 1930.

(1) [1919] 19 Cr. L. J. 157=43 I. C. 445.

(2) [1920] 1 P. L. T. 176=57 I. C. 464=21 Cr. L. J. 640.

(3) [1919] 23 C. W. N. 387=50 I. C. 1006=20 Cr. L. J. 898.

Motor Vehicles Act (8 of 1914), S. 16, Oudh Government Rules R. 79 — "License form F"—"Ply" means "ply" for hire.

The word 'ply' in the permit form F must be read to mean "ply for hire". [P 252, C 1]

H. K. Ghose—for the Crown

Asghar Hasan—for Accused.

Order.—This is a reference by the Additional Sessions Judge of Lucknow sitting at Bara Banki in respect of a conviction and sentence under S. 16, Motor Vehicles Act (Act 8 of 1914). Mohammad Hanif is a licensed driver of a public motor vehicle which is licensed to ply between Lucknow and Bara Banki and Bara Banki and Haidergarh. On a certain date he drove this public vehicle on the road from Bara Banki to Fyzabad and he has been convicted under S. 16 of the Act read with rule No. 79 of the rules for having contravened the condition of his license in plying on a route in respect of which he held no permit. On the facts it is clear that at the time Mohammad Hanif was not driving the vehicle for hire. He was using the vehicle for the purpose of transporting himself, his brother and his cleaner from Bara Banki to Fyzabad. He was proceeding to Fyzabad as he had private business there. The license Form F states the route on which the vehicle is permitted to ply, and the learned Magistrate considered that by proceeding from Bara Banki to Fyzabad he was plying. Now it is to be noted that the word 'ply' standing alone, though used in the license, is not used in the definition. In the definition Rule 3 No. (g) a 'public motor vehicle' is stated to mean a vehicle which is let for hire or which stands or "plies for hire" in any public place. I agree with the learned Sessions Judge that the word 'ply' in the permit Form F must be read to mean "ply for hire". In this connexion it appears to me impossible to hold that it can have any other meaning. To take the other view would involve extraordinary consequences. If a permit was granted to ply between Lucknow and Bara Banki to a public motor vehicle and that public motor vehicle was garaged outside Lucknow on the Cawnpore road the holder of the permit would, if this view were taken, be liable to a criminal prosecution on every occasion that he drove vehicle empty to the garage or drove it back empty to the place in which he commenced his business. The learned

Sessions Judge has taken a correct view of the matter and in these circumstances the conviction cannot stand. I set aside the conviction and sentence of fine and direct the fine, if paid, to be refunded. The order suspending the license will be annulled.

V.B./R.K.

Conviction set aside.

A. I. R. 1930 Oudh 252

NANAVUTTY, J.

Iqbal Husain and others—Accused—Appellants.

v.

Emperor — Complainant — Opposite Party.

Criminal Appeal No. 24 of 1930, Decided on 24th February 1930, from order Sess. Judge, Sitapur, D/- 17th January 1930.

(a) Penal Code, S. 304 — Death due to peritonitis from rupture which could not be connected with injuries — Offence under S. 304 cannot be sustained.

If a victim of an assault dies of peritonitis due to a rupture which could not be connected with the injuries received in the assault, there is no case of culpable homicide not amounting to murder. [P 253, C 2]

(b) Penal Code, S. 97—Right of private defence is not available to parties determined to fight.

According to the Penal Code no right of private defence arises in circumstances such as those when both parties arm themselves for a fight to enforce their right or supposed right and deliberately engage in very large numbers in a pitched battle killing one man and wounding others: 35 Cal. 368, *Foll*; 40 *Ind*. 105; 20 *All*. 450; *A.I.R.* 1925 Oudh 438, *Ref.*; 10 *O. C.* 196; *A.I.R.* 1923 *All*. 194; 17 *O. C.* 21; *A. I. R.* 1923 Oudh 167 and *A.I.R.* 1925 Oudh 425, *Dist*. [P 255, C 1]

Matinuddin, J. Jackson and Fateh Shah—for Appellants.

H. K. Ghosh—for the Crown.

Judgment. — In this case Iqbal Husain and 12 others have appealed against the judgment of the learned Sessions Judge of Sitapur convicting them of offences under S. 304, I. P. C., and S. 147, I. P. C., and sentencing them to various terms of imprisonment. I have heard the learned counsel for the appellants as also the learned Government Pleader and have carefully perused the evidence on the record. It is common ground that a riot did take place in village Dubsena, Thana Mahmudabad, District Sitapur. Iqbal Husain, Hamid Husain, Fida Husain and Bad-

shah Husain, all four brothers, at one time owned the entire village of Dubsena. Fida Husain died and his share devolved upon his son Tahawar Husain. About ten years ago Tahawar Husain mortgaged with possession his patti to Badshah Husain, and recently he sold his equity of redemption to Iqbal Husain and Hamid Husain who have recovered possession of the mortgaged share of Tahawar Husain by redeeming the mortgage from Badshah Husain. This redemption of the mortgage created bad blood between Iqbal Husain and Hamid Husain on the one hand and Badshah Husain on the other.

A small portion of the mortgaged patti consisting of 16 bighas seven biswas, however, was not redeemed by Iqbal Husain and Hamid Husain, and is still in the possession of Badshah Husain, and Durjan Pasi is a tenant of a plot in that portion of the patti which is still in the possession of Badshah Husain. The fight between the two factions took place over the collection of rent from this Durjan Pasi. It is common ground between the parties that Durjan Pasi wanted to pay his rent in kind. Upon the evidence on the record I am more inclined to believe the version of the appellants that Paras Ram, Sumer, Mahesh and Gobinde went with Ram Charan and Bhup Singh, tenants of Badshah Husain, to collect Durjan's rice in payment of the rent due from him. Durjan began to weigh out the rice, and the rice which was weighed was put into baskets and Bhup Singh and Ram Charan were going to take it away when Mumtaz Husain, Ali Husain, Phullar and Ghulam Ali came up on behalf of Iqbal Husain and Mumtaz Husain the son of Hamid Husain. An altercation ensued, the party of Badshah Husain insisting upon Bhup Singh and Ram Charan taking away the rice and Mumtaz Husain, Ali Husain and others wishing to prevent them. While this altercation was going on, the partisans of both sides rushed up to Durjan's house and then Mumtaz knocked the baskets of rice from the heads of Bhup Singh and Ram Charan, and Ali Husain struck Paras Ram with a lathi, and then the fight became general. Gobinde fled from Durjan's house to the house of Chhedi Pasi. Chhedi Pasi as P. W. 9 deposes that after a while when the fight ceased

Sardar told the men of Mumtaz Husain that Gobinde had taken refuge in his (Chhedi's) house. Iqbal Husain, Ali Husain, Mumtaz Husain, Ghasite and Sardar then ran to Chhedi's house and dragged Gobinde out of the house and began to beat him with lathis and practically left him for dead at Chhedi's house, and then when most of the men of Badshah Husain had been severely beaten the party of Ali Husain and Mumtaz left the place. Sarju Chaukidar went and made a report at the thana and Mumtaz Husain also made a report at the thana which is Ex. 6. The police investigated the offence and prosecuted both sides for riot and, as Gobinde died two days after the beating he had received, they prosecuted Mumtaz Husain and the men of his party on a charge under S. 302, I. P. C., but the learned Sessions Judge has convicted them only of the minor offence under S. 304, I. P. C., as also of the offence under S. 147, I. P. C.

The first point for determination in this appeal is whether the medical evidence justifies the conviction of the appellants of the offence of culpable homicide not amounting to murder under S. 304, I. P. C. The Civil Surgeon of Sitapur was of opinion that the cause of Gobinde's death was peritonitis. At the time of the post-mortem examination he found the peritoneum congested and flakes of pus present. He also found that the skull of the deceased was fractured. He deposed that the peritonitis from which Gobinde died was caused by a circular rupture half an inch in diameter in the ilium through which the contents had escaped. This rupture in his opinion must have been caused by violence but he could not connect the rupture with any one of the injuries of which he found marks on the body. Thus it is clear from the medical evidence that no case of culpable homicide not amounting to murder has been made out against anybody and in this state of the medical evidence it would not be safe to hold all the 13 appellants guilty of constructive culpable homicide by reason of the provisions of S. 149 read along with S. 304, I. P. C. In my opinion upon the evidence on the record the appellants cannot be legally convicted of culpable homicide not amounting to murder. They are, however, clearly

guilty of the offence of grievous hurt under S. 325, I. P. C., read with S. 149, I. P. C., as Gobinde's skull was fractured and grievous hurt was also inflicted upon Mahesh, according to the evidence of the Civil Surgeon of Sitapur (Ex. 2). For the reasons given above, I acquit all 13 appellants of an offence under S. 304, I. P. C., read with S. 149, I. P. C., but in its stead convict them all of an offence under S. 325/149, I. P. C.

I now turn to discuss the plea of the right of private defence of person and property raised on behalf of the appellants by their learned counsel Mr. John Jackson. It was strenuously argued on behalf of the appellants that the defence version of the occurrence, as set forth by Panchu Chamar and Ram Charan Chamar, should have been accepted by the learned Sessions Judge and that, if this version of the occurrence be accepted, then the accused were clearly entitled to the right of private defence of person and property given in Ss. 100 and 103, I. P. C. In support of his contention, the learned counsel for the appellants relied upon the ruling of the late Court of the Judicial Commissioner of Oudh reported in *Baij Nath v. Emperor* (1). He also cited another ruling reported in *Indarjit v. Emperor* (2). Upon the strength of the rulings quoted above it was contended that the appellants were merely acting in maintenance of an existing peaceful possession and that they were not enforcing any right or supposed right and that they were merely maintaining a possession already lawfully achieved. Reliance was also placed upon another ruling of the late Court of the Oudh Judicial Commissioner reported in *Sarabhawan Singh v. Emperor* (3). A judgment of a single Judge of the Allahabad High Court reported in *Emperor v. Hira* (4) was also quoted by the learned counsel for the appellants in support of his contention that the appellants were within their legal right in holding themselves in readiness to repel an attack on them and were protected by S. 97, I. P. C. It was also argued upon the strength of a ruling of the late Court of the Judicial

Commissioner of Oudh reported in *Hafiz Ali v. Emperor* (5), that when a person was attacked while doing a lawful act, he was entitled to stand his ground and defend himself. I have carefully studied these rulings and it seems to me that the facts of the present case are different from the facts of the cases cited by the learned counsel for the appellants and the ratio decidendi laid down in the rulings cited on behalf of the appellants is not applicable to the facts and circumstances of the present case. I have already shown that in the present case there was a free fight between two factions in village Dubsena. There was no question of maintaining a possession lawfully achieved or that Badshah Husain's party was the aggressor and that the appellants acted in the exercise of the right of private defence of person and property. At the commencement of the row the appellants may have had a reasonable case that they were merely doing a lawful act in collecting the rice crop in lieu of the rent due to them from Durjan Pasi, but they had no right to pursue the deceased Gobinde to the house of Chhedi and to drag him out of that house and to beat him mercilessly and to leave him for dead in front of Chhedi's house. S. 99, I. P. C. clearly lays down that the right of private defence either of person or of property in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

In the present case the appellants deliberately out of malice and hatred for the opposite party far exceeded their right of defence if any. The collecting of the rice crop from the house of Durjan was merely the occasion or the pretext which the appellants availed of for feeding fat their ancient grudge against the opposite party. The quarrel began with a few men on both sides, but it rapidly became a serious riot with dozens of men on both sides, and, in this view of the occurrence, neither party to the riot can claim the right of private defence. In *Mulla v. Emperor* (6) it was held by Daniels J. that where both parties came down armed with a full determination to settle their quarrel by force there could be no right of private defence. The same view was maintain-

(1) A.I.R. 1925 Oudh 425=27 O.C. 292.

(2) A.I.R. 1923 Oudh 167.

(3) [1914] 17 O.C. 21=23 I.C. 184=1 O.L.J. 527.

(4) A.I.R. 1928 All. 194=45 All. 250.

(5) [1907] 10 O.C. 196.

(6) A. I. R. 1925 Oudh. 438=29 O. C. 92.

ed by the Allahabad High Court in *Queen Empress v. Prag Dat* (7) in which it was held that when a body of men were determined to vindicate their rights or supposed rights by unlawful force and when they engaged in a fight with men who on the other hand were equally determined to vindicate by unlawful force their rights or supposed rights, no question of self defence arose.

The Bombay High Court in a ruling reported in *Emperor v. Bechar Anop* (8) has also laid down the same principle and held that the right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. Their Lordships of the Bombay High Court in this ruling relied upon a judgment of the Calcutta High Court reported in *Kabiruddin v. Emperor* (9) in which Rampini, J. delivered himself of the following weighty pronouncement:

"I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case when both parties arm themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle killing one man and wounding others."

The extract quoted above from the judgment of the learned judge of the Calcutta High Court is fully applicable to the facts and circumstances of the present case. It is common ground that there was long-standing and deep-rooted animosity between Badshah Husain and his men on the one hand and Iqbal Husain and Mumtaz Husain on the other, and the visit to Durjan Pasi's house for the purpose of collecting rice merely furnished both sides with a pretext to give vent to their feelings of hatred for one another. As pertinently observed by the learned Sessions Judge:

"We no longer live in the Nawabi days and zamindars must be taught—in these days they frequently need teaching—that disputes about land must be settled by the Courts and not by the lathi."

I entirely concur in this observation of the learned Judge.

I hold, therefore, for the reasons given above that the appellants cannot justify their commission of the riot and their infliction of grievous hurt on the opposite party by pleading the right of private defence of person and property. I hold upon the evidence on the record that the appellants were members of an unlawful assembly within the meaning of S. 141, I. P. C.

The learned counsel for the appellants also relied upon the evidence of alibi furnished by Iqbal Husain. D. W. 5, Hakim Niamat Rasul and D. W. 6, Syed Ainul Hasan are the two witnesses examined by Iqbal Husain in support of his alibi. Syed Ainul Hasan deposes that he cannot remember the date on which Iqbal Husain came to Bara Banki. He further states that he has not been asked to produce the memorandum showing that Iqbal Husain rented a house from him in Bara Banki. His evidence is therefore on the face of it, worthless. Hakim Niamat Rasul admits in cross-examination that he has no writing to prove the fact that Iqbal Husain came to Bara Banki just about the time when this riot took place. This medical practitioner keeps no register of patients, he pays no income-tax and he keeps no account of his fees. His statement that Iqbal Husain left Bara Banki on 28th September is, in my opinion, not based upon any fact capable of proof independently of the mere statement of this witness, and even if that statement be believed it does not make the presence of Iqbal Husain on the scene of the occurrence, when the riot took place, a physical impossibility. In my opinion the learned Sessions Judge was perfectly right in disbelieving the evidence of alibi furnished by the appellant.

The learned counsel for the appellants has not discussed before me the question of the guilt of each appellant in this case nor has he pointed to any evidence on the record in support of his allegation in his memorandum of appeal that the learned Sessions Judge has allowed himself to be influenced by extraneous circumstances and has adopted a most arbitrary criterion for convicting and acquitting the accused persons. So far as the question of the guilt of the 13 appellants before me is concerned, there is ample evidence on

(7) [1898] 20 All. 459=(1898) A. W. N. 11.

(8) [1916] 40 Bom. 105=31 I. C. 372=17 Bom. L. R. 888.

(9) [1903] 85 Cal. 368=7 C. L. J. 359=12 C. W. N. 884.

the record in proof of the fact that they took part in the riot and, as grievous hurt was inflicted on the deceased Gobinde and on Mahesh, I think all these 13 appellants can be rightly convicted of an offence under S. 325 I. P. C. read with S. 149 I. P. C. and S. 147 I. P. C.

As regards the question of punishment it seems to me that Iqbal Husain, Mumtaz Husain, Tahawar Husain and Ali Husain are the ring-leaders and the other appellants are merely their servants and supporters. I maintain the convictions and sentences passed upon each of the appellants for an offence under S. 147, I. P. C. I acquit all 13 appellants of an offence under S. 304 read with S. 149 I. P. C., but convict them of an offence under S. 325 I. P. C. read with S. 149 I. P. C. and sentence Iqbal Husain, Mumtaz Husain, Tahawar Husain and Ali Husain to three years' rigorous imprisonment each, and the remaining appellants to two years' rigorous imprisonment each. The sentences in each case will run concurrently.

To this extent this appeal is allowed. For the rest it stands dismissed.

V.B./R.K.

Sentences modified.

A. I. R. 1930 Oudh 256

STUART, C. J. AND SRIVASTAVA, J.

Kashif Husain and another—Plaintiffs—Appellants.

v.

B. Sashadhar Singh — Defendant—Respondent.

First Appeal No. 17 of 1929, Decided on 6th November 1929, from decree of Sub-Judge, Partabgarh, D/- 22nd November 1929.

Civil P. C., S. 47—Objection to sale of ancestral land attached in execution on ground of want of sanction as required under S. 20, Oudh Laws Act—Objection must be raised in execution proceedings for separate suit is barred by S. 47.

It is open to a party judgment-debtor at the very beginning of the sale proceedings to object

to sale of property on the ground of want of sanction under S. 20 Oudh Laws Act or that the Court had no authority itself to carry on sale, the property being ancestral property and such objection must be taken in execution proceedings. A separate suit raising this matter is barred under S. 47. 22 All. 108 Ref. 21 Cal. 496, (P. C.) Exp. [P 258 C 1]

Zahur Ahmad and Al-i-Raza—for Appellants.

P. N. Chaudhri—for Respondent.

Judgment.—This is an appeal by the plaintiffs Saiyed Kashif Husain, who is described in the grounds of appeal as a vakil practising at Rae Bareilly, and his son Saiyed Suleman Husain against the decree of the learned Subordinate Judge, Partabgarh dated 22nd November 1928 dismissing their suit. The facts are as follows: Saiyed Karamat Husain owned the whole of the village asthan in the Partabgarh District. When he died he was succeeded by his four sons Ibn Husain, Kashif Husain, Usuf Husain and Amir Husain. These four sons divided the village into four parts not of equal sizes and each took one part. Ibn Husain obtained the mahal Ibn Husain which comprised a 4 annas 6 pies share in the village; Kashif Husain obtained the mahal Kashif Husain which comprised a 3 annas 6 pies share in the village; Usuf Husain obtained the mahal Usuf Husain which comprised 3 annas 6 pies and Amir Husain obtained the mahal Amir Husain which comprised 4 annas 6 pies. Ibn Hasan died in 1906. He left a widow Kaniz Fatima, a daughter Asia Begam and his three brothers Kashif Husain, Usuf Husain and Amir Husain.

The question of his inheritance would have depended on the fact as to whether he was a Shia or a Sunni. There is nothing on the printed record of the proceedings before us to show that he was a Shia or a Sunni. If he were a Shia his widow and his daughter would have succeeded to the whole of his property, and his brothers would have had no share. If he were a Sunni his widow would have succeeded to a 2 annas share in his property, his daughter would have succeeded to an 8 annas share in his property, and his brothers would have succeeded to a share of 2-annas each. We find from Ex.A-6 that on 25th November 1911, his

widow and daughter Kaniz Fatima and Asia Begam transferred by a deed of sale in favour of Mehdi Hasan the whole mahal Ibn Hasan for Rs. 28,500/- of which Rs. 12,454-5-6 were left with the vendee for the satisfaction of debts due from the vendors and Rs. 16,045-10-6 were paid in cash to the ladies.

Kashif Husain instituted a suit to obtain the mahal Ibn Husain by right of pre-emption. The plaint is Ex. A-5. He instituted this suit against Kaniz Fatima and Asia Begam and the vendee Mehdi Hasan and he also joined Ahmad Husain the father of Mehdi Hasan. In this plaint he states in the para 2 that the mahal Ibn Hasan is in the ownership and proprietorship of Kaniz Fatima and Asia Begam. He makes no suggestion that he had inherited any share in it. But he claimed that both as a relation of the vendors being, as he was, the brother-in-law of Kaniz Fatima and the uncle of Asia Begam and as a co-sharer he had a right to obtain the property by pre-emption for Rs. 28,500. We have not the judgment before us. It was produced in evidence but it has not been printed. But we have the decree as Ex. A-9. It is dated 20th February 1912. It granted him the property on payment of Rs. 28,500/-. We find that Kashif Husain obtained the money with which to pay up this pre-emption decree by borrowing it from Ganga Bakhsh Singh and he executed on 8th March 1912 a deed of mortgage (Ex. A-1) in favour of Ganga Bakhsh Singh by which he mortgaged not only the mahal Ibn Hasan but also mahal Kashif Husain. We find that he has since combined these two mahals into one. Subsequently Ganga Bakhsh Singh instituted a suit on this deed of mortgage Ex. A-1 and obtained a decree on 17th June 1920 (Ex. A-2). In execution of this decree mahal Ibn Hasan was brought to sale. We need not give in detail the exceedingly lengthy proceedings in respect of the sale of this mahal. It is sufficient to say that they continued until the 20th May 1926, and proceeded for some years. The decree-holder did not endeavour to bring to sale during these proceedings the mahal Kashif Husain. We are told that he is now proceeding against that mahal for the balance of that decree. The proceedings in question affected

only the mahal Ibn Hasan. Kashif Husain the present plaintiff-appellant obtained postponement for a variety of reasons. Sometimes he objected to the date. Sometimes he objected to the conditions. Sometimes he asked for time in order to obtain money from influential friends who he was convinced would advance sufficient to save the property. This money never arrived and finally the sale took place on 22nd May 1926, and the decree-holder with the permission of the Court himself purchased the property for Rs. 32,371/- on 3rd June 1926, Kashif Husain filed an objection to the proceedings and asked that the sale should not be confirmed. This is Ex. A-51. In Ex. A-51 he states that an order had been passed for rateable distribution or in other words for a separate sale and that this order should not have been passed. He took the position that he owned two mahals one of which was ancestral and the other self-acquired. The ancestral mahal is clearly the Kashif Husain Mahal, so the self-acquired mahal must be the Ibn Husain Mahal. The learned Subordinate Judge by Ex. A-54 dismissed his objections on 7th August 1926.

He appealed to this Court against the dismissal of his objections and asked that the sale should be set aside. His appeal was dismissed by a Bench of the Chief Court on 4th March 1927 by Ex. A-66. On 15th and 17th March 1928 he with his son instituted the suit out of which the present appeal arises. They stated in this suit that mahal Ibn Hasan was the ancestral property of Kashif Husain which he had inherited along with his brother from his father who continuously owned the same mahal from the conclusion of the first Regular Settlement as defined in S. 20, Oudh Laws Act. The main point taken in this plaint was that as S. 20 Act 18 of 1876, lays down that no ancestral land shall be sold in satisfaction of a decree without the permission of the Lieutenant-Governor the sale of 22nd May 1926 was null and void because it had not been sanctioned by the Lieutenant-Governor. In order to succeed on this plea it was necessary to establish that mahal Ibn Hasan was ancestral property. They asked for a declaration that the sale of 20th May 1926 (what they call the sale of 20th May 1926 was

really the sale of 22nd May) was null and void as having been made without jurisdiction and they asked the Court to stop subsequent execution proceedings.

Now it is clear from what we have said that in the pre-emption suit Kashif Husain admitted that the two ladies were the sole proprietors of the property. It is very noticeable that in all the execution proceedings he only once referred in Ex. A-77 to the property in question as his ancestral property and then never put forward the fact that because it was his ancestral property the execution should be transferred to the Deputy Commissioner. We find that at the very end in Ex A-54 he clearly refers to the property as his self-acquired property. The main point is this. It was open to him at the very beginning as soon as the sale proceedings commenced to suggest to the Court that the property in question was his ancestral property and if it had been found that it was his ancestral property the execution proceedings would have been transferred to the Deputy Commissioner of Partabgarh. It was undoubtedly his duty to take that step, if he wished to make the assertion and he is not entitled to raise this matter in a separate suit. S. 244 of old Code, which is now represented by S. 47 of the present Code, would prohibit such a suit. This was decided in *Daulat Singh v. Jugal Kishore* (1). We agree that in these circumstances the present suit could not lie as a suit. But it was urged in the Court below that even if it could not lie as a suit, under Para. 2 of S. 47 the present suit could be treated as a proceeding under S. 47. The learned trial Judge refused to take this course as he considered that this suit would be barred by limitation as a proceeding under S. 47. We are in some doubt as to whether that is a correct view. If the proceedings were absolutely null and void the question of limitation would not ordinarily arise. But in any circumstances it is not necessary for us to determine the question as to whether an application is or not within limitation, for we find on the materials before us that the suggestion that this property is ancestral property cannot be supported. The learned Judge found on the merits that the property was non-

ancestral. We have to look at the facts. If Ibn Hasan were a Sunni his brother Kashif Husain would on his death have ordinarily inherited a 2 annas share in this property under the provisions of the Hanafi law. But if he were a Shia Kashif Husain would have inherited nothing. The case which was put up both in the trial Court and in this Court was that Ibn Hasan was a Sunni, that he (Kashif Husain) did inherit a 2 annas share in his property in 1906 when Ibn Hasain died, and that the title was vested in him at the time when he purchased the property in execution of the pre-emption decree. It can hardly be sufficient in a case of this kind for a finding that he had a title to the extent of 2 annas to have nothing more than a bare statement of the Hanafi law of intestacy. It is to be noted that even if this plea were accepted Kashif Husain would have obtained only a 2 annas share in the property upon his brother's death. He admits upon the same argument that his brothers Usuf Husain and Amir Husain would have obtained 2 annas each. Let us see what happened. The widow and the daughter sold the whole of the property as though it was their own. Neither Kashif Husain, nor Usuf Husain nor Amir Husain took any objection to this. Kashif Husain went further. He claimed to pre-empt the property and in his plaint he asserted that the property was the sole property of the two ladies and he paid a purchase value which, although the correct purchase value for the whole of the sixteen annas, in our opinion would have been an excessive purchase value for only ten annas. Taking the value at which this mahal was valued in the year 1926: (see the decision of this Court Ex. A-66). the mahal in 1926 was worth Rs. 36,500.

It would ordinarily have been worth less in 1912: yet we find Kashif Husain paying Rs. 28,500 in 1912 a moderate price for sixteen annas but an excess price for ten annas. Further we find him ignoring completely the titles, if any, of his brothers. We find him later on describing the property after he had purchased it as his self-acquired property and we find finally that in the plaint in the suit out of which the present appeal arises he never made the suggestion which he is making now that he had inherited this property from his

(1) [1900] 22 All. 108=(1899) A.W.N. 205.

brother Ibn Hasan. He says that he inherited this property from his father. The learned counsel for Kashif Husain, who put up as strong a case for his client as he could put up, has suggested to us that the reason why Kashif Husain did not assert his title to the two annas in 1912 was because he was under the impression that the result of the decision of their Lordships of the Judicial Committee in *Abdul Wahid Khan v. Saluka Bibi* (2), debarred him from instituting a suit for pre-emption unless he accepted the full title of the transferrer. We do not consider that their Lordships ever laid down a proposition such as that contended for. The proposition contended for is this. The ladies are now asserted to have only a title to ten annas. They had sold sixteen annas. Kashif Husain is asserted to have had a title to two annas. The suggestion is that unless he accepted the ladies' title to transfer the whole of the sixteen annas he would not be permitted to exercise the right of pre-emption which he undoubtedly would have possessed in respect of the ten annas.

Their Lordships never laid down any such proposition. What they decided was that in a case where the plaintiff was claiming a share in the property of her deceased daughter in the hands of her son-in-law, the son-in-law could not defeat her claim by pointing out that she had executed an agreement to sell a portion of that property, if she succeeded in the case, on the ground that if she succeeded in the case and obtained the property he would have a right of pre-emption against the vendees. There is no justification for the suggestion that Kashif Husain would have been compelled to admit that the ladies had a title which they did not possess under the penalty of foregoing the right of pre-emption which he did possess. Further it is very significant that Kashif Husain who is a vakil never made this suggestion himself. We find further that he gave evidence in this case as P. W. 2 and this is what he, being a vakil, says as to the rights of the parties :

"My father Syed Karamat Husain was the owner of the whole village named Asthan in Tahsil Kunda. His four sons got this property. Ibn Hasan."

(this means Ibn Hasan):

"get one-fourth. Each son got one-fourth."

(2) [1894] 21 Cal. 496=21 L. A. 26 (P.C.).

Ibn Hasan was my stepbrother from the same father. He died in 1906. The other three sons of Karamat Husain and the widow and daughter of Ibn Hasan were his heirs. The daughter of Ibn Husain and the widow of Ibn Hasan sold their shares of Mehdi Hasan of Paryawan. I got the whole of this property by pre-emption. They sold four annas and six pies share to Mehdi Husain. I do not know how they sold six pies more. I cannot say how much was the legal share of the widow and daughter of Ibn Hasan in the property sold."

In the first place he never states as to whether Ibn Hasan was a Shia or a Sunni. In the second place he states quite inaccurately that the shares obtained were one-fourth each when he subsequently admitted that two sons took shares of four and a half annas each and the other two sons took shares of three and a half annas each. We do not know what was the explanation of the difference in the shares. Then follows an amazing statement coming from a vakil :

"I cannot say how much was the legal share of the widow and daughter of Ibn Hasan in the property sold."

The plaint in the pre-emption suit was put to him. He offered no explanation. Now upon this evidence we have no hesitation in finding that the plaintiffs have absolutely failed to substantiate that the property in question or any part of it was their ancestral property. We have no reason to suppose that Kaniz Fatima and Aisa Bibi, who put themselves forward as the sole owners of the mahal Ibn Hasan, were not in fact the sole owners thereof. Kashif Husain accepted them as the sole owners thereof and based his right of pre-emption upon the transfer executed by them. When he acquired the property in exercise of a right of pre-emption it certainly was not his ancestral property but his self-acquired property. In these circumstances the sale proceedings were perfectly good. They were not null and void and the learned trial Judge has decided the matter correctly. We therefore dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. J. R. 1930 Oudh 260

WAZIR HASAN AND SRIVASTAVA, JJ.

Muhammad Mian—Plaintiff—Appellant.

v.

Bharat Singh and others—Defendants—Respondents.

Second Appeal No. 219 of 1929, Decided on 13th February 1930, from order of Addl. Sub-Judge, Sitapur, D/- 30th April 1929.

(a) Transfer of Property Act (1882), S. 82—Contribution—Several properties belonging to several owners mortgaged to secure one debt—Entire debt paid by one mortgagor—He is entitled to charge under S. 100—Purchaser of portion of such property also is liable rateably—Transfer of Property Act, S. 100.

Where several properties have been mortgaged by several owners to secure one debt and the property of one of the owners has contributed more than its proportionate share of the mortgage debt, then that owner is, under S. 100 of the Act entitled to a charge on the remaining properties which have not discharged their own share of the debt to contribute rateably towards the debt. Therefore, a purchaser of a portion only of such properties is liable to contribute rateably : 26 All. 407 and 31 All. 65, Ref. ; 33 All. 708, (Per Banerjee) Foll. [P 262 C 2]

(b) Transfer of Property Act, S. 82—Contribution, charge in respect of, exists even where co-mortgagor pays in excess of his share though not entire amount secured.

The co-mortgagor who has paid more than his rateable portion of the debt but not the entire debt is nevertheless entitled to a rateable charge on the property of the other mortgagor : 31 All. 65, Foll. [P 263 C 2]

(c) Transfer of Property Act, S. 82—Contribution—Right exists even where co-mortgagor who paid off debt has lost all property.

Where the payment made by a co-mortgagor exceeds his share of the liability, he is entitled to contribution as against the other party who has contributed less than his proper share, or not at all, irrespective of the consideration whether he (the co-mortgagor claiming charge) still continues in possession of the property or not. [P 264 C 1]

(d) Transfer of Property Act, S. 82—Voluntary payment by co-mortgagor does not affect doctrine of contribution.

For the application of the doctrine of contribution it is immaterial whether the payment in respect of which contribution is claimed has been made "voluntarily" to avert a legal process or has been enforced by sale of the property of the claimant : 26 All. 407 Foll.; 26 Mad. 686, Ref. [P 264 C 1]

(e) Limitation Act, Art. 132—Co-mortgagor's suit for contribution—Time runs from date of actual payment of money to mortgagee.

A claim to enforce the co-mortgagor's charge is governed by Art. 132, The starting

point for limitation is the time when the money sued for becomes due, that is, when payment was actually made to the mortgagee.

[P 264 C 2]

Naziruddin—for Appellant.

Ali Zaheer and Kamar Alam—for Respondents.

Wazir Hasan, J.—The facts of this case have been stated at length in the judgement of my learned brother Srivastava, J. By virtue of the deed of mortgage dated 16th October 1906 executed by the two brothers Ismail Hasan and Idris Hasan, Raja Pratab Singh redeemed the earlier mortgage and incumbrances which existed on the village of Misra Khera. In so doing Raja Pratab Singh had to pay an additional sum of Rs. 3,700 for the discharge of those incumbrances. When Ismail Hasan on 3rd April 1913 sold his half-share in the village to Bhabhuti Singh for Rs. 18,725 he left the purchase money in the hands of the vendee for the purpose of being paid to Raja Pratab Singh on redemption of the mortgage of 16th October 1906. This sum of money included the additional amount of mortgage money to the extent of Rs. 3,700 which Raja Pratab Singh had paid while redeeming the earlier mortgages. It is beyond dispute that Ismail Hasan's half share in the village was liable only to half the amount of mortgage money due to Raja Pratab Singh. This is so under the provisions of S. 82, Transfer of Property Act, 1882. But when Ismail Hasan left the entire sum of Rs. 3,700 in the hands of Bhabhuti Singh for payment to Raja Pratab Singh he intended not only to discharge the liability resting on his own half-share but also the liability resting on the other half-share of his brother Idris Hasan. Bhabhuti Singh when subsequently on 5th April 1921 bought a share in the village from one of the heirs of Idris Hasan he became a representative, pro tanto of Idris Hasan. In 1925 Bhabhuti Singh's representatives redeemed the village from the hands of Raja Pratab Singh and in so doing they paid to the mortgagee also the sum of Rs. 3,700 which Ismail Hasan had left in the hands of Bhabhuti Singh for payment to Raja Pratab Singh both for his share and his brother's share of liability. According to S. 82, T. P. Act, 1882, the half-share

of Idris Hasan was only liable to contribute rateably to the mortgage debt of Rs. 3,700 but under the deed of 3rd April 1913 Ismail Hasan's share of the property had been sold to pay the whole of that debt. It follows that Ismail Hasan is entitled to be recouped of the sum of money which he paid for his brother's share of the debt.

The question in the case is whether Idris Hasan's interest in the village now held by the representatives of Bhabhuti Singh is or is not liable to satisfy Ismail Hasan's claim for recoupment. To my mind the provisions of S. 82, T. P. Act, 1882, already referred to, clearly answer the question in the affirmative. The section says :

"Where several properties of several owners are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt secured by the mortgage"

In this case there were two properties the share of Ismail Hasan and the share of Idris Hasan, and each was the owner of his share. They were both mortgaged to secure one debt of Rs. 3,700 of Raja Pratab Singh. Each is therefore liable to contribute rateably to that debt. When specific immovable property is made liable by operation of law to satisfy a specific debt, the debt is clearly a charge on the property.

The claim to enforce the charge could not and did not arise in favour of the representatives of Ismail Hasan a moment earlier than the date on which the money which Ismail Hasan had left in the hands of Bhabhuti Singh was utilized by the representatives of the latter in redeeming the mortgage of Raja Pratab Singh and this was in 1926. The claim is therefore well within time under Art. 132, Sch. I, Lim. Act, 1908. I therefore agree with my learned brother that the appeal should be allowed, the decree of the Court below be set aside and that of the Court of first instance be restored with costs in all Courts.

Srivastava, J.—The facts of the case which has given rise to the present appeal are somewhat complicated and, for a proper comprehension of the points arising for determination, need to be stated in detail.

Two brothers Ismail Hasan and Idris Hasan owned a moiety each of village Misra Khera. On 3rd August 1900 they jointly executed a deed of mortgage with possession in respect of the entire village, in favour of Niaz Ahmad, Mouji Ram and Babu Ram for Rs. 10,000. In 1903 the aforesaid mortgagors executed a deed of further charge for Rs. 2,000. This deed included also a shop in Sitapur along with the aforesaid village. In 1904 they executed a second deed of further charge for Rs. 500. On 16th October 1906 Ismail Hasan and Idris Hasan both executed another usufructuary mortgage in favour of Raja Pratab Singh in respect of the village alone for the sum of Rs. 15,500. Rs. 12,000 out of the mortgage money were left with the mortgagee for redemption of the previous mortgages to which reference has been made above. Raja Pratab Singh redeemed the earlier mortgages but in doing so he had had to pay a sum of about Rs. 3,700 in excess of the amount which had been left with him for redemption of the prior mortgages. Idris Hasan died in 1907 leaving as his heirs defendants 6 to 9 as well as Ismail Hasan his brother.

On 3rd April 1913 Ismail Hasan sold his half share in Misra Khera to Bhabhuti Singh, the predecessor-in-title of defendants 1 to 5, for Rs. 18,725 and left with him Rs. 7,750 for payment to Raja Pratab Singh, being his half share of the mortgage money raised under the mortgage deed dated 16th October 1906 and a further sum of Rs. 3,700 being the excess money which Raja Pratab Singh had paid from his own pocket in redeeming the prior mortgages. On 5th February 1921 Qamar Alum defendant 6 who was one of the heirs of Idris Hasan sold his one-third share in the moiety of his father Idris Hasan in village Misra Khera to defendants 1 to 5 who are the legal representatives of Bhabhuti Singh. These defendants thus became owners of half of the village as representatives of Bhabhuti Singh the vendee of the share of Ismail Hasan and of another one-sixth share in the village as vendees of the share of Qamar Alum. In 1925 the aforesaid defendants obtained a decree for redemption against Raja Pratab Singh. They ultimately redeemed the mortgage by paying him Rs. 22,832-14-3

and obtained possession of the whole village in 1926. This amount of Rs. 22,832-14-3 included a sum of Rs. 3,690-5-0 on account of the excess payment made by Raja Pratab Singh to the prior mortgagees together with interest thereon. Ismail Hasan instituted the present suit for contribution against the defendants in respect of this sum of Rs. 3,690-5-0 (which has been referred to in the plaint as Rs. 3,700), on the allegation that the defendants as representatives of Idris Hasan had benefited by this payment and that plaintiff was entitled to recover it, together with interest thereon at 12 annas per cent per mensem, proportionately, from the defendants and prayed that it should be declared a charge upon the share of Idris Hasan in the hands of the defendants. The suit was contested by defendants 1 to 5 who were impleaded as transferees of the one-third share of Idris Hasan which was inherited from Qamar Alum. The remaining defendants 6 to 9 who were impleaded as heirs and legal representatives of Idris Hasan, did not defend the suit and the trial was *ex parte* against them.

The contesting defendants raised various defences but the only one which now survives is that the amount claimed by the plaintiff could not be a charge upon the property of Idris Hasan. Ismail Hasan died during the pendency of the suit and his legal representative was brought on the record in his place. The learned Munsif held that Ismail Hasan and his representatives were entitled to a rateable share of the sum of Rs. 3,700 together with interest from the defendants and that the said amount constituted a charge on the share of Idris Hasan in the hands of the defendants and decreed the plaintiff's claim accordingly. Defendants 6 to 9 accepted this decision of the trial Court. Defendants 1 to 5 alone appealed. The only contention urged on their behalf in the lower appellate Court was that the amount claimed by the plaintiff could not be a charge on the property of Idris Hasan and that no decree could therefore be passed against them. The learned Subordinate Judge was of opinion that Idris Hasan and his heirs were no doubt under a liability to reimburse the plaintiff according to their respective shares for the sum paid on their behalf

but that this liability was personal and that it did not create any charge on the estate left by Idris Hasan. His line of reasoning was that such a charge could arise only under S. 95, T. P. Act and that S. 95, T. P. Act, did not apply to the case for three reasons: namely, (1) because Ismail Hasan did not obtain possession over the property, (2) because he did not redeem the entire mortgage and (3) because he sold away his entire interest and had no subsisting interest in the property. He therefore allowed the appeal and dismissed the plaintiff's claim against defendants 1 to 5.

The plaintiff has come here in second appeal. His learned counsel has conceded before us that S. 95, T. P. Act, does not apply to the case. The only contention urged by him is that the one-third share of Idris Hasan which has been purchased by the defendants 1 to 5 from Qamar Alum, is liable to contribute rateably towards the plaintiff's claim and that the plaintiff is entitled to a charge against the aforesaid share under S. 82, T. P. Act. I am of opinion that the contention is well founded and the appeal must succeed. The first paragraph of S. 82, T. P. Act, enunciates the general rule as regards the apportionment of liability between several properties whether belonging to one or several owners when they are mortgaged to secure one debt. The rule is based upon general principles of justice and equity inasmuch as it makes a proportionate distribution of the burden of the mortgage debt over the several properties which form the subject of mortgage. The provision that the properties are liable to contribute rateably to the debt secured by the mortgage clearly implies that this liability constitutes a charge upon the properties. Further S. 100, T. P. Act, lays down that where immovable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. Thus it seems to me that the provisions of S. 82 read with S. 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability. This view is supported by the decision of a Full Bench of the Allahabad

High Court in *Bhagwan Das v. Karam Husain* (1); Banerji, J., (afterwards Sir Promodo Charan Banerji) at p. 722 of the report observed as follows:

"I am of opinion that by virtue of the provisions of Ss. 82 and 100, T. P. Act, a mortgagor or his representative-in-interest, whose property has contributed more than its proportionate share of the mortgage debt, is entitled to a charge on the remainder of the mortgaged property which has not discharged its own share of the debt."

The learned counsel for the defendants-respondents has, however, disputed the plaintiff's right to a charge under S. 82 on several grounds. His first contention is that S. 82 lays down only the rule as regards the proportionate liability of the several properties which form the subject of mortgage but that this liability can be enforced only in accordance with the rules laid down in S. 95, T. P. Act. His argument is that if the plaintiff's case cannot be brought within the four corners of S. 95 he cannot be allowed to enforce any charge by reference to S. 82, T. P. Act. I am of opinion that the argument is fallacious. S. 95 is by no means exhaustive of cases of contribution giving rise to a charge. The section provides for one class of cases in which a charge arises. It is not correct to say that a charge cannot be obtained otherwise than under the provisions of that section. As stated above, S. 82 lays down a general principle and if a case can be brought within the principles enunciated in that section, there is no reason why a charge should not arise even though the case may not fall within the provisions of S. 95.

Next it was contended that Ismail Hasan did not leave with Bhabhooti Singh the whole of the money which was payable to Raja Pratab Singh in respect of Idris Hasan's share of the mortgage money but only the portion which was payable to him for Idris Hasan's share in the excess money paid by Raja Pratab Singh. The learned counsel for the defendants-respondents relied upon the decision of Stanley, C.J., and Burkitt, J. in *Ibn Hasan v. Brijbhukhan Saran* (2), where they held that one of two or more mortgagors (in-

cluding the transferees of the equity of redemption from any of them) whose portion of the mortgaged property has been sold in execution of a decree for sale on the mortgage and has fetched at auction a larger sum than was rateably attributable to it, but has not discharged the whole of the mortgage debt, has no right against his co-mortgagors to compel them to contribute and indemnify him to the extent by which the proceeds of the sale of his portion of the mortgaged property was in excess of the amount rateably due from it. It may be noted that Banerji, J., dissented from this view. He was of opinion that it was not essential to the accrual of the right of contribution that the whole of the debt in respect of the payment of which contribution is claimed, should have been satisfied. In a later case, *Muhammad Yahiya v. Rashiduddin* (3), Stanley, C. J., himself explained his meaning in *Ibn Hasan v. Brijbhukhan* (2) in the following words:

"I did not decide or intend to decide that where a mortgage has been wholly satisfied, the co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contribution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied, a claim for rateable contribution could not be enforced."

So the decision in *Ibn Hasan v. Brijbhukhan* (2), cannot be of any help to the defendants-respondents. The present suit for contribution has been brought after the whole of the mortgage debt had been paid up. No exception can, therefore, be taken to the maintainability of the suit.

It was also argued that the plaintiff cannot maintain the suit as he has no interest left in any portion of the mortgaged property inasmuch as Ismail Hasan sold the whole of his share to Bhabhuti Singh in 1913. It seems to us that this is quite immaterial. R.3,700 out of the consideration of the sale deed executed by Ismail Hasan was left with Bhabuti Singh for payment of the excess money paid by Raja Pratab Singh on account of both Ismail Hasan and Idris Hasan. Thus R. 3,700 out of the sale proceeds of Ismail Hasan's property has gone to meet the liability for which the properties of Ismail Hasan and Idris Hasan were both liable. Idris

(1) [1911] 33 All. 708=11 I.C. 145=8 A.L.J. 854.

(2) [1904] 26 All. 407=1 A. L. J. 118=(1904) A.W.N. 74 (F.B.).

(3) [1909] 31 All. 65=6 A.L.J. 1=1 I.C. 5=(1908) A.W.N. 289.

Hasan's property, therefore, in the terms of S. 82, is liable to contribute rateably towards it. It is of no consequence that Ismail Hasan has no longer any subsisting interest in the property. No such condition is imposed by the terms of S. 82. Many cases in which a claim for contribution arises are cases in which the whole of the plaintiff's property has been sold off to meet the joint liability of himself and another. The fact that the plaintiff has lost the whole of his property has never been regarded as a defence to such a claim. If the payment made by any person or the amount realized from his property exceeds his share of the liability he is entitled to contribution as against the other party who has contributed less than his share towards the liability, irrespective of the consideration whether he does still continue to be the owner of the property or not.

Lastly, it was argued that the payment made by Ismail Hasan was a voluntary payment by means of a private sale and that such payment could not create any charge upon the property. I cannot accede to this argument. In *Ib. Hasan v. Brijbhukhan Saran* (2), already referred to, Banerji, J., held that as regards the application of the doctrine of contribution, there is no distinction between a case where the payment in respect of which contribution is claimed, is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant out of Court. Similarly in *Raja of Vizianagram v. Setrucharla Somasekhararaz* (4) Bhashyam Ayyangar, J., in his order of reference to a Full Bench observed that:

"It is perfectly immaterial whether a party seeking contribution made the payment voluntarily or involuntarily, i. e., whether he made the payment and thus averted any coercive process against his property, or, without making such payment suffered his property to be seized under process of law for the purpose of the amount being realized from its income or by its sale."

We can see no reason why a person should lose his right because he makes the payment from his pocket to save his property from sale or raises money by means of a private sale. This disposes of all the arguments advanced on behalf of the defendants-respondents against the appellant's contention. It is quite

clear that Ismail Hasan and Idris Hasan were equally bound for the payment of the excess amount which Raja Pratab Singh had to pay for redeeming the prior mortgages. As the whole of this amount was paid by Ismail Hasan out of the sale price of his share of the property and Idris Hasan has benefited by this payment to the extent of his share of the liability, his property is bound to contribute to the extent of the benefit which it has derived from such payment. It follows that the plaintiff is entitled to a charge in respect of one-third of the amount as against the one-third share of Qamar Alum in the hands of defendants 1 to 5.

The learned counsel for the defendants-respondents also contended that limitation for enforcement of the plaintiff's claim should run from 3rd April 1913, the date on which Ismail Hasan left the money with Bhabhuti Singh for the benefit of Idris Hasan. This contention is without substance. A claim to enforce such a charge is clearly governed by Art. 132, Sch. 1, Lim. Act. The starting point for limitation under this article is the time when the money sued for becomes due. In this case the money sued for did not become due until Bhabhuti Singh paid the money to Raja Pratab Singh in 1925. Idris Hasan cannot be considered to have derived any benefit until payment was made to Raja Pratab Singh of this amount. The claim is clearly within time from the date when the mortgage was redeemed from Raja Pratab Singh.

It was also suggested on behalf of the defendants-respondents that the price realized by Ismail Hasan by means of the private sale made by him was not a true criterion of the value, under S. 82, T. P. Act, and that the amount of the defendants' liability fixed by the trial Court was not correct. As Ismail Hasan and Idris Hasan were equal sharers in the property so the proportion of Idris Hasan's liability would always be the same irrespective of the value of the property. In any case, the defendants did not question the correctness of the finding of the trial Court as regards the amount in their appeal before the lower appellate Court. We must, therefore, accept the finding of the trial Court as regards the amount of the defendants' liability as correct.

(4) [1909] 26 Mad. 686=13 M.L.J. 83.

It might be mentioned that the learned counsel for the plaintiff-appellant also argued before us that in case the defendants alleged that the payment which they had made to Raja Pratab Singh was out of their own money and not out of the money left with them by Ismail Hasan, then the plaintiff should be entitled to a charge in respect of the amount claimed by him as unpaid consideration money under S. 55, T. P. Act, against the share sold by Ismail Hasan. It is not necessary for us to enter into a discussion of this question, as the defendants have not alleged that the money which they paid to Raja Pratab Singh was not the money left with Bhabhuti Singh by Ismail Hasan and as no such case was raised on the pleadings of the parties in any of the two lower Courts.

The result, therefore, is that I would allow the appeal, set aside the decision of the Additional Subordinate Judge and restore that of the Munsiff. The appellant will get his costs in all the Courts from the defendants-respondents.

J.M./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 265

SRIVASTAVA AND WAZIR HASAN, JJ.

Ram Kishan and another—Judgment-debtors—Appellants.

v.

B. Kundan Lal—Decree-holder—Respondent.

Execution Appeal No. 20 of 1929, Decided on 13th December 1929, against decree of Dist. Judge, Sitapur, D/- 15th January 1929.

Civil P. C., O. 21. Rr. 58 and 63—Objection dismissed—Objector instituting suit—Suit decreed in first Court but modified in appeal—Property released from attachment as result of lower Court's decree but before decision of appeal—Release cannot operate with regard to property with respect to which claim is dismissed in appeal.

Where an objection is preferred under O. 21, R. 58 but dismissed, the order of dismissal is subject to the final result of any suit which the objector might institute to establish the right which he claims to the property under attachment. Therefore if on the decree of the lower Court the attachment is released but the claim upheld in part in appeal, the release of attachment of the whole property before the decision of the appeal cannot be of any avail and cannot be allowed to be set up as against

the final result of the appeal : 10 *All.* 506; 45 *Cal.* 780; 41 *All.* 157 and 38 *Cal.* 482, *Dist.*

[P 266 C 2]

M. L. Saksena—for Appellants.

Ali Zaheer, Makund Benari Lal and P. L. Varma—for Respondent.

Srivastava, J.—This is a judgment-debtor's appeal. The facts necessary to be stated are that on 22nd November 1923, Babu Kundan Lal, the decree-holder-respondent, obtained a decree from the Court of the Assistant Collector for arrears of a drug lease under S. 108, Cl. 2, Oudh Rent Act read with S. 7, Excise Act. On 19th August 1926, the decree-holder-respondent made an application for execution of the decree. Certain shops and houses were attached and sold on 15th February 1927. One Har Dayal claimed the houses and shops which formed the subject of attachment, as his own property and made an application under O. 21, R. 58, Civil P. C., objecting to the attachment. His application was dismissed and he therefore instituted a suit in the civil Court for a declaration of his ownership in respect of the property in question. This suit was decreed by the Munsiff on 8th September 1927. A few days later, on 26th September 1927, the Assistant Collector relying upon the decree passed by the Munsif made an order releasing the property from attachment. The decree-holder appealed against the decision of the Munsiff and on 20th March 1928 the appellate Court modified the Munsiff's order and dismissed Har Dayal's claim for a portion of the property in suit but upheld it in respect of the rest of the property. On 12th May 1928 the decree-holder applied to the Assistant Collector for confirmation of the sale which had taken place on 15th February 1927 in respect of the properties regarding which Har Dayal's claim had been dismissed. The Assistant Collector rejected the application on the ground that he had already released the property from attachment. He was of opinion that the effect of his order was to put an end to the sale and that he could not, by reason of the appellate Court's order dated 20th March 1928 revive the attachment or sale or make any order of confirmation in respect of it. The decree-holder went in appeal to the District Judge of Sitapur who has reversed the order of the Assistant Collector and

confirmed the sale which took place on 15th February 1927, except as regards the property with regard to which Har Dayal's claim has been upheld by the appellate Court. The judgment debtors have come here in second appeal.

The contention urged on behalf of the judgment-debtors-appellants is that the property having once been released from attachment and the execution case having been struck off, the attachment cannot be revived and the sale cannot be confirmed. The argument urged on their behalf is that as the decree-holder has allowed the order passed by the Assistant Collector on 26th September 1927 to become final the only remedy available to him now is to make an attachment again of the property and to take fresh proceedings for sale. We find ourselves unable to accede to the appellants' contention. The learned counsel for the appellants has relied on *Ram Chand v. Pitam Mal* (1), *Abdul Rahman v. Amir Sharif* (2), *Dildar Husain v. Sheo Narain* (3) and *Namuna Bibi v. Roshua Miah* (4), in support of his contention. None of the authorities cited seem to us to have any application to the present case. *Ram Chand v. Pitam* (1) and *Abdul Rahman v. Amin Sharif* (2) are both cases of attachment before judgment. They lay down that "on the dismissal of the suit pending which the attachment has been made, the attachment before judgment falls to the ground. The other two cases, namely *Dildar Husain v. Sheo Narain* (3) and *Namuna Bibi v. Roshun Miah* (4) are cases in which the applications for execution had been struck off but the Court had expressly ordered that the attachment should remain. It was held that the word "default" in O. 21, R. 57 is not restricted to default of appearance or matters of that description and that the attachment must be deemed to have come to an end when the applications for execution were dismissed. The learned counsel for the decree-holder-respondent has also been unable to cite to us any decided case which might throw any direct light on the question

under consideration. O. 21, R. 63, provides that:

"where a claim or objection is preferred the party against whom the order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

It follows from this that when Har Dayal's objection was dismissed on 8th January 1927, the order of dismissal was subject to the result of any suit which Har Dayal might institute to establish the right which he claimed to the property under attachment. The words "the result of such suit" obviously mean the final result. So the dismissal of Har Dayal's objection must be considered to be subject to the order finally passed on 20th March 1928 by the appellate Court. In so far as the appellate Court dismissed Har Dayal's claim for part of the property in suit, the order dated 8th January 1927 must, in the terms of O. 21, R. 63, be deemed to be conclusive. The result therefore is that in so far as these properties are concerned, the order of the Assistant Collector releasing them from attachment cannot be of any avail and cannot be allowed to be set up as against the final result of Har Dayal's declaratory suit. On general principles also we think that we must arrive at the same conclusion. The order of the Assistant Collector dated 26th September 1927 is founded on the decree passed by the Munsiff. This decree was subsequently modified by the Court of appeal. In so far as the foundation of the Assistant Collector's order had been removed by the appellate Court there remains nothing to support it. The order of the Assistant Collector must therefore be deemed to be subject to the order of the appellate Court. For the above reasons we are of opinion that the decision arrived at by the learned District Judge is correct. The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 266

WAZIR HASAN, C. J. AND SRIVASTAVA, J.

Ganga Sahai—Applicant—Appellant.

v.

Shiam Sunder Lal and others—Defendants—Respondents.

Misc. Appeal No. 40 of 1929, Decided on 13th February 1930.

(1) [1883] 10 All. 506=(1898) A. W. N. 195.

(2) [1918] 45 Cal. 780=44 I. C. 229=22 C. W. N. 927.

(3) [1919] 41 All. 157=49 I.C. 113=17 A.L.J. 52.

(4) [1911] 33 Cal. 482=18 C. L. J. 621=9 I. C. 558=15 C. W. N. 428.

Provincial Insolvency Act, S. 34—Transferee of property subjected to charge is person interested in payment of debt charged within meaning of S. 69, Contract Act and such payment is debt provable in insolvency.

The transferee of immovable property who purchases such property with or without notice of charge on the same is a person interested in the payment of the debt charged within the meaning of S. 69, Contract Act, and in case such transferee pays off such debt the payment becomes a debt for money paid to the transferrer which can be proved in insolvency: 28 All. 563 and A. I. R. 1926 Cal. 385, Rel. on, [P 268 C 1]

Ali Zaheer and G. P. Bajpai—for Appellant.

B. Sita Ram—in person.

Judgment.—This is an appeal from the order of the District Judge of Sitapur dated 23rd March 1929, passed in the exercise of his insolvency jurisdiction. The appellant, Dr. Ganga Sahai, made an application in the lower Court for permission to prove a debt of Rs. 10,000 recoverable from the assets of the insolvent. The receiver in insolvency proceedings resisted the application. The learned District Judge rejected the application by the order under appeal.

The circumstances are as follows:

On 16th July 1923 one Seth Brij Behari Lal purchased certain villages from the insolvent. One of the covenants of the transaction of sale was that if the vendor's title was found to be defective and thereby the vendee lost any of the properties purchased by him the vendor would be liable to refund the proportionate value of such property; and to secure the liability the vendor specifically charged other three villages Birgadia, Birha and Bikhari. Subsequently the two last mentioned villages were sold by the insolvent to the appellant, Dr. Ganga Sahai. On a claim by the niece of the insolvent the vendee Seth Brij Behari Lal lost a one-eighth share in some of the villages which he had purchased under the sale of the 16th July 1923. Thereupon Seth Brij Behari Lal made a claim by notice on Dr. Ganga Sahai as the purchaser of the villages charged with the liability for making good the loss sustained by him by reason of the claim of the insolvent's niece. Dr. Ganga Sahai naturally complied with the demand of Seth Brij Behari Lal and satisfied the charge which existed on the villages of Birha and Bi-

khari by payment of Rs. 10,000 to Seth Brij Behari Lal. There is no question in the case that Dr. Ganga Sahai's claim would amount to a debt if the insolvent were held liable to pay it. On behalf of the receiver, however, it is argued that the insolvent is not so liable for the reason that though the debt was a charge on the properties purchased by Dr. Ganga Sahai yet he was not liable to satisfy that charge because he had no notice of it.

In support of the argument advanced on behalf of the receiver several cases were quoted before us with a view to establish the proposition that if a transferee of specific immovable property has no notice of a prior charge against that property the charge does not follow the property in the hands of the transferee and that, therefore, he is not bound to satisfy it. On behalf of the appellant two arguments were placed before us: (1) that when specific immovable property is charged with the liability of satisfying a debt the charge follows the property in the hands of the transferee and it is immaterial whether he had or had not notice of the same, and (2) that the insolvent is liable under S. 69, Contract Act, 1872. We propose to decide the appeal with reference to the second argument just now mentioned. S. 69, Contract Act, 1872, is as follows:

"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

There can be little doubt that the insolvent was under a liability to recoup the loss suffered by Seth Brij Behari Lal when the latter lost a share in the properties purchased by him by virtue of the decree in favour of the insolvent's niece. The insolvent had further charged two of his villages which he subsequently sold to the appellant with liability to satisfy that loss. He was, therefore, bound by law to pay the claim of Seth Brij Behari Lal. The next question is whether the appellant, Dr. Ganga Sahai, was interested in the payment which he made to Seth Brij Behari Lal. In the case of *Tulsa Kunwar v. Jageshar Prasad* (1), Stanley C. J., observed that S. 69, Contract Act, 1872, lays down a wider rule than is recognized by the English authorities and in-

(1) [1906] 28 All. 563=3 A. L. J. 372=(1906) A. W. N. 114.

interpreting the words "interested in the payment of money" he accepted the comment made in Pollock's Law of Contract that those words might include the apprehension of any kind of loss or inconvenience or at any rate of any detriment capable of being assessed in money and that it is enough for a person claiming under the provisions of this section to show that he had an interest in the payment of the money claimed by him at the time of payment. We think that there can be no doubt that the appellant, Dr. Ganga Sahai, was interested in the payment of money which he made to Seth Brij Behari Lal.

The villages which Dr. Ganga Sahai had purchased were admittedly charged with the liability for the loss when Seth Brij Behari Lal had suffered by reason of the success of the suit brought by the insolvent's niece. If Dr. Ganga Sahai had not amicably settled the claim of Seth Brij Behari Lal a litigation between the two was bound to ensue and the issue would have been exactly the same as it has arisen now, that is, as to whether Dr. Ganga Sahai had or had not notice of the charge and as to whether even if he had not the property which he purchased being specifically charged with the liability would still be liable in his hands. To avoid this controversy Dr. Ganga Sahai made the payment in question. On those facts we think that he was a person who was interested in the payment of that money. As observed in *Eastern Mortgage and Agency Co. Ltd. v. Muhammad Faslul Karim* (2):

"a debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid, a debt or promise to pay is then implied in law, without any actual agreement to that effect."

It follows that the payment made by Dr. Ganga Sahai is a debt against the insolvent and that Dr. Ganga Sahai is entitled to prove it in these insolvency proceedings.

We, therefore, set aside the order under appeal with costs and direct the lower Courts to deal with Dr. Ganga Sahai's application and to decide it according to law. The costs will come out of the assets of the insolvent.

V.B./K.K.

Order set aside.

(2) A. I. R. 1926 Cal. 385=52 Cal. 914.

A. I. R. 1930 Oudh 263

RAZA AND PULLAN, JJ.

Abil Husain—Appellant.

v.

Ram Nidh and others—Respondents.

Second Appeal No. 72 of 1929, Decided on 20th February 1930, from decree of First Addl. Dist. Judge, Lucknow, D/- 24th November 1928.

(a) Civil P. C., S. 100—Point abandoned before lower appellate Court—Point though of law cannot be raised in second appeal.

It is not open to a party in second appeal to raise again a point which was abandoned before the lower appellate Court, even if that point is a pure point of law: *A. I. R. 1927 Oudh 37, Foll.* [P 269 C 2; P 270 C 1]

(b) Transfer of Property Act, S. 128—S. 128 applies to Mahomedan donee.

There is no provision under S. 123 for the proposition that a Mahomedan donee is not governed by the provisions of S. 123 [P 270 C 1]

(c) Civil P. C., S. 47—Order refusing to execute decree against alleged legal representative—Order is appealable and no separate suit challenging its validity lies.

An order of the executing Court refusing to allow the decree-holder to execute the decree against an alleged legal representative or universal donee of the deceased judgment-debtor is of the nature of the decree and is appealable and precludes a separate suit challenging the validity of the order under the express provisions of S. 47. [P 270 C 1]

Ghulam Hasan—for Appellant.

Zaheer Ahmad for *Haider Husain*—for Respondents.

Judgment.—This is an appeal from a decree of the additional District Judge, Lucknow at Bara Banki, dated the 24th November 1928, affirming a decree of the Subordinate Judge, Bara Banki, dated the 15th August 1927.

The circumstances out of which this appeal has arisen, so far as they are material to the judgment, may be shortly stated:

The plaintiff-appellant is the son of one Mirza Sadiq Husain. Mirza Sadiq Husain owned considerable moveable and immovable property including villages Abupur and Barai. He agreed to sell Abupur to one Balkaran Singh some time in 1919.

He then gave a lease of the said property to Ram Nidh and four others (defendants 1 to 5, respondents) on the 12th June 1919, and thus got Rs. 11,160 from them. Balkaran Singh brought a suit against Mirza Sadiq Husain and the lessees for specific performance of the contract of sale on 16th June 1919. His claim was decreed on 21st February

1920 on payment of Rs. 9,500 which he paid into Court after deducting the costs of the suit. Ram Nidh and other lessees (i. e. defendants 1 to 5) took the amount deposited in Court and then sued Mirza Sadiq Husain for the balance on 4th April 1921. They obtained a decree against Mirza Sadiq Husain for Rs. 3,425 odd on 28th November 1921. Mirza Sadiq Husain executed a deed of gift in respect of the whole of his property (moveable and immovable) in favour of his son Mirza Abid Husain, appellant, on 21st April 1921. It was clearly stated in the deed that the donor had made a gift of the whole of his moveable and immovable property which was owned and possessed by him at the time of the execution of the deed in favour of his only son Mirza Abid Husain. The village Barai was not expressly mentioned in the list of the property annexed to the deed of gift; but the deed contains a provision to the effect that if any property had been left out by mistake it must be deemed to have been transferred to the donee. It was also provided by the deed that the donee would be liable to pay all the debts due from the donor. Mirza Sadiq Husain died on 14th July 1923. After the death of Mirza Sadiq Husain, the decree-holders (i. e. defendants 1 to 5) applied for execution of the decree against Mirza Abid Husain appellant. The name of Mirza Abid Husain was duly brought on record in place of Mirza Sadiq Husain deceased. He filed objections under S. 47, Civil P. C., contending that he was not the sole legal representative of the deceased and that the decree-holders could not take out execution against him and the property held by him under the deed of gift but his objections were disallowed by the Court on 3rd June 1926. He then filed the present suit on 16th February 1927 without preferring an appeal from the order dismissing his objections under S. 47, Civil P. C. The suit was brought against the lessees and certain other persons including all other heirs of Mirza Sadiq Husain deceased. The principal defendants in the case were the lessees named above (i. e. defendants 1 to 5).

The claim was resisted by the principal defendants on various grounds.

The learned Subordinate Judge rejec-

ted the claim on the following grounds: (1) that the plaintiff being the universal donee was liable to pay the debts of his father under S. 128, T. P. Act; (2) that the plaintiff was liable to pay the debts also under the terms of the deed of gift mentioned above and (3) that the suit is not maintainable under S. 47, Civil P. C.

The plaintiff went in appeal to the Additional District Judge, but the learned Judge dismissed the appeal agreeing with the finding of the learned Subordinate Judge on all the points mentioned above.

The plaintiff has now come to this Court in second appeal. We think there is no substance in this appeal. We think the lower Courts were perfectly right in holding that the plaintiff being the universal donee of his father, Mirza Sadiq Husain, is liable to pay his debts under S. 128, Act 4 of 1882. We have examined the deed of gift carefully. It is clear that Mirza Sadiq Husain had made a gift of the whole of his moveable and immovable property in favour of his son Mirza Abid Husain appellant. The village of Barai was not expressly mentioned in the list of the property annexed to the deed, but it must be taken to have been transferred to the donee along with other property under the saving clause of the deed mentioned above. The judgment of the learned Subordinate Judge shows that mutation was effected in favour of the plaintiff in respect of village Barai also as a donee after the execution of the deed of gift. This finding was not challenged in appeal before the learned Additional District Judge. The learned Additional Judge has made the following observations in his judgment, on the point under consideration:

"As to (1) it was contended in the lower Court in view of the omission of village Barai in the list of property given in the deed of gift that the plaintiff was not a universal donee and that the respondents could execute their decree by attaching that village. This point, however, has not been urged before me in appeal, for in view of the clear provision in the gift deed that all properties of the donor, whether mentioned in the list or not, would be deemed to have been transferred to the donee, it could not properly be contended that the title in Barai also had not passed to the donee."

We should like to note that it is not open to a party in second appeal to raise again a point which was abandoned be-

fore the lower appellate Court, even if that point is a pure point of law (see *Raj Krishna v. Sahab Baksh Singh* (1)).

The judgment of the learned Judge shows that it was contended before him with reference to S. 129, T. P. Act that a donee under the Mahomedan Law is not governed by the provisions of S. 128, T. P. Act. This point, however, has not been urged in this appeal before us. We are not aware of and have not been referred to any rule of Mahomedan Law which conflicts with the provisions of S. 128, T. P. Act. The first and second grounds of appeal therefore, fail and must be rejected.

There is no force in the third ground also. The deed of course contains a provision to the effect that all the debts of donor should be paid by his son the donee. It is true that the respondents' debt was not mentioned specifically in the deed of gift, but it should be borne in mind that the deed was executed during the pendency of their suit. The debt due to the respondents of course existed at the time of the execution of the deed and they succeeded in obtaining a decree for it on 28th November 1921.

The remaining grounds of appeal, also are not well founded.

We find the lower Courts perfectly right in finding that the present suit is not maintainable under S. 47, Civil P. C. The question, whether the appellant as a universal donee of Mirza Sadiq Husain, is his representative and liable to pay the decretal money as such, was decided against him by the learned Subordinate Judge, by an order dated 3rd June 1926. That order was of the nature of a decree and therefore appealable. However, no appeal was filed from that order and it became final. The plaintiff has sought to question the correctness and validity of that order by bringing the present suit, but he cannot be allowed to do so under the express provisions of S. 47, Civil P. C.

The result is that the appeal fails on all the points and must be dismissed. Hence we dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

* A. I. R. 1930 Oudh 270

STUART, C. J. AND RAZA, J

Rugghu Singh and others—Plaintiffs
—Appellants,

v.

Deputy Commr. Sitapur—Defendant
—Respondent.

Second Appeal No. 74 of 1929, Decided on 18th December 1929, against order of Sub-Judge, Sitapur, D/- 15th November 1928.

(a) Limitation Act, Art. 148—Conditions necessary for taking advantage of S. 6, Act 1 of 1869, explained.

In order to take advantage of S. 6, Lim. Act (1 of 1869) the mortgage must have been executed on or after 13th February 1844 and then too the advantage is available in two cases only namely, in mortgages which fixed no term within which the property comprised might be redeemed or mortgages which fixed the term within which the property comprised might be redeemed if such term had not expired before 13th February 1856. [P 271 C 2]

(b) Civil P. C., S. 11—Suit for redemption brought before right accrues dismissed—Decision operates as *res judicata* in subsequent suit brought after accrual of right (*obiter*.)

If a suit for redemption is brought by the mortgagor even though he had no right then to redeem and the suit is dismissed, the decision operates as *res judicata* in the subsequent suit for redemption brought when the mortgagor acquires such a right. [P 272 C 1]

Ali Zaheer and Habib Ali Khan—for Appellants.

G. H. Thomas, K. P. Trivedi and B. K. Bhargava—for Respondent.

Judgment.—This second appeal relates to a suit for redemption. The facts are these: It is admitted between the parties that a certain Thakur Kesri Singh who is now represented by the plaintiffs-appellants mortgaged to Thakur Shoo Bakhsh Singh the Taluqdar of Katesar through his karinda Jhao Lal the villages of Sultanpur and Akbarpur by two deeds executed on 28th Muharram 1262, Hijri corresponding with 27th January 1846. There is no dispute now as to the fact that these deeds were executed on that date and that both the villages in question were mortgaged. It is the property mortgaged by these deeds which the appellants now desire to redeem and, their claim to redeem having been rejected by the Courts below, they have come here in second appeal.

We have to look closely at the terms of these deeds. Under the terms of the deeds the mortgagor mortgaged the villages without possession and agreed that

(1, A. I. R. 1927 Oudh 37.

if he did not pay the amount due by the end of Aghan 1255 Fasli, that is to say, in the year 1848 A. D., he would lose all his rights in the villages and that he would then hand over possession of the villages to the mortgagee. It is admitted before us that nothing was paid and that the villages were actually handed over to the mortgagee not in the year 1848 but in the year 1852 and the mortgagee has been in possession of these villages ever since. The suit was dismissed on the ground that it was barred by limitation and also under the principles of *res judicata*. We have first to consider what remedy the mortgagor had under the deeds. Until the annexation of Oudh in 1856 it must be held that his remedy would ordinarily be confined to the remedy given him under the terms of the deeds themselves and if that view is taken the suit clearly fails, for under the terms of the deeds all his title to the property disappeared in 1848 as he had not by then paid up the amount due. But even if another view is taken and it is held that under the rule of Kings of Oudh there was an equitable right to recover possession, this right would have commenced in the year 1852 when the mortgagee obtained possession.

It is to be remembered that the British annexation took place on 13th February 1856 and that from the time of the British annexation up to the disturbances of 1857, that is to say, for something over a year, there were British Courts in existence. If he had an equitable right to redeem he could have exercised that right at any time during that period. We have not been referred to any Act of the legislature from 13th February 1856 onwards which gave a right to redeem in the case of mortgages executed before the annexation, where under the terms of the mortgages themselves the right to redeem had ceased to exist. But if it be conceded that the equitable principle which permits redemption came into force to cover such cases, it must be taken to have come in force as soon as the British Courts came into being in February 1856. The reason why we take this view is as follows: The article of limitation that would cover this case is clearly Art. 148, Sch. 1, Act 9 of 1908. The period is 60 years from the date

when the right to redeem or to recover possession accrues. Strictly speaking the right to redeem under these mortgages accrued as soon as the mortgages were executed. The possession did not pass until after the right to redeem had disappeared, if the terms of the mortgages are taken strictly. But even putting the case for the appellants as high as it can be put, the right to recover possession may be said to have accrued at the latest in 1852 after the property had passed out of his hands. So the period of 60 years would have expired in 1912. This suit was instituted in January 1928.

The learned counsel for the appellants has argued that owing to the action of the British Government his right to redeem disappeared on 15th March 1858 when under the well-known proclamation of Lord Canning all rights in Oudh land were confiscated. He argued that under the proclamation of 10th October 1859 the property in question was handed over with full proprietary title to the taluqdar, and that he had no right of redemption until Act 1 of 1869 was passed when under the provisions of S. 6 his right to redeem was re-admitted and safeguarded. He overlooks one important fact here. S. 6 applied to mortgages executed on or after 13th February 1844. These mortgages were executed after 13th February 1844. But the section applies only to two classes of mortgages. Mortgages which fixed no term within which the property comprised might be redeemed or mortgages which fixed the term within which the property comprised might be redeemed if such term had not expired before 13th February 1856. Now these mortgages did fix a term within which the property comprised in the mortgages might be redeemed, but that term had expired in 1848. We do not consider that this argument can be accepted. In any instance the appellants have to meet what appears to us to be an insuperable difficulty. If, to put it at the highest their right to redeem had accrued in 1852 and it is granted that between 1858 and 1869 the right had disappeared and revived again in 1869 there is nothing in Art. 148 which justifies the tacking of the term of the extra ten years on to the 60 years period allowed, and even if it were tacked on the suit would be time

barred, for it was not filed within 77 years. The suggestion of the learned counsel that it must be taken that his right to redeem or to recover possession accrued only in 1869 is one that we cannot accept. He had a right to redeem clearly from 1846. If he did not lose the right in 1848 and lost it for a period when it was revived again, it did not come into being for the first time in 1869. For these reasons we consider the appeal must fail and we need look only shortly at the other point.

It is established that in the year 1858 the predecessors of the present plaintiffs-appellants came into the Settlement Court to redeem this property under these deeds and their claim was rejected. The Courts below decided that their right to redeem cannot now be raised under the principles of *res judicata*. The argument on behalf of the appellants is that in 1868 they had no right to redeem though they acquired such right in 1869 and that the suit was rightly dismissed and that they were foolish ever to have brought it. There is support for the view that although they had no right to redeem in 1868 and had a right in 1869 the decision operates as *res judicata* against them. This principle was laid down by a Bench of the late Judicial Commissioner's Court in *Raja v. Santaram Das* (1). But as we consider that the case clearly fails upon the other point, we do not consider it necessary to discuss the question as to whether the suit is or is not barred under the rule of *res judicata*. We accordingly dismiss this appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1915] 18 O. C. 95=30 I. C. 193=2 O.L.J. 228.

A. I. R. 1930 Oudh 272.

RAZA AND SRIVASTAVA, JJ.

T. Nathon and others — Objector — Appellants.

v.

Mrs. A. S. Nathon — Petitioner — Respondent.

Misc. Appeal No. 39 of 1929, Decided on 11th February 1930, from order of Dist. Judge, Lucknow, D/- 20th March 1929.

(a) **Practice**—Court's decision must rest not on suspicion but upon legal grounds.

Court's decision must not rest on suspicion but upon legal grounds established by legal testimony. [P 273 C 1]

(b) **Will—Construction**—All property bequeathed to wife—Insertion of "provident fund etc." in will do not affect other provisions.

When the testator bequeaths all his property to his wife the insertion of the words "my provident fund etc." in no way affects the other provisions of the will. [P 273 C 1]

(c) **Succession Act (1925), S. 295**—Court cannot go into questions of title to which letters of administration refer.

It is not the province of the Court to go into the questions of title to property to which the letters of administration refer. 28 Bom. 644, *Foll.* [P 273 C 2]

(d) **Oudh Civil Rules—Rule 289 (5) and (8)**—Full fee should be allowed in case where grant of letters of administration is asked for and opposed—Succession Act S. 295.

Under S. 295, Succession Act, the proceedings in a case in which there is contention should take the form of a regular suit according to the provision of the Civil P. C. in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff and the person who has appeared to oppose the grant shall be the defendant. The practice is that full fee is allowed in such a case. [P 274 C 1]

H. D. Chandra and Ganesh Prasad—for Appellants.

M. Wasim and Girja Saran Lal—for Respondent.

Judgment.—This is an appeal from an order, dated 20th March 1929, passed by the learned District Judge, Lucknow in a case under S. 276 Succession Act.

The litigation which has given rise to this appeal relates to the property of one Mr. D. C. Nathan, a Permanent Way Inspector in the East Indian Railway. He died at Lucknow on the 15th July 1928. His widow, Mrs. A. S. Nathan, applied for grant of letters of administration of the property of her deceased husband, on the 26th November 1928. The application was opposed by Mr. T. Nathan, brother of the deceased, and subsequently also by the three sisters of the deceased. All the objectors denied the genuineness and validity of the will dated 1st August 1927 set up by Mrs. A. S. Nathan and contended also that the deceased was not competent to leave his wife a certain kothi situate on the Latouche Road in Lucknow by his will. At a subsequent stage of the proceedings, however, the counsel for the objectors stated that while it was admitted that the will had been written and signed by the deceased Mr. D. C. Nathan, they contended that it had been attested after his death. It was also stated that the will was tampered with, as four words "my provi-

dent fund etc." had been inserted in the will sometime after the rest of the will had been written.

The learned District Judge found that the will was genuine and valid, that it was not tampered with as alleged by the objectors and that the insertion, if any, of the words in question did not affect the validity of the will. He did not think it proper to decide in these proceedings the question whether the applicant was entitled under the will to the house referred to by the objectors. The result was that the learned District Judge granted the applicant, Mrs. A. S. Nathan letters of administration with the will annexed, holding that she was entitled to letters of administration with the will annexed without any limitation.

Mr. T. Nathan alone filed this appeal in this Court. He has since died and is now represented by his legal representatives.

We think there is no substance in this appeal. We are not prepared to accept the contention that the will was not properly attested at the time it was executed by Mr. D. C. Nathan. We agree with the finding of the learned District Judge on this point. The whole decision as to the accuracy of this finding turns on the evidence of two witnesses, viz, Mohammad Husain, P. W. 1 and Mohammad Nasrullah, P. W. 2. We have examined the will and have gone through the evidence of these witnesses carefully. Their evidence reads well and has not been shaken in cross-examination. Their evidence is clear, consistent and convincing. It is satisfactorily proved that the will was properly executed and attested on 1st August 1927. The appellant's learned counsel has taken us through the evidence of Mrs. A. S. Nathan also, but we find nothing in her evidence to give rise to the suspicion that the will was not properly attested as alleged by the objectors. The Court's decision must rest not upon suspicion, but upon legal grounds established by legal testimony.

We think there is no force in this contention also that the will was tampered with as alleged by the objectors. The evidence on the record shows that it was not tampered with. Even granting that the words in question were inserted soon after the will was written out

by Mr. D. C. Nathan this insertion does not in any way affect the validity of the will. S. 71, Succession Act (Act 39 of 1925), does not help the appellant in this case. We should like to note also that this plea was faintly pressed by the appellant's learned counsel. The testator had already bequeathed all his property to his wife and the insertion of the words in question in no way affects the other provisions of the will. We agree with the learned District Judge in finding that the will propounded by the applicant is genuine and was validly executed by her deceased husband Mr. D. C. Nathan.

The next question is whether the learned District Judge was wrong in not deciding the question of the applicant's title to the house in dispute. Mr. D. C. Nathan had got the house in dispute under the will executed by his sister Miss. M. Nathon on 7th March 1913. In determining the question under consideration not only the present will but also the will executed by Miss. Mr. Nathan has to be examined. It was under these circumstances that the learned District Judge did not think it proper to decide the question of title to the house in the present proceedings. We think the learned District Judge was not wrong in not deciding the question in the present proceedings. As pointed out in the case of *Ochavaram Nanabhai v. Dolatram Jamietran* (1) it is not the province of the Court to go into questions of title to the property to which the letters of administration refer.

The last question which we have to consider is the question of costs. The appellant's learned counsel contends that the fee of the petitioner's pleader should have been taxed under R. 289, Cl. (8) Oudh Civil Rules and not under, Clause (5) of the said rule. We are not prepared to accept this contention also. Under S. 295, Succession Act (Act 39 of 1925), the proceedings in a case in which there is contention should take the form of a regular suit according to the provisions of the Civil P. C. in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff and the person who has appeared to oppose the grant shall be the defendant. The practice is that

(1) [1904] 29 Bom. 644=6 Bom. L. R. 996

full fee is allowed in such cases. We may refer here to the order dated 17th June 1920 passed by a Bench of the late Court of Judicial Commissioner of Oudh in the case of *Rani Inder Kuer v. The Estate of Kunwar Girdhari Singh deceased* (2). We see no sufficient reason to depart from the practice which has all along prevailed in this province.

The result is that the appeal fails on all the points and must be dismissed. We dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(2) Misc. Appln. No. 666 of 1919.

A. I. R. 1930 Oudh. 274

Full Bench

WAZIR HASAN, AG. C.J., MISRA AND
PULLAN JJ.

(*Rai*) *Gaya Prosad*—Defendant — Appellant.

v.

S. Faiyaz Hussain — Plaintiff—Respondent.

Second Appeal No. 280, of 1928 Decided on 5th February 1929 against decree of Sub-Judge, Rae Bareilly, D/- 17th May 1928.

(a) Oudh Laws Act (18 of 1876), S. 10—Vendee not cosharer at date of sale—He cannot defeat pre-emption suit by acquiring position of cosharer during pendency of suit provided such possession is not acquired from person entitled to notice under S. 10

A vendee, who at the date of the sale was not a cosharer, cannot defeat the suit brought by a pre-emptor by acquiring the possession of a cosharer during the pendency of the suit, provided he has not acquired such a position from a person who was entitled to a notice under S. 10 and had not received it and whose right of pre-emption was not extinguished by any rule of law on the date of the acquisition by the vendees. [P 276, C1,2]

(b) Oudh Laws Act (18 of 1876)—Interpretation—Act is not to be construed in the light of Mahomedan law as regards pre-emption or in the light of assumed intention of the legislature.

Per *Wazir Hasan, Ag. C.J.*—When the terms of a statute are clear it is contrary to principles of interpretation to first conceive the intention of the legislature in enacting a statute and then to construe it in accordance with that intention: *Leader v. Duffy*, (1888) 13 A. C. 294 and *Bank of England v. Vagliano Brothers*, (1891) A. C. 107 *Rel. on.* [P 275, C 1]

The provisions of Oudh Rent Act, therefore, cannot be construed in the light of the rules of the Mahomedan law in the matter of pre-emption which might have been in force previous to the passing of the Act or in the light of an assumed intention of the legislature.

[P275 C 1]

(c) Oudh Laws Act (18 of 1876), Ss. 6 and 9—Right and liability of pre-emption pass with property and can be enforced by or against the last vendee.

Per *Wazir Hasan Ag. C. J.*—When property which carries with it the right of pre-emption passes from one person to another the right also passes with it and the new holder of the property acquires the status of a cosharer which his predecessor had possessed. Similarly when the property which bears the burden of pre-emption is transferred by any of the various modes of acquisition of the property known to law, i.e. purchase, devise or inheritance, the burden is also transferred with it. The last vendee in a chain of successive vendees of a property which bears the burden of pre-emption is, therefore, as liable to deliver the property to the legitimate pre-emptor as is the first vendee. [P275 C 2]

(d) Oudh Laws Act (18 of 1876), S. 10—Only persons entitled to proper notice on date of proposal to sell are entitled to pre-empt.

Per *Wazir Hassan, Ag. C.J.*—Only such persons are entitled to acquire or retain the property, which is the subject matter for a claim for pre-emption, who are entitled to the proper notice prescribed by S. 10 on the date of the proposal to sell must have received such a notice. Such persons, however, include their representatives-in-interest. [276 C 1]

(e) Oudh Laws Act (18 of 1876), S. 10—“Legitimate pre-emptor” explained.

Per *Wazir Hasan Ag. C.J.*—A pre-emptor who shows that the person from whom the title to the property, which carries with it the right of pre-emption, has devolved on him was not given the notice required by S. 10 then such person must be held to be a legitimate pre-emptor and is entitled to acquire the subject matter of the same. [P 276 C 1]

Ram Bharose Lal and Raj Narain Shukla—for Appellants.

Kalb-i-Abbas—for Respondent.

Wazir Hasan, Ag. C. J.—The decisions bearing on the question with which we are at present concerned, of the late Court of the Judicial Commissioner of Oudh are mentioned and considered in the judgment of my learned brother, Pullan, J. One of such decisions is *Sadiq Hussain Khan v. Muhammad Karim* (1). I was a party to that decision. It appears to me that the view expressed in that judgment as to the nature of the right of pre-emption is the view which in my opinion gives a stable basis for the answer to the question raised in the reference. I shall freely use the reasoning and the expressions employed in the aforementioned judgment.

In my opinion the question must primarily be answered with reference to the terms of the statute (Oudh Laws Act, 1876). Ch. 2 of that Act deals with the

(1) A. I. R. 1922 Oudh 289=25 O. C. 819

matter of pre-emption. We have therefore to interpret the provisions of that chapter and I think that we are entitled to do no more. When the terms of a statute are clear, it is contrary to principles of interpretation to first conceive the intention of the legislature in enacting a statute and then to construe it in accordance with that intention. In the case of *Leades v. Duffey* (2), Lord Halsbury said:

"Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained . . . and it is arguing in a vicious circle to bring by assuming an intention of the instrument itself, and having made that fallacious assumption, to bend the language in favour of the assumption so made."

The observations of Lord Herschell in the case of *Bank of England v. Vagliano Brothers* (3), are so apposite to the present case that I cannot help quoting them:

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead as before, by roaming over a vast number of authorities in order to discover what the law was . . ."

Having regard to the above principles I am unable to construe the provisions of the enactment in the light of the rules of the Mahomedan Law in the matter of pre-emption which might have been in force previous to the passing of the Act or in the light of an assumed intention of the legislature. In interpreting the provisions of Chap. 2, Oudh Laws Act, 1876, therefore, I propose to disregard altogether the so-called fundamental principle of law of pre-emption, that is, the exclusion of strangers from the proprietary community of the village. If I were free to speculate I would venture to say that the intention of the legislature in enacting the

afore-mentioned provisions was to do away with the then nebulous state of law by prescribing definite, certain and clear rules in a codified form.

According to my judgment the provisions of Chap. 2, Oudh Laws Act, 1876, are quite clear. Ss. 6 and 9, when read together, give a definition of the right of pre-emption in both its aspects that is, in relation to persons and also to property. The first element of this definition is that the right of pre-emption is possessed only by such persons as have an interest, proprietary, or under proprietary in land. This element may be called the subjective element. The subject matter is again an interest in immoveable property, proprietary, under-proprietary or other transferable right affecting the lands of the village. This may be described as the objective element. Clearly both elements are incidents of the ownership of land. In the former case it is the right and in the latter case it is the corresponding obligation or burden. Apart from these incidents of the ownership of land there can be no claim for pre-emption. Therefore on general principle the right and the burden will run with the land respectively. Another general principle is that an assignee, a legatee or an heir takes property with all its incidents, that is rights appertaining thereto and the obligations resting on it. It would seem to follow that when property, which carries with it the right of pre-emption, passes from one person to another the right also passes with it and the new holder of the property acquires the status of a co-sharer which his predecessor had possessed. Similarly when the property which bears the burden of pre-emption is transferred by any of the various modes of the acquisition of property known to law, gift, purchase, devise or inheritance, the burden is also transferred with it. This being so, it becomes unquestionably true that the last vendee in a chain of successive vendees of a property, which bears the burden of pre-emption, is as liable to deliver the property to a legitimate pre-emptor as is the first vendee. I have used the word "legitimacy" purposely because its meaning in this connection will give the precise point at which the line is to be drawn.

Section 13, Oudh Laws Act, 1876, shows that the condition precedent for

(2) [1888] 13 A.C. 294=53 L. J.P. C. 13=56 L. T. 9.

(3) [1891] A. C. 107=60 L. J. Q. B. 145=55 J. P. 676=39 W. R. 657=6 L. T. 353

the enforcement of the right of pre-emption is the absence of a valid and proper notice to the claimant as required by S. 10. It follows that a person who has received due notice but has made default or a person who is not entitled to the notice is not entitled to exercise the right of pre-emption. This brings me to the consideration of the provisions of S. 10. According to that section a person is required to give notice when he;

"proposes to sell any property . . . in respect of which any persons have a right of pre-emption"

and the notice shall be given "to the persons concerned." S. 10, therefore, prescribes the time at which notice is to be given and the person by whom it is to be given as also the persons to whom it is to be given. The time is the time of the proposal to sell, the persons to whom the notice is to be given are the persons enumerated in S. 9 and designated as cosharers and the person, who is laid under the obligation to issue the notice, is the person who proposes to sell. I therefore hold that only such persons are entitled to acquire or retain the property, which is the subject matter of a claim for pre-emption, who are entitled to the proper notice prescribed by S. 10 on the date of the proposal to sell but have not received such a notice. On the reasoning given in the preceding paragraph of this judgment such persons will also include representatives-in-interest. If a plaintiff pre-emptor therefore shows that the person from whom the title to the property which carries with it the right of pre-emption has devolved on him was not given the notice required by S. 10 (I am of opinion that) such a plaintiff must be held to be a legitimate pre-emptor and is entitled to acquire the subject matter of the sale and in similar circumstances a vendee is entitled to retain the property brought by him or if of equal status each is entitled to ask for the drawing of lots.

My answer to the question, therefore, is that a vendee who at the date of the sale was not a cosharer cannot defeat the suit brought by a pre-emptor by acquiring the position of a cosharer during the pendency of the suit provided he has not acquired such a position from a person who was entitled to a notice

under S. 10, Oudh Laws Act, 1876, and had not received it and whose right of pre-emption was not extinguished by any rule of law on the date of the acquisition by the vendee.

Pullan, J.—The law of pre-emption in Oudh rests upon statute, and pre-emption as defined in Chap. 2. Oudh Laws Act, is a right of certain persons to acquire in certain cases immovable property in preference to all other persons. In practice the law gives to all cosharers in a village a right to purchase any land that may be sold in the village in a certain order. Thus the cosharer in the subdivision, if any, has the first right; the cosharer in the whole mahal has the second right and any member of the village community has the third right. Those whose title is equal may decide the matter by lot. In order that the members of the village community may exercise their right the intending vendor must give them notice of the sale proposed, and the person who is the best entitled under the law to make the purchase may enforce his right by suit, while any person whose right is equal to that of the prospective vendee may obtain an adjudication by lot.

It will be observed that nothing is said in the Oudh Laws Act about strangers and the very fact that pre-emption is allowed in the case of a sale which has been made to a cosharer negatives the idea that the basic principle of pre-emption is the exclusion of strangers from the village community.

The Allahabad High Court not having to administer any statute of pre-emption until very recently, has adopted the view that pre-emption is designed to keep out the stranger and has developed this view in a number of rulings which have been accepted by many of the Judges of the late Judicial Commissioner's Court as applicable to Oudh. Taking their stand on this principle the Allahabad Judges have allowed themselves to consider not so much the rights of the pre-emptor and the vendee at the time of the sale as at the time when the case was being tried. In their desire to exclude a stranger they have held that a man, who was a cosharer at the time of the sale, but subsequently lost that position, becomes himself a stranger and is therefore not able to maintain a claim for pre-emption, even though he may

have established it in the Court of first instance and obtained a decree. They have also held that if the vendee has ceased to be a stranger during the suit and has acquired some other title which, had he possessed it at the time of the sale, would have enabled him to contest successfully a claim for pre-emption, he may still make good that claim at any time in the course of the suit, at least up to the date of the decree of the first Court. These rulings commence with a decision of Strachey, C. J., reported in *Ram Gopal v. Piari Lal* (4). That case dealt with a plaintiff who during the course of the proceedings lost the position which he held at the time of the sale and the learned Chief Justice, finding that there was no general principle of law which compelled him to look exclusively to the state of things that existed at the date of the institution of the suit, held that the plaintiff was not entitled to succeed if at the date of the decree he was not entitled to pre-emption under the terms of the *wajibularz* upon which the suit was based. It will be observed that the learned Chief Justice regarded the plaintiff's rights as being what they were at the time of the institution of the suit, and so, if I may say so, inserted the thin end of the wedge which has enabled subsequent Judges to make a wide breach in the rights of the pre-emptor. This judgment was carried to its logical conclusion by a Bench of the Allahabad High Court in *Bihari Lal v. Mohan Singh* (5), in which it was held that the acquisition by the vendee of a share in the village by gift during the pendency of the suit entitled him to resist successfully the claim of pre-emption. In the words of their Lordships:

"It seems to us immaterial whether it is the plaintiff's position that has been changed or that of the vendee. The result in either case is that on the date of the decree the plaintiff was no longer in a position to say to the Court, I am a person who is entitled to pre-empt as against the vendee."

The case which was decided in that ruling of the Allahabad High Court is similar to the case which is now before this Bench, and we have been asked to hold that the law as laid down in that ruling is good law and applicable to

Oudh. The Oudh Court, that is to say the Court of the Judicial Commissioner, has followed two lines of reasoning: one of them is based strictly on the views of the Allahabad High Court and the other claims that the ruling of that Court should not be applied to Oudh. In *Tahawar Khan v. Madho Ram* (6), they deliberately followed the Allahabad High Court holding that the broad principle that the plaintiff in a pre-emption suit must be able to show a title which is valid and subsisting at the time when he brings his suit into Court, was entirely applicable to suits under the Oudh Laws Act, and that the corollary that the purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a pre-emption suit instituted after the acquisition of the said title was equally applicable. The same learned Judge, Mr. Piggott (now Sir Theodore Piggott) pursuing the same line of argument held in the case of *Sheo Charan Singh v. Bhikkhai* (7), that a re-transfer by the vendee to his vendor before the institution of the suit was sufficient to defeat the claim for pre-emption. This latter judgment was overruled in the decision of a Bench which was reported in the footnote in the case of *Manna Singh v. Bihari Singh* (8), in the judgment of which at p. 189 the Judicial Commissioner said that they were unable to agree with Mr. Piggott that any general principles laid down by the Allahabad High Court regarding the law of pre-emption which obtains in the province of Agra can be applied so as to affect the scope of the statute which regulates the law of pre-emption in Oudh; and whatever the object of the law of pre-emption generally may be conceived to be we have to take the language of the statute as we find it and to give full effect to it.

In the judgment of the case to which this Bench decision was appended Stuart, A. J. C., (now Sir Louis Stuart, C. J.), held that a right of pre-emption after it has once accrued cannot be defeated by anything that happens afterwards. It cannot be said that this view was ac-

(4) [1899] 21 All. 441=(1899) A.W.N. 163.

(5) [1920] 42 All. 268=55 I.C. 71=18 A.L.J. 220.

(6) [1908] 11 O.C. 290.

(7) [1911] 14 O.C. 156=11 I.C. 532.

(8) [1916] 19 O.C. 182=37 I.C. 181=3 O.L.J. 720.

cepted by other members of the Court at the same time for in a ruling reported in *Ratan v. Ram Newaz* (9), Mr. Kanhaiya Lal, A. J. C., went the whole distance with the Allahabad High Court and found that no man can be allowed a decree for pre-emption in preference to another who has a superior right on the basis of a title acquired after the right to sue accrued. In *Sitla Baksh Singh v. Jagdat* (10), the same learned Judge refused to follow his previous finding to its logical conclusion, and held that the vendee could not be allowed to use a transfer effected subsequent to the filing of the suit as a shield and thus defeat his claim. In my opinion this view is illogical. Once the relative position of the parties subsequent to the execution of the sale deed is considered by the Courts to be the basis on which their decision is founded it is impossible to say that the vendee can set up a right acquired after the sale and before the suit and deny him the right to set up a right acquired at any time until the final decision. The Courts no doubt have hesitated to give effect to this conclusion because it might result in a see-saw of rights. The plaintiff might lose his right by sale of the share which had given him the right of pre-emption, or the vendee might acquire by sale or gift a share which made his right stronger than that of the plaintiff. The plaintiff might again acquire a better right by another gift and so ad infinitum.

In my opinion the judgment in *Mana Singh v. Behari Singh* (8), and the Bench ruling which it reproduced showed the way to the proper decision of this question, and this view was repeated by a Bench of the Judicial Commissioner's Court in *Lal Raghoindra Pratap Sahai v. Abu Jafar* (11), and the ruling in *Mana Singh v. Behari Singh* (8), has been recently re-affirmed in this Court by a Bench in *Durga Prasad Singh v. Bishunath Baksh Singh* (12). In a case reported in *Husain Khan v. Mohammad Karim* (1), another Bench of the Judicial Commissioner's Court dealt with the

whole question of pre-emption under the Oudh Laws Act and refused to follow the principles laid down by the Allahabad High Court. The question before that Bench was not the same as that before us now, but I notice that the conclusion which was drawn by the Judicial Commissioners was that the right of pre-emption is an incident to the ownership of one land and a burden on ownership of another land. This view emphasises the fact that the right of pre-emption accrues only in virtue of the possession of certain other land at the time of the sale, and I am unable to see how an acquisition of another property after the sale gives to the vendee any right as against the property in suit. Nor can such an acquisition destroy the obligation laid by law on the property in suit and make it not subject to the plaintiff's exercise of his right of pre-emption. In my opinion the Oudh Law considers only the rights which existed at the time of the sale. A vendee, who is not a cosharer at the time of the sale, cannot resist the claim of one who was, because he becomes a cosharer afterwards. I would dismiss altogether from consideration the theory that once the vendee ceases to be a stranger he has a good right to maintain a purchase made by him while he was still a stranger against the claim of a pre-emptor. As I have pointed out above, it is immaterial whether the vendee is a stranger or not for the purposes of the Oudh Laws Act.

The only question is whether the plaintiff is a person who has under that Act a right to buy the property as good as or better than the right of the vendee. Apart from those rulings of the Judicial Commissioner's Court which go to support this view I am fortified by a Full Bench decision of the Chief Court of the Punjab: *Dhanna Singh v. Gur Baksh Singh* (13). It is conceded that in the Punjab there is a law of pre-emption almost identical with that in Oudh, and the judgments in that case show that there is no difference in principle between the laws of the two provinces. In that case four out of five Judges held that a vendee could not defeat the plaintiff's claim by becoming a proprietor in the village

(9) [1916] 19 O.C. 110=36 I.C. 793=3 O.L.J. 580.

(10) [1917] 20 O.C. 195=41 I.C. 903=1 O.L.J. 488.

(11) [1919] 22 O.C. 353=54 I.C. 371=6 O.L.J. 618.

(12) A.I.R. 1927 Oudh 353.

(13) [1909] 91 P.R. 1909=148 P.L.R. 1909=4 I.C. 337=161 P.W.R. 1909 (F.B.).

whether by gift or otherwise after the date of the institution of the suit and the judgment of Shah Din, J., considers those judgments of the Allahabad High Court to which I have already referred and definitely comes to the conclusion that a vendee by means of a gift could under no circumstances have a retrospective right of purchase in respect of any sale of land which took place prior to the date of the gift.

It may be considered too late at this stage to permit a plaintiff to claim pre-emption in a suit when he has already lost his position as a cosharer, because this view has been consistently held for a long period of years and on the principle of stare decisis it is inadvisable now to absolve the plaintiff from the necessity of proving at least that at the time of bringing the suit he is one of those persons entitled under the Oudh Laws Act to do so. Further than this I would not go. I consider that the Court has then got to decide the case as it is presented, and that the plaintiff, who was a cosharer entitled to pre-empt the property at the time of the purchase by one who was not a cosharer, and maintains that position at the time of the suit, cannot be defeated by the acquisition on the part of the vendee of an equal or superior right of purchase acquired after the sale. Such a right may affect subsequent sales but it cannot have a retrospective effect in respect of a sale which has already been completed.

I would, therefore, reply to the question which has been referred to this Bench in the negative.

Misra, J.—The question referred to the Full Bench is as follows :

"Can a vendee, who at the date of the sale was not a cosharer, defeat the suit by a pre-emptor through acquiring the position of a cosharer during the pendency of the suit?"

The facts which gave rise to this reference are as follows :

A certain share in village Chak Mumhiyan, District Rae Bareilly, was purchased by the defendant-appellant by a sale deed, dated 26th October 1926. The share in suit was situate in Patti Ghulam Husain in which the vendor Mehdi Hasan and the plaintiff-respondent Faiyaz Husain were cosharers. The defendant-appellant was not however, a co-

sharer in that patti, but only a cosharer in the village. The plaintiff-respondent therefore, instituted a suit for pre-emption in respect of the share sold. The suit was instituted on 18th October 1927. After the institution of the suit the defendant acquired a share by gift in the patti in which the land in suit lies and on its strength has claimed preferential right. It has been held by both the Courts below that the acquisition of the said share by the defendant-appellant subsequent to the institution of the suit, would not give him any preferential right and taking this view they have decreed the plaintiff's claim.

The main point involved in the reference is, whether the acquisition made by the vendee after the institution of the suit for pre-emption can be set up as a defence to that suit. In order to arrive at a correct answer to the reference we must turn to the provisions relating to pre-emption embodied in Chap. 2, Oudh Laws Act 16 of 1876. This chapter deals with pre-emption and consists of ten sections commencing with S. 6 and ending with S. 15.

Section 6 defines the right of pre-emption as a right of certain persons mentioned in S. 9 to acquire specified immovable property in preference to all other persons.

Section 7 enacts that there shall be a presumption as to the existence of the right of pre-emption in all village communities.

Section 8 lays down that no such presumption will exist in the case of a town or a city but the right may be shown to exist therein and to be exercised by a particular class of persons by virtue of a local custom.

Section 9 defines in what order the right of pre-emption is to be claimed. It will be exerciseable first by the cosharers of the tenure in which the property is comprised in order of their relationship to the vendor, and then by the cosharers of the mahal in the same order and lastly to any member of the village community. It further provides that where two or more persons are equally entitled to such right the person to exercise the same shall be determined by lot.

Section 10 provides for the issue of notice to all persons, who are entitled to exercise the right of pre-emption in the case of a particular sale. The notice is

to be given through the Court within the local limits of whose jurisdiction the property or any part thereof is situate, and shall be deemed sufficiently given if it be stuck on the chaupal or other public place of the village in which the property is situate.

Section 11 lays down that any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right if within three months of the date of the said notice he does not pay or tender the price aforesaid to the person proposing to sell.

Section 12 lays down that the right of pre-emption can also be exercised in the case of the foreclosure of a mortgage.

Section 13 lays down that a person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds :

(a) That no due notice was given as required by S. 10 ;

(b) That tender as required by S. 11 was made and refused;

(c) That in the case of a sale the price stated in the notice was not fixed in good faith.

It further provides that if the Court comes to the conclusion that the price was not fixed in good faith, it shall fix such price as appears to it to be the fair market value of the property sold.

Section 14 lays down that if the Court grants a decree to the plaintiff it shall specify a day on or before which the purchase money has to be deposited.

The last section, namely S. 15, lays down that if such purchase money is not paid into Court before it rises on the date fixed the decree shall become void and the plaintiff shall lose his right of pre-emption in respect of the property sold.

It would appear from the analysis of the law given above that one of the main grounds on which a suit can be brought by a pre-emptor is that no notice was given to him. It is also clear that the notice is to be given to all the persons concerned, by which it is meant all those who would be entitled to purchase the property in preference to the person to whom it was proposed to sell the said property. To my mind it is quite clear from these provisions that if a notice has not been given to a person, who was not preferentially entitled to purchase

the property at the time of the sale, he has no ground to complain and would not be entitled to exercise the right of pre-emption. If he acquires any right after the sale that would not throw upon the vendor a responsibility of giving him notice to which he was not entitled at the time of the sale. Similarly if a vendee is not entitled to purchase the property in preference to the pre-emptor, he must be liable to the right of pre-emption being exercised against him, and he cannot escape that liability by acquiring any property after the sale. It would, therefore, be quite logical to hold that nothing should affect the right of the plaintiff or of the defendant if it has happened after the sale.

It has, however, been consistently held in the province of Oudh that although it is incumbent for a pre-emptor to show that he had a preferential right to purchase at the date of the sale, yet, if events have subsequently happened, which deprive him of this preferential right, he would not be entitled to a decree. This may happen in various ways, for instance, he may sell the property on the basis of the ownership of which he was entitled to pre-empt or by virtue of a subsequent partition, his share might be thrown in a patti or mahal other than that in which the share sold is situate.

Similarly if the defendant has acquired property after the sale, which has destroyed the right of pre-emption exercisable by the pre-emptor but before the institution of the suit, he would not be entitled to bring the suit. The position that has to be seen in each of these cases is that a right which existed at the time of the sale must also continue to exist at the time when the suit for pre-emption has been brought. So far the position has to be conceded. I am not, however, prepared to allow any circumstances which have happened after the date of the institution of the suit to affect the right of the plaintiff as it existed on the date of the suit. I feel that it would be taking the matters too far. The Courts must look to the rights of the parties as they stood at the date of the suit and must try to give effect to them. Nothing should be taken into consideration which has happened afterwards. The Allahabad High Court has, however, taken the matter further by

Looking into the position of the parties' right up to the date of the decree. They have held that if circumstances have happened after the institution of the suit, which go to deprive the plaintiff of the right of pre-emption, he should not be granted a decree. Similarly if the defendant has acquired property, which has given him a preferential right to purchase though after the suit but before the decree, the right of the plaintiff should be considered to have been destroyed.

But it appears to me that if the right of the plaintiff for the purpose of giving him a decree has to be seen not only at the date of the suit, but also at the date of the decree, endless complications will arise; for instance, if the position of the parties has to be seen on the date when the decree is passed by the Court of first instance there is no reason why the position standing on the date of the decree of the appellate Court or even of the second appellate Court should not be considered. It is quite possible that the plaintiff-appellant may have a preferential right to purchase the property on the date of the sale and may also have a similar right on the date when the suit is brought by him to enforce his right to pre-empt and also at the date of the decree, yet his right may be destroyed by the defendant's acquiring property subsequent to the suit or it may be even subsequent to the passing of the decree in his favour. It appears to me that it would be unjust and improper to allow the pre-emption right to be thus destroyed by events over which the plaintiff had no control and they may have been expressly brought about at the instance of the defendant. I am not, therefore, inclined to follow the view taken by the Allahabad High Court in the pre-emption cases in this respect. I think the rule of law laid down by the Full Bench of the Punjab Chief Court in *Dhanna Singh v. Gur Bakhsh Singh* (13) that in a suit for pre-emption the vendee should not be allowed to defeat the plaintiff's claim by becoming a proprietor in the village by acquiring a preferential right to purchase the property after the date of the institution of the suit is sound. I am in entire agreement with the view of Shah Din, J., propounded in that case. The case has been so ably put and exhaustively dealt by

him that I do not think it would serve any useful purpose to repeat his arguments.

My answer, therefore, to the reference before us is in the negative. A vendee who at the date of the sales was not a cosharer should not be allowed to defeat the suit by a pre-emptor by acquiring the position of a cosharer during the pendency of the suit.

By the Court.—The reference is returned to the Bench concerned with the judgments delivered by the members of the Full Bench.

R.K.

Order accordingly.

A. I. R. 1930 Oudh 281 Full Bench

WAZIR HASAN C. J. RAZA, AND
SRIVASTAVA, JJ.

Bajjnath Prasad and another—Plaintiff—Appellants.

v.

Gajadhar Bakhsh and another—Defendants—Respondents.

Second Rent Appeal No. 48 of 1929, Decided on 20th March 1930, against decree of First Addl. Dist. Judge, Bara Banki, D/- 22nd July 1929.

(a) Oudh Rent Act (22 of 1886), S. 127—For action under S. 127 person to be proceeded against must be in actual possession at institution of proceedings—His being in possession for portion of the period in suit is not sufficient.

A suit under S. 127 lies only against a person in actual possession of the land in respect of which the relief is claimed. The provisions of S. 127, however, have no application in a case of a person who during the portion of the period in suit has been in actual possession, out who at the time of the institution of the suit is only in constructive possession: *A. I. R. 1926 Oudh 417 Appr.*; *7 O. W. N. 21 Rel. on.* [P 283 C 1, 2]

(b) Oudh Rent Act, S. 127—S. 127 must be strictly construed.

The provision of S. 127 are exception to the general law and, therefore, they should be strictly construed. [P 283 C 1]

Bishambhar Nath for H. D. Chandra—*for Appellants.*

Zahur Ahmad—*for Respondents.*

Order of Reference

Stuart, C. J. and Raza, J.—The facts of the suit out of which this appeal arises are these: The plaintiffs Bajjnath Prasad and Jagdish Prasad are purchasers of a certain mahal in a village called Amouli Kiratpur. The defendants Gajadhar Bakhsh and Mohan Singh were the proprietors of the rights purchased by the plaintiffs. The plain-

tiffs obtained possession over the mohal on 27th February 1926. The defendants on the findings of fact retained certain plots without the consent of the plaintiffs. In the year 1928 the plaintiffs proceeded to sue the defendants under the provisions of S. 127, Act 22 of 1886 for rent payable for land occupied without the consent of the landlord and for ejectment. The Courts below have dismissed the suit considering that the Rent Courts had no jurisdiction according to the decision of the late Misra J. in *Badri Bishal Singh v. Ram Autar* (1). The view taken by the learned Judge was that the rent Courts have only jurisdiction to take action under S. 127 against persons in actual possession and the section has no application to persons in constructive possession. The decision in question does not, however, fully cover the facts of the present case. The suit was brought for rent payable for land occupied without the consent of the landlord in respect of the years 1333, 1334, 1335 and Kharif 1336 Fasli. The finding of fact is that during the years 1333, 1334, and 1335 Fasli the defendants-respondents actually cultivated the land themselves. They were in actual possession and not in constructive possession. But in the year 1336 Fasli they sublet the plots to subtenants and were in constructive possession and not in actual possession. We consider the case is of sufficient importance to justify a reference to a Full Bench under the provisions of S. 14, Oudh Courts Act, 1925 and we desire the opinion of the Bench upon the following points :

1. Does the Bench accept the view of the late Misra J. in *Badri Bishal Singh v. Ram Autar* (1). If they do not accept that view of the law, what is their view ?

2. If the principle be accepted that the provisions of S. 127 only apply to the case of a person in actual possession and not in constructive possession, would those provisions have application in case of a person who during a portion of the period in suit has been in actual possession, but who at the time of the institution of the suit was only in constructive possession ?

The reference will be made accordingly.

(1) A. I. R. 1925 Oudh 417=29 O. C. 266.

Opinion

Wazir Hasan, C. J., Raza and Srivastava JJ.—This is a reference to a Full Bench by a Divisional Bench of this Court for answer to two questions:

1. Is the view laid down in *Badri Bishal Singh v. Ram Autar* (1) decided by the late Misra, J. correct ?

2. If it is correct in principle, whether it is applicable to the facts of this case? We have not literally reproduced the questions referred to the Full Bench for decision but that is the substance of those questions.

The facts are as follows :

The plaintiffs-appellants purchased at an auction sale a mahal in a village, called Amouli Kiratpur. This was done in execution of a decree on the foot of a mortgage against the defendants. Formal possession of the property purchased was delivered to the plaintiffs on 27th February 1926 and for the purposes of this suit it is agreed that the plaintiffs obtained possession of everything to which they were entitled except 7 plots of land, over which the defendants retained possession in spite of delivery of possession to the plaintiffs. The defendants not only retained possession of those plots of land on the date of the delivery of possession but they continued the same possession up to the end of the year 1335 Fasli. In Kharif 1336 Fasli, however, they sublet it to a person who is now in actual possession of those lands but he is not a party to the litigation, out of which this reference arises.

In this state of facts the suit out of which this matter arises has been laid by the plaintiffs-appellants under S. 127, Oudh Rent Act, 1886, for a decree for rent for the years 1333, 1334, 1335 and Kharif 1336 Fasli against the defendants-respondents and also for the relief of ejectment. The Courts below have dismissed the suit on the sole ground that the provisions of S. 127, Oudh Rent Act, are inapplicable to this case for the simple reason that on the date of the suit the defendants were not in actual possession of the lands for which the rent is claimed. The Courts below have followed the decision of the late Gokaran Nath Misra, J. already referred to and, as we have stated before, one of the questions in the case is as to whether that decision is sound in principle or

not. We are of opinion that it is.

Section 127, Oudh. Rent Act, 1886, is as follows:

"(1) A person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant, and shall thereupon be liable for the rent of that land payable in the previous year, at such rate as the Court may determine to be fair and equitable, but he shall not in respect of that land, have any of the statutory privileges conferred by this Act.

(2) When a Court passes a decree for arrears of rent under sub-S. (1) read with Cl. (2), S. 108, it shall, on the application of the plaintiff, also pass a decree for the ejectment of the defendant from the land."

It is agreed and we think rightly that a suit of the nature contemplated by the provisions of S. 127 would ordinarily lie in a civil Court in the form of a suit for ejectment against a trespasser and for mesne profits. It follows that the provisions of the aforementioned section are exceptions to the general law and it further follows that they should be strictly construed. It seems to us that a view contrary to that taken by Misra, J., in the case mentioned above would lead to anomalous results. If the contrary view were permitted it would follow that a suit under S. 127 would lie both against a person who is in actual possession (and there is no dispute as to that) and also against a person who is in constructive possession as is contended for by the plaintiffs-appellants' learned advocate in respect of the liability for mesne profits in respect of the lands of the plaintiffs in possession of the defendants constructively and in possession of the subtenant actually. This result could not have been intended by the legislature. As pointed out in the judgment of our late colleague Gokaran Nath Misra, J., the words employed by the legislature in enacting S. 127 sufficiently clearly indicate the intention that a suit under that section would lie only against a person in actual possession of the lands in respect of which the relief may be claimed. The words are: "taking or retaining possession" and "be treated as a tenant." The words "taking possession" in their literal sense indicate taking actual possession as opposed to obtaining possession constructively. Similarly the words "retaining possession" connote a physical contact with the land and not symbolical. The words "treated as a tenant" again, according to our

judgment, indicate a more closer relation of the person in possession with the land than a symbolical connexion or the right to collect rent.

The principle which underlies the decision of our late brother, Gokaran Nath Misra, J., has been accepted by the Board of Revenue of these Provinces as correct in *Mahadeo Singh v. Pudai Singh* (2) and we do not see any compelling reason to make us deviate from the view taken in that case. On the contrary as stated above, we find several reasons in favour of the same view.

It was argued that there is no reason even on the construction which we have placed on the provisions of S. 127, Oudh Rent Act, 1886, to reject the plaintiffs' claim for rent for the years in which the defendants were in actual possession of the lands in question. Prima facie the argument is attractive but we think it is not sound. The phraseology of S. 127 amply supports the view that the person in possession of land without being entitled to such possession is a trespasser in essence. The object of S. 127 is to provide for an alternative remedy in favour of the owner of the land to treat such a person in possession not as a trespasser but as a tenant and sue him for rent accordingly instead of seeking relief in a civil Court for ejectment and damages. The provisions therefore call upon the owner of the land to make an election between two rules of procedure and obviously the owner signifies his election to proceed under S. 127 by instituting a suit in accordance with the provisions of that section. Therefore the date of the institution of the suit is the date of election and it must in the very nature of things be state of facts on that date which should determine the applicability or otherwise of the provisions of S. 127. If therefore the suit is laid as it is laid in the present case against a defendant who is not in actual possession on the date of the election it seems to us clear that it would logically follow that no relief can be given under that section.

Accordingly our answer to the first question is that we accept the view of law laid down in *Badri Bishan Singh v. Ram Autar* (1) and our answer to the second question is in the negative

R.K.

Reference answered.

*** A. I. R. 1930 Oudh 284**
Full Bench

WAZIR HASAN, C. J., RAZA AND
 SRIVASTAVA, JJ.

Angaraj Bahadur Singh and another
 —Defendants—Appellants.

v.

Ramrup and others—Plaintiff and De-
 fendants—Respondents.

Second Appeal No. 260 of 1929, Deci-
 ded on 29th April 1930, from decree of
 First Addl. Dist. Judge, Bara Banki,
 D/- 24th July 1929.

*** Hindu Law—Alienation—Father— Suit**
by mortgagee for possession on mortgage
executed by father—Sons questioning mort-
gage on ground of legal necessity—Question
can be agitated in suit.

Where on a mortgage executed by a Hindu
 father, the mortgagee brings a suit for posses-
 sion of the mortgaged property, impleading the
 sons of the mortgagor as defendants, if sons
 question the mortgage on the ground that it
 was neither justified by legal necessity nor
 supported by any antecedent debts it is neces-
 sary to determine in such suit whether or not
 the mortgage is binding upon the sons: *A. I. R.*
1917 P. C. 41, Rel. on.; *A. I. R. 1926 Oudh*
357, Expl. [P 234 C 1, 2]

Ali Zaheer and Ghulam Imam—for
 Appellants.

Radha Krishna—for Respondent 1.

Wazir Hasan, C. J.—A Divisional
 Bench of this Court constituting of my
 learned brothers, Bisheshwar Nath, J.,
 and Nanavutty, J., has referred the fol-
 lowing question for decision by a Full
 Bench :

"In the case of a mortgage executed by a
 Hindu father, the mortgagee brings a suit for
 possession of the mortgaged property and the
 sons of the mortgagor are impleaded as defen-
 dants. They question the mortgage on the
 ground that it was neither justified by legal
 necessity nor supported by any antecedent
 debt. Is it necessary or not to determine in
 such suit whether the mortgage is binding
 upon the sons?"

The lower appellate Court has deci-
 ded this question in the negative and
 the authority referred to for the view
 taken in a decision of a Bench of this
 Court in the case of *Bhawani Din v.*
Satrohan Singh (1). In pursuance of
 the view thus taken the Court below
 has refrained from deciding the ques-
 tion of legal necessity or of antecedent
 debt raised by the sons of the mortga-
 gor and has given a decree for posses-
 sion to the representative of the mort-
 gagee on the terms of the mortgage.

In the order of reference the learned
 Judges think that the lower appellate

(1) *A. I. R. 1926 Oudh 357.*

Court has not correctly interpreted the
 decision of this Court in *Bhawani Din*
v. Satrohan Singh (1), but if it has, it
 seems to be in conflict with a decision
 in the case of *Ram Charan v. Abida*
Begam (2).

I am of opinion that the decision in
 the case of *Bhawani Din v. Satrohan*
Singh (1), does not afford sufficient sup-
 port for the view taken by the lower
 appellate Court. The main question
 argued in that case was as to whether
 the sons of the mortgagor should be
 given the relief of redemption of the
 mortgage on the basis of which the
 mortgagee had brought the suit for
 possession of the mortgaged property.
 The learned Judges held that it was
 neither necessary nor desirable that the
 sons should be given an opportunity of
 redeeming the mortgage in suit at that
 stage of the litigation and that the
 opportunity should be left open to them
 to be availed of whenever they thought
 fit after the mortgagee had been put in
 possession by the decree of the Court.
 It must be admitted that there are
 certain observations in that case which
 are liable to be misunderstood as to
 their full effect and it appears to me
 that they have been misunderstood in
 the present case. It does not appear
 from the report of the decision that the
 learned Judges were asked to decide the
 question as to whether the mortgage on
 which the covenant for possession rested
 was void or not in its relation to the
 sons of the mortgagor and if that ques-
 tion was not argued I must hold that it
 was not decided also.

According to my judgment the ques-
 tion referred for decision to the Full
 Bench must be answered in the affirma-
 tive, that is, it is necessary to deter-
 mine in such a case whether the mort-
 gage is binding or not upon the sons.
 The answer which I propose to give is
 in my opinion wholly covered by the
 decision of their Lordships of the Judi-
 cial Committee in the case of *Lachman*
Prasad v. Sarnam Singh (3). In that
 case a suit for the relief of enforcement
 of a mortgage against the hypothecated
 property was instituted by the mort-
 gagee. Sons and a grandson of some of
 the mortgagors were impleaded as defen-

(2) *A. I. R. 1927 Oudh 177.*

(3) *A. I. R. 1917 P. C. 41=39 All. 500=44 I. A.*
163 (P. C.).

dants. These defendants pleaded that there was no legal necessity and that the debt was not binding upon their joint family. The Court of first instance dismissed the suit on the ground that there was no proof of an antecedent debt or of necessity and therefore the mortgage was not binding upon the joint family property. The decision was affirmed by the High Court. When the matter went before their Lordships of the Judicial Committee Viscount Haldane, in delivering the judgment of the Board, quoted the well known observation of Lord Watson in the case of *Madho Pershad v. Mehrban Singh* (3), and said:

"Now these are the principles which govern this and all other cases of the kind, and, according to these principles, there can be no doubt that the present mortgage is void."

The result was that the decree appealed from was affirmed. Now two observations fall to be made. If the plea of the absence of legal necessity or antecedent debt raised by the sons of the mortgagor in the present case is decided in their favour it must follow that the mortgage on which the relief is founded is void. If this is the effect of the determination of the plea arising by the sons of the mortgagor it is difficult to see how the Court can refuse to adjudicate it. The second observation, which I desire to make is that if the mortgage is void, as it may be no relief is available to the mortgagee on that mortgage. The relief for possession in this case is expressly based on a covenant contained in the deed of mortgage. That covenant may fall to be decided is void altogether and therefore no relief arising out of it could have been granted.

In the course of the arguments before us the learned advocate for the respondents tried to differentiate the decision of their Lordships of the Judicial Committee quote above on the ground that the case in which that decision was given was a case in which the relief for sale was prayed for. I am of opinion that that fact does not differentiate it in principle from the present case. In both cases the relief was founded on the terms of the deed of mortgage. What is material is that it arises out of the contract of mortgage and if that con-

tract is void no relief either of sale or possession can validly be granted.

Raza, J.—I would also answer the question in the way in which it has been answered by the learned Chief Judge. I have to say something to explain the decision in the case of *Bhawani Din v. Satrohan Singh* (1) as I was a party to that decision. It was never intended or meant to lay down in that case the broad proposition that where a mortgage was executed by a Hindu father and the mortgagee brings a suit for possession of the mortgaged property and the sons of the mortgagors are impleaded as defendants, they (that is, sons) cannot question the mortgage on the ground that it was neither justified by legal necessity nor supported by any antecedent debt. In that case the mortgagor was permitted to take many pleas which he should not have been allowed to take. He wanted that his sons and grandsons also should be made parties to the suit and he succeeded in his attempt. If his sons and grandsons had not been parties to the suit he himself would not have been able to raise the plea that the mortgage was invalid or void for want of legal necessity or an antecedent debt.

It was held by the late Court of the Judicial Commissioner of Oudh in the case of *Mt. Rajwanto v. Rameshar* (5), that a Hindu representing a joint Hindu family consisting of himself and his sons and grandsons can question the validity of the mortgage executed by him on the ground that there was absence of legal necessity for the debt or that there was no antecedent debt. This decision was however, dissented from, by a Bench of this Court in the case of *Sukh Lal v. Muhari Lal* (6). It was held in that case that the plea of legal necessity for a mortgage debt incurred on the security of a joint Hindu family property, or for the interest stipulated therein, is available only to such members of the joint family as were not parties to the mortgage deed and not to such members as were themselves executants of the same. It was therefore observed in the case of *Bhawani Din v. Satrohan Singh* (1) that Bhawanidin, the mortgagor, in that case, should not have been permitted to take the pleas which he

(4) [1890] 18 Cal. 157=17 I. A. 194=5 Sar. 586 (P.C.).

(5) A. I. R. 1925 Oudh 440=28 O. C. 393,
(6) A. I. R. 1926 Oudh 272=1 Luck. 160.

had been allowed to take. If he had not been permitted to take the pleas in question, his sons and grandsons would not have been made parties to the suit and then it would not have been necessary for the Court to go into the questions of antecedent debt and legal necessity. The main point which was argued before us in that appeal was that the mortgagor and his sons should be permitted to redeem the mortgage in the suit for possession of the mortgaged property. It was held under these circumstances that a mortgagor should not. If no suit for redemption has been brought, be given a decree for redemption in a suit where he has been sued for possession which he has wrongfully refused to give to the mortgagee under the terms of the mortgage. It is now well settled that a mortgage of the joint property of a Mitakshara family by its karta, unless legal necessity or antecedent debt is proved, is void and the transaction itself gives to the mortgagee no rights against the karta's interest in the joint family property. If the mortgage is void for the reason that no legal necessity or antecedent debt is proved, it cannot be enforced against the sons or grandsons of the mortgagor in respect of the joint family property. The suit may be a suit for possession of the mortgaged property or for sale of that property. The rule must be the same in both cases. This being the case there is no reason why the sons and grandsons of the mortgagor, who are made parties to a suit for sale or possession of the mortgaged property under the terms of the mortgage, should not be allowed to question the validity of the mortgage. If the mortgagee fails to prove legal necessity or antecedent debt, he cannot be allowed to enforce the mortgage in question and his claim must therefore be rejected. I am of opinion therefore that it is necessary to determine in the suit mentioned in the order of reference whether or not the mortgage is binding upon the sons.

Srivastava, J. — The principle is firmly established that a Hindu father possesses only qualified powers of alienation in respect of ancestral property. It is therefore well settled that if a mortgagee from a Hindu father in respect of the ancestral property seeks to enforce the mortgage against the sons,

he must establish either that the mortgage was justified by legal necessity or was supported by antecedent debt. The learned counsel for the respondents concedes that it is so in the case of a suit brought by a mortgagee for sale or foreclosure of a mortgage but he would distinguish a case in which the mortgagee seeks merely to obtain possession of the mortgaged property. I fail to see any particular point of distinction in the two cases. A suit for possession by the mortgagee is as much a suit for the enforcement of a mortgage as a suit brought by him for sale or foreclosure of the mortgaged property. I have, therefore, no doubt that both classes of suits must be governed by the same principles.

The matter may be looked at from another view point. These is a series of cases decided by the late Court of the Judicial Commissioner and by this Court in which it has been held that where a mortgage of a joint ancestral property is effected by a Hindu father not for legal necessity or for discharging an antecedent debt the mortgage is void from its inception. *Shambhoo v. Dhaneshar* (2), is one of such cases decided by a Bench of this Court. This view is fully supported by the decision of their Lordships of the Judicial Committee in the case of *Lachman Prasad v. Sarnam Singh* (3). The learned counsel for the respondents has conceded and he could not but do so, that if it is found that the mortgage in the present case was not justified by any legal necessity or was not supported by any antecedent debt it would not be binding upon the sons. I, therefore, fail to see how we can shut out inquiry into a matter so vital for the determination of the rights of the mortgagee as against the sons of the mortgagor whether the claim by him be one to obtain possession of the mortgaged property or to enforce the mortgage by a decree for sale or foreclosure. For these reasons I agree that the answer to the question referred to us for opinion should be given in the affirmative.

By the Court.—The question referred to the Full Bench is answered in the affirmative.

V.S./R.K. *Answered affirmatively.*

A. I. R. 1930 Oudh 287

SRIVASTAVA AND NANAVUTTY, JJ.

Lalji and another—Defendants —
Appellants.

v.

Ghasi Ram—Plaintiff—Respondent.

Second Appeal No. 276 of 1929, Decided on 18th February 1930, from decree of Dist. Judge, Hardoi, D/- 19th July 1929.

(a) Limitation Act, Art. 85 — "Mutual" transaction meaning explained.

To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. 34 *Mad.* 513, *Foll.*; *A. I. R.* 1923 *Bom.* 82, *Ref.* [P 288 C 1]

(b) Limitation Act, S. 20—Money paid on general account cannot be said to have been paid for interest.

If money is paid on a general account without a definite appropriation on the part of the debtor, no part of the money can be said to have been paid for interest "as such." *A. I. R.* 1929 *Oudh* 479, *Foll.* [P 288 C 2]

(c) Limitation Act, S. 19 — Acknowledgment must be made before expiration of period prescribed for suit.

One condition precedent to the application of S. 19 is that the acknowledgment should have been made before the expiration of the period prescribed for the suit. [P 288 C 1]

(d) Contract Act, S. 25 (3)—Promise must constitute novation of contract independently of original debt.

The promise referred to in this clause is a promise which constitutes a novation of the contract which can form the basis of a suit independently of the original debt. *A. I. R.* 1921 *Pat.* 29 and *A. I. R.* 1922 *Lah.* 425, *Ref.* [P 289 C 1]

K. P. Misra—for Appellants.*Radha Krishna* for *A. P. Sen*—for Respondent.

Judgment.—This is the defendants' appeal arising out of a suit for recovery of Rs. 1,590-11-0 for the price of cloth supplied by the plaintiff to the defendants together with interest thereon at 1 per cent. per mensem. The plaintiff is the proprietor of a firm of wholesale cloth dealers in Bilgram and the defendants own a retail cloth shop in village Newada, district Hardoi. The plaintiff's case was that dealings between the parties commenced on 5th December 1923 and that between this date and 4th October 1924 he supplied the defendants with cloth worth Rs. 4,989-9-8, that during this period and up to 26th June 1925 he had been paid Rs. 3,958-8-6 and that a balance of Rs. 1,031 was due to

them for the price of cloth besides interest. It was also alleged that interest at the rate of 1 per cent. per mensem had been agreed upon between the parties and that he was entitled to Rs. 559-10-3 on account of interest at this rate. The defendants made an absolute denial of the alleged dealing between the parties and also pleaded that the suit was barred by limitation.

Both the Courts below have found the alleged purchases by the defendants from the plaintiff fully established and that the amount claimed is due to the plaintiff from the defendants. However, the first Court dismissed the suit on the ground that it was barred by limitation under Art. 52, Sch. 1, Lim. Act. On appeal the learned District Judge while agreeing with the trial Court that the suit was governed by Art. 52, Lim. Act, has held that limitation was saved under S. 20, Lim. Act, by reason of certain payment towards interest, and by S. 19, Lim. Act, by reason of an acknowledgment contained in a letter, Ex. 4 dated 15th January 1928. He has also held that this letter Ex. 4, constitutes a new contract under S. 25, Cl. 3, Contract Act, and that the plaintiff is also entitled to a decree on the basis of this contract independent of the original liability.

The learned counsel for the defendants appellants has challenged the correctness of the decision of the lower appellate Court as regards the application of Ss. 20 and 19, Lim. Act, of S. 25, Cl. 3, Contract Act, to the facts of the case. The learned counsel for the plaintiff respondent while supporting the judgment of the lower appellate Court on the grounds mentioned above has also contended that this case is governed not by Art. 52, but by Art. 85, Sch. I, Lim. Act. Under the circumstances it would be convenient to discuss first the question as regards the article of the Limitation Act applicable to the case. Art. 85, Sch. 1, Lim. Act, provides for suits :

"for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties."

The question therefore is whether in this case there was any open, mutual and current account involving reciprocal demands between the parties. It is the common case of both parties that the dealings between them consisted of the

supply of cloth by the plaintiff on the one hand and the payment of cash for the price of the said cloth on the other. It is also admitted by the learned counsel for the plaintiff that as a matter of fact the amount of payments made by the defendants to the plaintiff did not at any time exceed the amount due to the plaintiff from the defendants. In other words the balance was always in favour of the plaintiff and never against him. It seems therefore to be clear that in this case it is impossible to say that there were any reciprocal demands between the parties. The element of mutuality which is necessary for the application of Art. 85 seems to be absolutely wanting in the present case in which there was only the supply of goods by one party and part-payment of the price of such goods from time to time by the other. As remarked by Ayling, J. quoting Holloway, in *Shiri Gowda v. Fernandes* (1) :

"To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

Reliance has been placed upon the observation of their Lordships of the Bombay High Court in *Satappa Jakappa v. Annappa Basappa* (2) to the effect that :

"It is sufficient if the dealings are such that the balance might have been in favour of either party, it is not essential that the balance should in fact have been in favour of the defendant at some stage."

It would be enough to say that the nature of the dealings in the present case were not such that the balance at any time could have been in favour of either party. The payments were always mere part-payments of the price of goods already supplied. In view of the nature of the dealings between the parties, it could never be expected that the payments made by the defendants would at any time exceed their liability to the plaintiff. We are therefore in agreement with the two Courts below that Art. 85 has no application to the case. The case clearly falls within the terms of Art. 52, Lim. Act, which provides for suits for the price of goods sold and delivered when no fixed period of credit is agreed upon.

(1) [1911] 34 Mad. 513. 21 M. L. J. 391 S. I. C. 141=(1911) 1 M. W. N. 1.

(2) A. I. R. 1923 Bom. 52=17 Bom. 128.

The next question is as regards the application of S. 20, Lim. Act. The learned District Judge is of opinion that the fact that there were general payments made by the defendants without any specification about the payment being made either towards principal or interest, is enough to bring the case within S. 20, Lim. Act. We find ourselves unable to agree with this opinion. In the first place it is to be pointed out that there is no evidence to prove any agreement between the parties to pay interest. The trial Court held the plaintiff entitled to interest only by way of damages. The learned counsel for the plaintiff has not been able to refer us to any evidence of the alleged agreement. Even the plaintiff when he went into the witness-box did not say one word about it. This being so there can be no question of payment of any interest as such. Further the learned District Judge seems to have overlooked the fact that the plaint itself shows beyond all doubt that all the payments made by the defendants were appropriated by the plaintiff towards the principal. There is no suggestion in the plaint that any payments were made or credited towards interest. Thus it seems to be quite clear that there could not be, and as a matter of fact there was never, any payment of interest as such and further that the payments were always appropriated towards principal. The question therefore whether a payment made towards the general account can be regarded as a payment of interest as such does not arise. But even if it did, the view adopted by the lower appellate Court is clearly contrary to the decision of a Bench of this Court in *Narain Das v. Chandrawati Kuar* (3) where it was held that if money is paid on a general account without a definite appropriation on the part of the debtor no part of the money can be said to have been paid for interest "as such."

Next as regards the application of S. 19, Lim. Act. We are of opinion that the decision of the lower appellate Court on this point also cannot be upheld. One condition precedent to the application of S. 19, Lim. Act is that the acknowledgement should have been made before the expiration of the period

(3) A. I. R. 1929 Oudh 479.

prescribed for the suit. In this case the period prescribed for the suit under Art. 52, Lim. Act, was three years from the date of the delivery of the goods. As stated before the last supply of goods was made on 4th October 1924. The period prescribed by this article therefore expired on 4th October 1927.

We have already held that the plaintiff could not claim any extension of time under S. 20, Lim. Act. Thus the alleged acknowledgment contained in Ex. 4 dated 15th January 1928 was clearly after the expiration of the period prescribed for the suit. It cannot therefore be of any avail to the plaintiff. In this view it is not necessary for us to consider the further question whether the letter, Ex. 4 constitutes a valid acknowledgment within the meaning of S. 19 or not.

Lastly the question remains whether the letter Ex. 4 can be regarded as an agreement under S. 25, Cl. 3, Contract Act. This clause refers to:

"a promise, made in writing, and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

The promise referred to in this clause is a promise which constitutes a novation of the contract which can form the basis of a suit independent of the original debt.

We are of opinion that the letter, Ex. 4 does not contain any such promise. The letter in question is very brief and elliptical and is to the following effect:

"Received your letter. Noted its contents. I will come to Bilgram on 17th or 18th January and will certainly see you and carry out your orders. I am making arrangements but the matter will entail a delay of about two weeks, more when we meet. I rely upon your favour, rest assured."

In *Ram Bahadur Singh v. Damodar Prasad Singh* (4) it was pointed out that while the English Law makes no distinction between an acknowledgment of promise which is sufficient to extend the time in the case of a debt which is not yet barred and an acknowledgment or promise which is sufficient to create a new contract where the debt has already become barred by lapse of time, in India a distinction has always been drawn between an acknowledgment

which is sufficient to extend the time under S. 19, Lim. Act. and a promise to pay a barred debt under S. 25, Cl. (3), Contract Act, and that a mere acknowledgment of the debt without a promise to pay is insufficient to create a new contract to pay, as required by S. 25, Contract Act. In *Nand Lal v. Pratab Singh* (5) also the difference between the English and Indian Law was pointed out and it was held that a mere acknowledgment of a debt would not constitute or imply a promise to pay. We are satisfied that the letter, Ex. 4, even though it might be deemed to constitute an acknowledgment under S. 19, Lim. Act, does not contain any such definite promise to pay as would constitute a new contract within the meaning of S. 25, Cl. 3, Contract Act.

The result therefore is that the period of limitation prescribed by Art. 52 expired on 4th October 1927. This period was not extended by any payments under S. 20 or by any acknowledgment under S. 19, Lim. Act and there has been no novation of the contract. The present suit which was instituted on 23rd January 1928 must therefore be held to be barred by limitation. We therefore allow the appeal, set aside the decision of the lower appellate Court and dismiss the plaintiff's suit with costs in all the Courts.

V.B./R.K.

Appeal allowed.

(5) A. I. R. 1922 Lah. 425=3 Lah. 326.

A. I. R. 1930 Oudh 289

NANAVUTTY, J.

Burmha—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 16 of 1930, Decided on 20th March 1930, from an order of Sess. Judge, Fyzabad, D/- 16th January 1930.

Penal Code, S. 366—Person taking away girl below 16 from lawful guardianship commits offence under S. 366.

A person who finding the girl below 16 years of age takes her away from guardianship to make use of her for his own purposes, is guilty of the offence and the offence is completed the moment he takes away the girl: A. I. R. 1921 Oudh 226; 27 Cal. 1041; 38 All. 664; A. I. R. 1926 Pat. 493; A. I. R. 1924 Oudh 335, Dist. [P 290 C 2]

Moti Lal Saksena—for Applicant.
H. K. Ghose—for the Crown.

(4) A. I. R. 1921 Pat. 29=6 Pat. L. J. 121.

Judgment.—This is an application for revision of an appellate order of the learned Sessions Judge of Fyzabad upholding the conviction and sentence passed upon the applicant Burmha of an offence under S. 366, I. P. C. The story of the prosecution out of which this application for revision has arisen are briefly as follows:

One Mt. Nanka, a minor girl of about 12 or 13 years of age is said to have been taken away from her mother's lawful guardianship by Mt. Maharani, on the pretext that she wanted her to grind corn and then made her over to two other persons. The story of the minor girl Mt. Nanka is that she was living in Durjankapurwa with her mother Mt. Lachhna and had been married to one Bhagoti Ahir of village Mau. She stated that 4 or 5 days before her arrest at Dharyanwan she was sleeping in the "usara" of her house when at about three gharis before sunrise the accused Mt. Maharani came to her and asked her to go with her to grind corn in her house. Mt. Nanka left her home with Mt. Maharani and did spend some time in grinding corn at the house of Mt. Maharani. Mt. Maharani then got her to the outskirts of the village and made her over to her own son Chedi and the applicant Burhma; these two persons took her to Baidkapurwa and there kept her at the house of one Shambhu. After she had been kept there for some days, four or five persons came with the applicant Burhma and they were taking her to another place when after going a short distance, one Bhagwan intervened and there was a lathi fight between Burhma and Bhagwan in which the latter was knocked down and Burhma then ran away. At this juncture a constable and a chaukidar arrived on the spot and Mt. Nanka and Badri were arrested and taken to the thana. Mt. Maharani, Chhedi, Mt. Ram Kali, Mt. Bhagana, Shambhu and Sudama were all acquitted, and it follows logically from this that it is not established who took Mt. Nanka away from her mother's lawful guardianship and how she came to be in the unlawful possession of the applicant Burhma.

On behalf of the applicant it is strenuously argued that the offence of kidnapping is not a continuous offence,

and, in support of this contention, reliance is placed upon a ruling of Lindsay, J. reported in *Emperor v. Gokaran* (1) in which it was held that it was a well-established point of law that kidnapping was not a continuing offence. The same view was taken by a Full Bench of the Calcutta High Court in the case of *Nemai Chatteraj v. Queen-Empress* (2) in which it was held by a majority of the Full Bench that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta and that the petitioner therefore could not be convicted under S. 363, I. P. C., and it was further held that the offence of kidnapping was complete when the minor was actually taken away from her legal guardian. The same view was taken by Sunder Lal, J., in *Emperor v. Abdul Rahman* (3) in which it was held that the offence of kidnapping was completed the moment a girl under 16 years of age was taken out of the custody of her lawful guardian and was not an offence continuing so long as the minor was kept out of such guardianship.

Similarly, the Patna High Court in the case of *Nanak Sao v. Emperor* (4) held that the offence of kidnapping was not a continuing offence but was complete the moment the minor was removed from the keeping of the lawful guardian. The question, however, in the present case is when was the act of kidnapping completed. Upon the findings of the trial Court, which are accepted as correct by the lower appellate Court, Mt. Nanka is not proved to have been kidnapped by Mt. Maharani. She was, however, found in the unlawful possession of the applicant Burmha, at a time when she was not under the lawful guardianship of her mother. In the case of *Idu v. Emperor* (5) it was held by the late Court of the Judicial Commissioner of Oudh that it was not necessary for a conviction under S. 366, I. P. C. that the accused should know definitely who the guardian of the minor

(1) A. I. R. 1921 Oudh 226=24 O. C. 329.

(2) [1900] 27 Cal. 1041=4 O. W. N. 645 (F. B.).

(3) [1916] 38 All. 664=36 I. C. 466=14 A. L. J. 765.

(4) A. I. R. 1926 Pat. 493=5 Pat. 536.

(5) A. I. R. 1924 Oudh 335=27 O. C. 32.

girl was, whom he found wandering about and made use of for his own purposes.

Upon the findings of fact arrived at by the lower Courts, it is clear that the applicant Burmha found this minor girl at the house of Mt. Maharani away from the lawful guardianship of her mother and was taking her in the company of Badri and others to another place when he had a fight with Bhagwan and the police arrived on the spot and arrested Badri and the minor girl. The applicant when he joined Badri and others in taking the girl away from Mt. Maharani's house must have known that this minor girl had a lawful guardian from whose custody he was taking her away. The question of the offence of kidnapping being a continuous offence does not arise in the present case, because the finding of the trial Court is that Mt. Maharani is not proved to have kidnapped Mt. Nanka. That being the case no offence of kidnapping in respect of Mt. Nanka is proved to have taken place before the applicant Burmha came on the scene and he, in taking away this girl in order to sell her to Bishun Dayal and in pocketing half the proceeds of the sale-price, was clearly guilty of an offence under S. 366, I. P. C. The fact that Bishun Dayal, the would-be husband and purchaser of Mt. Nanka was a Brahman whilst Mt. Nanka was an Ahiran does not affect the question of the guilt of the applicant. The sentence in my opinion, if anything, errs very much on the side of leniency.

For the reasons given above, I uphold the conviction and sentence passed upon the applicant and dismiss this application for revision.

V.B./R.K.

Conviction upheld.

A. I. R. 1930 Oudh 291

PULLAN AND SRIVASTAVA, JJ.

Jagdeo Prasad—Plaintiff—Appellant.

v.

Mst. Lakhraji and others—Defendants—Respondents.

Second Appeal No. 339 of 1929, Decided on 25th February 1930, from decree of Dist. Judge, Gonda, D/- 28th October 1929.

(a) Will—Construction—No words indicative of giving absolute ownership—Mere gift of possession specially where donee is

Hindu woman does not imply intention to give absolute estate.

Where on context of a will there are no words indicating absolute ownership, the mere gift of possession in itself, especially where the donee is a Hindu woman, cannot be said to imply an intention on the part of the testator to give an absolute estate. [P292 C 1]

(b) Will—Construction—Will laying down certain shares to donees—Absence of provision as to remainder—Unless heirs are excluded by terms of will, absence of provision as to remainder is indicative of giving absolute estate to heirs.

Where a will lays down certain shares in which the donees are to obtain possession of the property of the testator, if no provision is made as to the remainder, the general law is that the estate will go to the heirs, unless there is anything in the terms of the will which indicates that the testator had an intention to exclude these heirs by giving an absolute estate to the donees. [P 292 C2]

R. P. Srivastava and S. C. Banerji—for Appellant.

Wasim—for Respondents 1 and 2.

Judgment.—This is an appeal from the decree of the learned District Judge of Gonda who upheld the decision of the learned Subordinate Judge of Gonda dismissing a suit brought by the nearest reversioner of one Gokul Pandey deceased for a declaration in respect of certain property, which is now in the possession of Mst. Lakhraji and Dharam Kuar the widow and granddaughter respectively of the testator. The suit has been ultimately dismissed on two grounds. The first ground is that the suit is premature in the lifetime of Mt. Lakhraji; but this contention has now been given up by the learned counsel for the respondents and we have only to consider the second ground on which the lower appellate Court dismissed the suit and that is his finding that a will executed by Gokul Pandey in the year 1898 conferred an absolute estate on certain females, namely, his two widows Mt. Manjhari and Lakhraj and his daughter-in-law Narayan Dei. The will is a brief one and executed in a very simple language. There are only three passages in the will on which reliance is placed by the learned counsel for the respondents to prove the grant of an absolute estate. The first is the preliminary statement that the testator intends to reserve his ownership in the property during his life, the second is the clause granting to the three ladies possession and the third is a clause dealing with their power of alienation.

As to Cl. 1 it is one generally found in wills and does no more than distinguish a deed of will from a deed of gift by reserving to the testator his interest in the property during his lifetime. It has no effect in transferring the rights of the testator to the donee. Cl. 2 contains no words which indicate absolute ownership and the mere gift of possession in itself, especially where the donee is a Hindu woman, cannot be said to imply an intention on the part of the testator to give absolute estate. Cl. 3 dealing with alienation is in our opinion rather a restriction on alienation than otherwise. It merely lays down that the widows shall have no power to alienate the property unless they have taken the consent of three persons. Two of these persons were admittedly the nearest reversioners to the estate at the time when the will was executed and the other was a stranger. A Hindu widow holding a life-state can alienate the estate with the consent of the nearest reversioners and this clause inserted in a will does not extend the right of the widow, but it rather lays down certain conditions under which she could exercise a right already given her by the Hindu Law. The contention of the learned counsel for the respondents is that reading together the clause giving possession and the clause giving a power of alienation we should hold that an absolute estate was conferred, and he refers us to a passage in Lord Halsbury's Laws of England, Vol. 28, para. 1410 where it is laid down that;

"where on the context of the will the donee is given an unrestricted right of enjoyment in specie during his life, together with a right of disposition on his death, or generally, he takes an absolute interest."

In our opinion this dictum has no application to the present case where no right of disposition was given to the donees on their death or generally. The right given to them, such as it was, was a restricted right of alienation which is possessed in a less restrained form by Hindu women who obtain a life-estate under the Hindu Law. Thus we are not prepared to find that the terms of the will create an absolute estate. The learned counsel for the respondents has suggested that the mere fact of making a will indicates an intention on the

part of the testator to give more to these ladies than they would have obtained under the Hindu Law. But the terms of this will lay down certain shares in which the ladies were to obtain possession and furthermore included a daughter-in-law who under the Hindu Law would have had no right. Thus it cannot be said that there was no object in making a will; on the contrary the will served a very definite purpose in securing a half share to one widow and a division of the other half share between the remaining widow and the daughter-in-law. Nor can we agree with the learned counsel in his contention that the absence of a provision as to the remainder is indicative of an intention to give an absolute estate. When no provision is made as to the remainder the general law is that the estate will go to the heirs, and there is nothing in the terms of this will which indicate that the testator had any intention to exclude those heirs by giving an absolute estate to the donees.

As we find that the Courts below were wrong in holding that the will of Gokul Pandey conferred an absolute estate on the ladies and as the counsel does not now support the view that the suit is premature there can be no question that the plaintiff as the nearest reversioner is entitled to the second relief which he seeks, namely, that a declaratory decree be passed in his favour to the effect that the defendant 1 has only a life-interest in the property of Gokul Pandey and that possession of defendant 2, over the assets of Gokul Pandey after the death of defendant 1, is null and void as against the reversioners. We allow this appeal, set aside the decree of the Court below and order that a decree be prepared in favour of the plaintiff for the second relief prayed by him. The plaintiff will have his costs throughout.

V.B./R.K.

Order accordingly.

A. I. R. 1930 Oudh 292

WAZIR HASAN AND SRIVASTAVA, JJ.

Prag Din—Plaintiff—Appellant.

v.

Nankau Singh and another—Defendants—Respondents.

Second Appeal No. 281 of 1929, Decided on 3rd January 1930.

Transfer of Property Act, S. 68 — Land mortgaged acquired under Land Acquisition Act and compensation deposited — Deposit becomes security in new form.

Where a portion of the mortgaged property is acquired under Land Acquisition Act and the compensation money deposited in treasury, the rights of the parties to the land and to any mortgage on or interest in it are transferred to the compensation money. The money so paid becomes impressed with the same liability as the land for which it is compensation and becomes a security in new form: 6 *Mad.* 344; *Foll.*; *In re, Stewart's Trust*, 22 *L. J. N.S.* 369; 1 *I. A.* 106; 33 *Mad.* 429; 13 *C. W. N.* 350; 5 *P. L. J.* 650; 42 *All.* 596; 4 *O. L. J.* 386 *Ref.*; 20 *O. C.* 256; 22 *O. C.* 342, *Dist.* [P 293 C 2]

Ali Zaheer and D. K. Seth — for Appellant.

Gaya Prasad Srivastava — for Respondents.

Srivastava, J.—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Lucknow, dated 19th July 1929, affirming the decree of the Munsiff of the same place dated 11th February 1929.

The facts are as follows :

The defendants, Nankau Singh and Lal Behari Singh, and their brothers Sheodhir Singh and Sadho Singh, now deceased, executed a deed of possessory mortgage dated 30th May 1913 in favour of one Mahabir Prasad in respect of 16 bighas 19 biswas 10 biswansis land and a grove measuring 1 bigha 15 biswansis situate in village Karora, pargana Mohanlalganj, in the district of Lucknow for a sum of Rs 3,250. The term of the mortgage was to be 30 years certain, Mahabir Prasad entered into the possession of the mortgaged property and on 16th February, 1922 transferred his mortgagee rights to the plaintiff for a consideration of 4,105. In consequence of this transfer the plaintiff entered into the possession of the mortgaged lands. While the plaintiff was in possession the Government under the provisions of the Land Acquisition Act, 1894, acquired 1.604 acres for public purposes out of the mortgaged area of the lands and paid a sum of Rs. 629-12-0 as compensation. This sum of money is held by the District judge of Lucknow. In the suit out of which this appeal arises the plaintiff asks for a declaration that he is entitled to the compensation money and not the mortgagors.

The defendants resisted the plaintiff's claim. The Courts below have dismissed the suit on the ground that the

plaintiff's sole remedy lies in a relief contemplated by the last portion of S. 68, T. P. Act, 1882. The argument in second appeal is two-fold : (1). That the said provisions of S. 68 are not exhaustive and (2) that these provisions are inapplicable to the facts of the present case.

The relevant portion of S. 68, T. P. Act, 1882, is as follows:

"Where by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed or the security is rendered insufficient as defined in S. 66 the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails so to do, may sue him for the mortgage money."

On a plain interpretation of the above it is clear to us that a mortgagee has a right to call upon the mortgagor to give another sufficient security but he is not bound to do so. The present case is a case of substituted security. Part of the subject of the security has now assumed a new form and on general principles the mortgagee is entitled to take possession of the new form of the security. This principle was applied by their Lordships of the Judicial Committee in *Bijnath Lall v. Ramodeen Chowdry* (1), where the mortgagee had lost the undivided share of his mortgagor by reason of a partition and was held entitled to take the lands allotted to his mortgagor in the partition:

"He would take the subject of the pledge in the new form which it assumed."

The case is wholly covered by the decision in *Venkata Viraragavayangar v. Krishna Sami Ayyangar* (2). In that case, as in the present case, a portion of the mortgaged property was acquired under the Land Acquisition Act and a sum of Rs. 460 was deposited in the treasury as compensation thereof. The learned Judges said:

"The rights of parties to the land and to any mortgage on or interest in it are transferred to the compensation money. The money paid into the treasury is to be considered as money or moveable property in the treasury impressed with the trusts and obligations of the immovable property which it represents."

They quoted the observations of Stuart, V. C. *In re, Stewarts Trusts* (3)

(1) [1875] 1 *I. A.* 106=21 *W. R.* 233=2 *Suther* 942=3 *Sar.* 333 (*P. C.*),

(2) [1889] 6 *Mad.* 344.

(3) [1853] 22 *L. J. N. S.* 369=1 *Sm. & G.* 1=1 *W. R.* 17=16 *Jur.* 1063.

"that where money has been paid into Court by reason of real estate having been taken under the compulsory powers and remains in Court, it is to be held as money or personal estate in the hands of the Court impressed with the trusts of real estate. The money in Court is to be considered for the purpose of the question as to who was entitled to it, real estate."

In re, Stewart's Trust is referred to in *White & Tudor's Leading Cases*, Vol. I, p. 326, Edn. 9 as an authority for the view that:

"Where money is paid into Court, the produce of real estate converted by compulsory powers under Acts of Parliament It in general remains in Court subject to the rights of the parties interested in it to have it re-invested in land and is to be considered as money or personal estate in Court, subject to a trust to be invested in land, and therefore impressed with the quality of the real estate until some act is done by the owner showing his election to take it as personalty."

We are of opinion that the money paid by the Government in the present case as compensation for a part of the mortgage estate is impressed with the same liability as the land for which it is the compensation and is thus a security in the new form.

Para. 1636 in *Fisher's Law of Mortgage*, Edn. 6 is as follows:

"The right of the owner of property generally, and therefore of one who has a pledge or other security thereon is not destroyed by the mere transmutation of its subject matter into a different form without his assent. In support of the principle reference may be made to a case where the property of a principal has been converted by his agent into money and in such cases it is wholly immaterial whether the property be in its original estate or has been converted into money or securities or negotiable instruments, or other property, so only that it is distinguishable and separable from the other property and assets of the agent and has an earmark or other appropriate identity." *Story's Commentaries on the Law of Agency*, Edn. 9, S. 231.

It need hardly be added that this is so because the position of the agent is that of a trustee. The view which we are taking is supported by a series of cases decided by the High Courts in India. *Venkatrama Iyer v. Esuma Rowther* (4), *Jotoni Chowdhurani v. Amar Koishna Saha* (5), *Ashutosh Rai v. Babu Lal* (6), and *Bhup Singh v. Chheda Singh* (7).

The Courts below seem to rely on *Sajjadi Begam v. Mt. Janki Bibi* (8) and

(4) [1910] 33 Mad. 429=5 I. C. 92=20 M. L. J. 330.

(5) [1903] 13 C. W. N. 350=1 I. C. 164.

(6) [1920] 5 Pat. L. J. 650=59 I. C. 513.

(7) [1920] 42 All. 596=58 I. C. 171=18 A. L. J. 807.

(8) [1917] 20 O. C. 256=42 I. C. 193.

Ladli Prasad v. Nizamuddin Khan (9).

The first mentioned case does *prima facie* run into conflict with our view in the present case but the precise point decided in that case was one of limitation and the important distinction lies in the fact that in that case the whole of the mortgaged property had been acquired. It appears to us that the case was not well argued before the learned Judge and the principle of substitution of security where it had changed its form was not considered. In the latter case the mortgagor sought to recover the compensation money from the hands of the mortgagee in a suit for redemption of the mortgage but the substance of the claim was the recovery of the compensation money. The learned Judge held that the suit was barred by Art. 120, Lim. Act, and that it was not a case of redemption of a mortgage. In *Abdul Wahab v. Basant Lal* (10), the same learned Judge held that the remedy after partition of a transferee of an undivided estate is:

"to follow the transmuted security although in cash in the hands of his transferrer."

We agree with this view of the law and are giving effect to it in the present case. Apparently the decision in *Abdul Wahab v. Basant Lal* (10) was not brought to the notice of the learned Judge in the subsequent two cases quoted above.

We accordingly allow this appeal, set aside the decrees of the Courts below and grant the declaration prayed for to the plaintiff with costs in all Courts.

V.B./R.K.

Appeal allowed.

(9) [1919] 22 O. C. 342=54 I. C. 535.

(10) [1919] 4 O. L. J. 386=41 I. C. 413.

* A. I. R. 1930 Oudh 294

SRIVASTAVA AND RAZA, JJ.

Chhote Singh and another—Appellants.
v.

Surat Singh and others—Respondents

Second Appeal No. 247 of 1929, Decided on 23rd December 1929, against decree of Dist. Judge, Hardoi, D/- 1st May 1929.

* Transfer of Property Act, S. 91—Reversioner has no right of redemption during lifetime of Hindu widow apart from any case of waste or necessity for preservation of property.

Apart from any case of waste or necessity for preservation of the property a reversioner in the lifetime of a Hindu widow is not a per-

son having any interest in the mortgaged property or in the right to redeem it within the meaning of Cls. (a) and (b), S. 91: *A. I. R.* 1921 *Mad.* 272 ; 36 *Mad.* 426; 30 *All.* 497; 6 *O. L. J.* 248; 4 *O. & A. Law Reporter*, 493 ; *A. I. R.* 1917 *P. C.* 95, *Ref.* 8 *O. C.* 349 ; 2 *O. L. J.* 338; *A. I. R.* 1925 *Oudh* 30, *Dist.* (*English Cases discussed*). [P 298 C 2]

Radha Krishna and Raj Bahadur—for Appellants.

M. Wasim, R. B. Mohan Lal and S. C. Dass—for Respondents.

Judgment.—This is a second appeal against the judgment and decree dated 1st May 1929 passed by the District Judge of Hardoi reversing the decision dated 30th April 1928 passed by the Additional Subordinate Judge of the same place. It arises out of a suit for redemption of a mortgage dated 7th December 1882 executed by Laltu Singh, husband of Mt. Ganeshi, who was originally impleaded as defendant 1 in the suit. The mortgage was for Rs. 4,000 in favour of Girindra Singh grandfather of Chhotey Singh defendant 2. The remaining defendants in the suit were impleaded as subsequent transferee and as persons holding rights of grove-holders from defendant 2. The plaintiff, Surat Singh, claimed the right to redeem the mortgage on the ground that he was the 'presumptive reversioner of Laltu Singh on the death of Mt. Ganeshi. Chhotey Singh and Mt. Ganeshi contested the suit. Chhotey Singh raised various pleas in defence, but the only plea with which we are now concerned is the legal one as regards the plaintiff's right as reversioner to redeem the mortgage in the lifetime of the widow. Mt. Ganeshi denied the plaintiff's title as a reversioner.

The learned trial Judge found that in the lifetime of a Hindu widow the reversioner cannot be considered to have any interest in the property within the meaning of S. 91, T. P. Act, which could entitle him to institute a suit for redemption. He dismissed the suit accordingly. On appeal the learned District Judge has disagreed with the opinion of the trial Judge and held that the plaintiff Surat Singh is entitled to redeem the property.

Before we enter into a discussion of the question of law arising for determination in this appeal, it is necessary to mention that on 25th April 1928 the plaintiff made a statement in the trial

Court discharging Mt. Ganeshi defendant 1 from the array of parties in the case but this fact appears to have been overlooked when the plaintiff filed his appeal in the Court of the District Judge, as she was impleaded as a respondent in the appeal. The attention of the learned District Judge also does not seem to have been drawn to the fact that Mt. Ganeshi had ceased to be a party to the suit in the trial Court because we find that he has decreed the plaintiff's suit not only against Chhotey Singh, but also against Mt. Ganeshi.

It is under these circumstances that the present appeal has been filed both by Chhotey Singh and Mt. Ganeshi. The main contention urged in support of the appeal is that the plaintiff as a reversioner has, in the lifetime of Mt. Ganeshi, the widow of Laltu Singh, no present interest such as could entitle him to maintain a suit for redemption. S. 91, T. P. Act, provides that besides the mortgagor any of the following persons may redeem or institute a suit for redemption of the mortgaged property :

(a) any person (other than the mortgagee of the interest sought to be redeemed), having any interest in or charge upon the property ;

(b) any person having any interest in or charge upon the right to redeem the property

The plaintiff's position is that as a reversioner he is a person having an interest in the property as well as an interest in the right to redeem the property within the meaning of Cls. (a) and (b), S. 91 quoted above. In *Davis v. Angel* (1) the Lord Chancellor Lord Westbury made the following observations :

But though the distinction is a fine one yet it perfectly exists and is easily apprehended : I mean the distinction between an interest that has arisen and is represented and an interest that has not arisen and that never may arise, but with regard to which there is a remote possibility that the event which has not occurred and upon which it is made to hang may hereafter occur. The latter is not an interest—it is not a right ; it is nothing more than a bare expectation of a future right. The expectation of a future interest or rather of a future event that may give an interest is not a thing which would justify a Court of equity in entertaining a suit at the instance of a party having that and nothing more."

These remarks seem to us quite apposite to describe the status of the plaintiff in the present case. In *re Parsons Stokle v. Parsons* (2), Kay, J., remarked that :

(1) 45 E. R. 1297.

(2) [1890] 45 Ch. D. 51.

"It is indisputable law that no one can have any estate or interest at law or in equity contingent or other in the property of a living person to which he hopes to succeed as heir-at-law or next-of-kin of such living person. During the life of such person no one can have more than a spes successionis an expectation or hope of succeeding to his property."

In *In re, Green, Green v. Meinall* (3) Warrington, J., dealing with the spes successionis which the brother of a person has during his lifetime to a share in his property observed as follows :

"Is it possible to say that this spes successionis is a "right, title, estate or interest in expectancy in, to or in respect of property." In my opinion it is not."

In *Amrit Narayan Singh v. Gaya Singh* (4) their Lordships of the Judicial Committee referring to the case of a Hindu reversioner observed that :

"A Hindu reversioner has no right or interest in praesenti in the property which the female owner holds for her life. Until it vests in him on her death should he survive her he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere spes successionis."

Thus we have little doubt that the interest referred to in Cls. (a) and (b) S. 91, T. P. Act, which can entitle a person to redeem or institute a suit for redemption must be a present interest in the mortgaged property or in the equity of redemption. It would hardly be in consonance with sound principles of jurisprudence to construe the terms of these clauses so as to give a right of suit to a person who has no interest whatever at present and has at best in the words of Lord Westbury in *Davis v. Angel* (1) cited above nothing more than :

"an expectation of the possibility of a future event which if it occurs may give birth to an interest."

It is also clear that the position of a reversioner like the plaintiff during the lifetime of a Hindu widow is nothing more than that of the person with a mere spes successionis. It would therefore follow that a person in the position of the plaintiff cannot have any right to redeem or institute a suit for redemption while the widow is alive. We are strengthened in this conclusion by the consideration of the many an-

amolies, complications and difficulties which would arise in case such a right of redemption is conceded to a reversioner in the widow's lifetime. O. 34, R. 1, Civil P. C., provides that :

"all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage".

If the reversioner is recognized as a person having an interest within the meaning of Cls. (a) and (b), S. 91, T. P. Act, he must also be considered to be a person having an interest in the mortgage security or in the right of redemption within the meaning of O. 34, R. 1, Civil P. C. The result of this would be that in all suits for foreclosure, sale and redemption it will be obligatory on the plaintiff to implead the reversioner. To carry the matter to its logical conclusion it should be necessary to implead not only presumptive reversioner, but the whole body of reversioners. If the presumptive reversioner has such an interest as is referred to in O. 34, R. 1, Civil P. C., it can hardly be said that a more remote reversioner is not possessed of a similar interest. It is rarely a matter of the degrees of possibility between one reversioner and another. It is obvious that it will be laying a heavy burden upon plaintiffs in such cases to make a search for the reversioners and to implead them. Again the question would arise whether if the reversioner is allowed to maintain such a suit for redemption the suit should be considered to have been instituted by him in his representative capacity or otherwise? When we questioned Mr. Wasim, the learned counsel for the plaintiff-respondent on this point he realizing the difficulties of the position said that he would not claim a suit like the present one to be a representative suit. If this is so then there can be no end of such suits, because each reversioner may claim to exercise his right to institute a suit for redemption. O. 34, R. 7, provides that the decree for redemption shall direct the plaintiff to pay the mortgage money :

"on a day to be fixed by the Court, and that if such payment is not made on or before the day to be fixed by the Court the plaintiff shall "unless the mortgage is simple or usufructuary be debarred from all right to redeem or (unless the mortgage is by conditional sale) if the mortgaged property is sold."

(3) [1911] 2 Ch. D. 275=80 L. J. Ch. 623=27 T. L. R. 490=55 S. J. 552=105 L. T. 360.

(4) A. I. R. 1917 P. C. 95=45 Cal. 590=45 I. A. 385 (P.C.).

Suppose the mortgaged property is sold, what would be the position then of the widow or of the actual reversioner, if he happens to be a person different from the plaintiff in case they want to redeem the property? Again what would be the position as regards the right of the actual reversioner to challenge the mortgage on the ground of its being without any legal necessity in case he happens to be a person different from the reversioner who has redeemed the mortgage? Further it is conceivable that difficulties and complications might arise as regards the position of a reversioner who makes the redemption in relation to the mortgaged property and as regards the limitation governing a suit brought by the widow or by the actual reversioner to recover the property from him or his representatives.

Mr. Wasim on behalf of the plaintiff laid emphasis on the fact that if the reversioner is not allowed to redeem there may be cases in which the mortgage money might swell into a huge amount which might make the redemption impossible or cases in which the widow might allow the right of redemption to become barred by time. He has also argued that as it is well settled that the reversioner has a right to demand that the estate should be kept free from waste and free from danger during its enjoyment by the widow so there is no reason why he should not similarly be allowed to redeem the property at least for the protection of the estate. It is not necessary for us in the present case to decide whether a reversioner should or should not be allowed to redeem the property, where he succeeds in making out a case on the ground of the redemption being necessary for the preservation or protection of the property. It is sufficient to say that the learned counsel for the plaintiff Surat Singh has not urged any arguments before us on this ground.

Reliance has also been placed by Mr. Wasim on some decisions of the late Judicial Commissioner's Court. The first case relied upon is *Sheoratan Singh v. Hubba Singh* (5). In this case Mr. Spankie, A. J. C., formulated the question arising for determination in the case in the following terms :

(5) Select Case No. 271.

"The question I have to decide seems therefore to be whether the plaintiffs, as presumptively entitled to the possession of the lands on the death of the widow, if they survive her, have only a spes successionis or have an interest in the lands and in the right to redeem them."

He answered this question by holding that the expectancy of succession which the person has who is presumptively entitled to possession on the death of a Hindu widow, if he survive her, seems to be a possibility coupled with an interest. He based his conclusion upon the grounds that such a reversioner has a right to sue to preserve the property and to obtain a declaration in respect of alienations made by the widow without legal necessity. With all respect we find ourselves unable to accept the decision as correct. The fact, that a reversioner is interested in the preservation of the property and has therefore been allowed to institute such suits, does not mean that he has any present interest in the property which could entitle him to maintain a suit for redemption. Further in the face of the very definite and clear pronouncement of their Lordships of the Judicial Committee in *Amrit Narayan Singh v. Gaya Singh* (4) to which we have made reference above it can hardly be possible to say now that the position of a Hindu reversioner is in any way better than that of a mere possibility.

The next case relied upon is *Gumani Singh v. Chakkar Singh* (6) in which a Bench of the Judicial Commissioner's Court approved and followed the decision of Mr. Spankie in select case No. 271. In this case it was remarked that S. 91, T. P. Act, allows the right of redemption to :

"persons as remotely, if not more remotely, interested in the property than a reversioner, have a right to redeem."

With due respect to the learned Judges we would point out that all persons who have been allowed the right of redemption in this section are persons having a present interest in the property. *Jangi Ram v. Sheoraj Singh* (7) was also referred to. In this case another Bench of the same Court made a remark with reference to the decision in *Gumani Singh v. Chakkar Singh* (6) that the reversioner's rights to redeem cannot be denied. It might be pointed out that

(6) [1905] 8 O. C. 349.

(7) [1915] 2 O. L. J. 338=30 I. C. 234.

the remark is a mere obiter dictum and in any case it does not carry us beyond the decision in *Gumani Singh v. Chakkar Singh* (6) on which the remark is founded.

The last case relied upon is *Basawan v. Natta* (8) decided by a single Judge of the late Judicial Commissioner's Court. In this case also the decision in 8 O. C., 349 was followed. It was also argued that we ought to follow the view taken in these cases on the principle of stare decisis. As regards this, it would be sufficient to say that the decisions of the late Judicial Commissioner's Court are not binding upon us. Further in a matter like the one involved in this case there can be no apprehension of our unsettling any settled rights. At best it would prevent persons in the position of plaintiff from instituting such suits hereafter. Moreover we think that the course of decisions even in the late Judicial Commissioner's Court was not altogether uniform. In *Mt. Jot Kuar v. Lakha Singh* (9) Pt. Kanhaiya Lal (afterwards Kanhaiya Lal, J.), did not go to the length of the view taken in *Sheoratan Singh v. Hubba Singh* (5) and *Ghuman Singh v. Chakkar Singh* (6) but adopted, if we may say so, a middle position in holding that the reversioners could be allowed to redeem the mortgage, where it was necessary for the protection of the property. In *Basant Singh v. Rampal Singh* (10) a Bench consisting of Daniels and Lyle, JJ., overruled the decision in S O. C., 349 and held that the reversioner has no more than a spes successionis and has not therefore any present interest in the property within the meaning of S. 91, T. P. Act, so as to enable him to redeem a mortgage in respect of the property.

The view which we have taken above is supported by the decision in *Ram Chandra v. Kallu* (11) in which a Bench of the Allahabad High Court consisting of Stanley, C. J., and Banerji, J., held that the reversionary heirs of the deceased husband of a Hindu widow in possession as such of her husband's property are not persons who, within the meaning of S. 91, T. P. Act

1882, have such an interest in the mortgaged property, as would entitle them during the lifetime of the widow to redeem a mortgage made by the husband. We are in entire agreement if we may say so with respect, with the reasons given by the learned Judges in support of their decision. In *Narayan Kutti Goundan v. Pechiammal* (12) Sundara Ayyar, J., held that a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose, but he was of opinion that where a suit is instituted by a mortgagee for sale such a reversioner would be entitled to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow. In *Sesha Naidu v. R. Periasami Odayar* (13) Ramesam, J., held that the reversioner cannot sue to redeem during the lifetime of the widow, but was inclined to the opinion that where the appropriate allegations are made and the facts are proved to the effect that the intervening female's conduct is such as to raise the apprehension that the property will never be redeemed or altogether lost to a transferee, the reversioner should be allowed to maintain an action for the preservation of the property, on the same principle that actions to retain waste are allowed.

It might be necessary for us in some cases hereafter to decide as regards the right of a reversioner to maintain a suit for redemption on the ground of its being necessary for preservation of the estate, or as regards his right to discharge the mortgage when a suit is instituted by the mortgagee for sale or foreclosure but as we have stated before, these questions do not arise in this case and it is not therefore necessary for us to express any opinion about them. All that we decide is that apart from any case of waste or necessity for preservation of the property, a reversioner in the lifetime of a Hindu widow like the plaintiff in the present case is not a person having any interest in the mortgaged property or in the right to redeem it within the meaning of Cls. (a) and (b), S. 91, T. P. Act. The result therefore

(8) A. I. R. 1925 Oudh 30.

(9) 4 Oudh & Agra Law Reporter 493.

(10) [1919] 6 O. L. J. 248=51 I. C. 985.

(11) [1908] 30 All. 497=5 A. L. J. 681=(1908) A. W. N. 225.

(12) [1913] 36 Mad. 426=22 M. L. J. 364=15 I. C. 206=(1912) M. W. N. 353.

(13) A. I. R. 1921 Mad. 272=44 Mad. 951.

is that the claim of the plaintiff which has been pressed on the basis of his right as a reversioner simpliciter must fail.

For the above reasons we allow the appeal, set aside the decree of the lower appellate Court and dismiss the plaintiff's suit with costs in all the three Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 299

NANAVUTTY, J.

Hira Singh—Defendant—Applicant.

v.

Sunder Singh — Plaintiff — Opposite Party.

Civil Revn. Appln. No. 65 of 1929, Decided on 25th February 1930, from order of Small Cause Court Judge, Bilgram, D/- 21st August 1929.

Contract Act, S. 68 — Person borrowing money in his personal capacity and not as guardian of minor—Mere statement in document that amount was borrowed to meet certain necessary expenses on behalf of minor will not bind minor.

Where a person borrows money in his personal capacity and not as guardian of a minor, mere statement in the bond itself that the amount was borrowed to meet certain necessary expenses on behalf of the minor will neither bind the minor nor will it prove that the sum was actually spent for defraying the costs of necessities purchased for the benefit of the minor : 35 Cal. 320, *Ref.* [P 299 C 2]

Girja Saran Lal—for Applicant.

Judgment.—This is an application for revision under S. 25, Small Cause Courts Act 9 of 1887, praying that the judgment and decree passed by the Munsiff of Bilgram exercising Small Cause Court powers against the minor appellant Hira Singh be set aside. The facts of the case are briefly as follows:

One Sunder Singh brought a suit in the Court of the Munsiff of Bilgram in the district of Hardoi against Kali Din Singh and the present applicant Hira Singh on the basis of a bond executed by Kali Din Singh for Rs. 100 in favour of Sunder Singh on 1st January 1926. I have examined the bond and find that Kali Din Singh in his own personal capacity borrowed the sum of Rs. 100 from Sunder Singh. At the foot of the bond there is a note to the following effect:

"*Bagaras parwarish Hira Singh nabalish barwakt lahrir dastawez wasool paya Rs 53.*"

The learned Judge of the Small Cause Court has not only decreed the plaintiff's claim in full against Kali Din Singh the executant of the bond, but he has also passed a decree against the minor applicant Hira Singh making his estate liable in a sum of Rs. 53. It is against this order of the lower Court that this application for revision has been filed, and the learned counsel for the applicant invites my attention to a ruling of their Lordships of the Calcutta High Court reported in *Bhawal Sahu v. Baijnath Pratab Narain Singh* (1). At p. 329 of the ruling above referred to their Lordships delivered themselves of the following pronouncement:

"It is established law that a guardian cannot bind his ward's estate except by a document purporting to bind it : see *Maharana Shri Ranmal Singhji v. Wadi Lal Vakhatchand* (2), and we have to decide whether these two bonds purport to bind the estate of the minor. . . . In neither of the two bonds is it distinctly stated or are words used from which it could be possible to draw only the one inference that the debts were incurred for the benefit of the estate of the minor. . . . It is merely stated that the executrix was personally under the necessity of borrowing the money. The promise to repay the money in each bond is a personal promise and there is nothing in either of the bonds to indicate that in the event of her failure the estate of the minor would be liable or that by the bond she purported to bind the minor's estate."

In the present case a perusal of the bond in suit makes it very clear that Kali Din Singh executed the bond on 1st January 1926 in his own personal capacity and not as the guardian of the minor Hira Singh. In fact there is nothing in the bond to show what relationship Kali Din Singh bore to the minor Hira Singh.

There is no evidence adduced by the plaintiff Sunder Singh in this case to show that, as a matter of fact, the sum of Rs. 53 had been borrowed to meet certain necessary expenses on behalf of the minor Hira Singh. The mere statement in the bond itself will not bind the minor nor will it prove that this sum of Rs. 53 was actually spent for defraying the cost of necessities purchased for the benefit of the minor. S. 68, Contract Act, therefore, has also no applicability to the facts of the present case.

(1) [1908] 35 Cal. 320=12 C.W.N. 256.

(2) [1896] 20 Bom. 61.

The result is that I allow this application for revision, modify the judgment and decree of the lower Court and, while upholding the decree of the lower Court against Kali Din Singh, dismiss the plaintiff's suit in toto with costs against Hira Singh.

V.B./R.K. *Application allowed.*

A. I. R. 1930 Oudh 300

PULLAN, J.

Gopal Sahu—Defendant—Appellant.

v.

Nand Kumar Singh—Plaintiff—Respondent.

Second Appeal No. 13 of 1930, Decided on 5th February 1930, from decree of Addl. Sub-Judge, Fyzabad, D/- 25th November 1929.

(a) **Evidence Act S. 115—No estoppel arises against statute—Sale of occupancy holding is absolutely void and plea of estoppel cannot be raised.**

The sale of an occupancy holding is contrary to law and absolutely void and no estoppel arises against a statute. A person resisting suit for possession of an occupancy on the ground that it has been sold to him cannot raise the plea of estoppel. [P 300 C 2]

(b) **Deed—Construction—Document called lease but on proper construction appearing to be sale—Court is not bound to hold it to be lease—Real nature of transaction must be looked into—Acquiescence by occupancy tenant in illegal transfer does not affect his heir to get rights after his death—Adverse possession.**

Merely because a document is called a lease or a will, although on its proper construction it appears to be something else the Court is not bound to hold it to be that which it calls itself. The Court must look to real nature of the transaction. [P 301 C 1]

H, an occupancy tenant transferred his holding to *D*. On *H*'s death *P* brought a suit for possession against *D*. *P* contended that the deed of transfer executed by *H* was sale-deed and as such the sale was void, while *D* said that it was a perpetual lease and also put up plea of adverse possession, namely that *P* had not proved possession within 12 years.

Held : that the document purported to be a perpetual lease of an occupancy holding transferring all the rights of the occupancy tenant without any right of re-entry for ever to the lessee on the payment of a certain sum and an annual sum which was equivalent to land revenue due to Government. Nothing therefore was left to the lessor and the transaction was in fact a sale and not a lease. The transaction being void could not be challenged by *P*. [P 301 C 2]

Held: further *P* had no right until the death of *H* and as soon as *H* died *P* took every course to assert his right. *P* was not bound by the acquiescence of *H* for period of twelve years in his own illegal transfer : A. I. R.

1928 Oudh 472; A. I. R. 1922 Oudh 81 : A. I. R. 1921 Oudh 240 ; A. I. R. 1922 Oudh 42, Rel. on. [P 301 C 1]

R. D. Sinha—for Appellant.

H. Hussain—for Respondent.

Judgment.—This is the defendant's appeal in a suit brought for possession of an agricultural holding by the heir of a deceased occupancy tenant. The former occupancy tenant was one Himanchal Singh who died in about the year 1925. The plaintiff in this suit who is admittedly his nearest heir attempted to get possession. He at first was successful in his suit brought against the landlords, but he found himself unable to obtain possession against the present appellant who asserted a title by virtue of a registered deed executed in his favour by Himanchal in the year 1915. In the Courts below the decision turned upon the interpretation of this deed and plaintiff contended that it was a sale deed and the defendant that it was a perpetual lease. He relied upon the fact that there was some authority for the view that an occupancy tenant may execute a perpetual lease of his holding and he also set up a case of adverse possession. The findings of the Courts below on both points are against him. It was found that on its proper construction the deed was not a lease but a sale deed and that the defendant had failed to establish the fact that he had been in possession for a period of 12 years.

In this Court a new plea of estoppel is raised and a further plea of limitation which is to some extent a converse of the plea of adverse possession raised by the defendant in the Courts below. Apart from the fact that the plea of estoppel was not raised before, it is not a plea which can succeed if the finding of the Courts below as to the nature of the deed are correct. The sale of an occupancy holding is contrary to law and absolutely void and no estoppel arises against a statute. Moreover the plea appears to be based on a misconception of the rights of the plaintiff. He possessed those rights himself and not through Himanchal Singh who had merely a heritable and non-transferable right in the property during his lifetime. On both these grounds the plea of estoppel cannot be maintained. The

new plea of limitation is that the plaintiff had not proved possession within 12 years but the plaintiff had no right of any kind until the death of Himanchal Singh, and as soon as Himanchal Singh died he took every course that was open to him to assert his rights in the holding against the defendant-appellant. He cannot be met by a plea that he is bound by the acquiescence of Himanchal Singh for the period of 12 years in his own illegal transfer.

The main point in dispute, namely, whether the deed relied upon by the defendant appellant is a perpetual lease or a sale deed has been considered at some length by the Courts below. In appeal I have been referred to certain decisions of this Court and of the Judicial Commissioner's Court to the effect that in pre-emption cases the Court should accept all documents on their face value and not go into the question of the intention of the parties. That this is an incorrect interpretation is shown by a recent ruling of a Bench of this Court reported in *Mohamad Ishag v. Fahimunnisa* (1). It was pointed out in that judgment that in the previous decisions referred to no question as regards the admissibility of evidence about the real nature of the transaction was raised, and that there was nothing in those judgments to support the contention that such evidence is inadmissible or that it should be cast aside in determining the nature of the transaction. As observed on p. 829:

"The position is entirely different in a case in which the parties had really entered into a sale transaction but disguised it under the mask or cloak of a different transaction. In such cases the Court must look to the real nature of the transaction for the purpose of determining whether it could be subject to the right of pre-emption or not."

The same principle applies to cases which are not cases of pre-emption, and it has repeatedly been held by this Court that merely because a document is called a lease or a will, although on its proper construction it appears to be something else, the Court is not bound to hold it to be that which it calls itself. In the case of a so-called perpetual lease granted by a superior proprietor by which under-proprietary rights were conferred on the lessees, the rent reserved was substantially equi-

(1) A. I. R. 1928 Oudh 472.

valent to the Government revenue, and no right of re-entry was reserved for the lessor, it was held in the case reported in *Zalfan Khan v. Sant Baksin Singh* (2) that the transaction amounted to a sale and a similar view was taken in the cases reported in *B. Lachhman Das v. Bhagwant Ram* (3) and *Karim Dad Khan v. Mt. Bibi Ghafuran* (4). The present document purports to be a perpetual lease of an occupancy holding transferring all the rights of the occupancy tenant without any right of re-entry for ever to the lessee on payment of a sum of Rs. 350 and an annual rent which is exactly equivalent to the land revenue due to Government. There is therefore, nothing left to the lessor and the transaction has in my opinion rightly been held by the Courts below to be not a lease but a sale. Such a transaction being void it can be challenged by the person who is entitled to the occupancy rights on the death of the transferor and, in my opinion, this suit was decided rightly by the Courts below and I dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(2) A. I. R. 1922 Oudh 81=24 O. C. 310.

(3) A. I. R. 1921 Oudh 240.

(4) A. I. R. 1922 Oudh 42.

A. I. R. 1930 Oudh 301

SRIVASTAVA AND PULLAN, JJ.

Shafiuddin Ahmad — Applicant—Appellant.

v.

Prag Tewari—Objector—Respondent.
Misc. Appeal No. 61 of 1929, Decided on 25th February 1930, from order of Dist. Judge, Gonda, D/- 6th September 1929.

Lunacy Act (4 of 1912), S. 42—Attendance and examination before doctor is also contemplated.

Section 42 in terms refers only to the attendance and examination of the lunatic in Court but the principle contained in S. 42 would apply equally to her attendance and examination before a doctor. [P 302 C 2]

Ali Mohammad—for Appellant.

H. D. Chandra—for Respondent.

Judgment.—This is an appeal against the order dated 6th September 1929 passed by the District Judge of Gonda dismissing an application for the appointment of a guardian under the Lunacy Act (4 of 1912). The learned District Judge has dismissed the application on two grounds, firstly, that the applicant

had been delaying the proceedings deliberately and secondly that he had refused to let the alleged lunatic undergo medical examination to establish the frame of her mind in spite of repeated orders to that effect. We are of opinion that neither of these two grounds is well founded.

The objector in his objections had raised a plea against the bona fides of the application on the ground that it was intended to delay the proceedings which he had been taking for obtaining a decree for foreclosure against the alleged lunatic. It is admitted by the learned counsel for the opposite party that a decree for foreclosure has now been passed in his favour and that he has obtained possession of the property. So the objector respondent can have no longer any ground of complaint on that score.

Next a reference to the order-sheet shows that 4th May 1929 was the first date fixed for hearing. On this date the statement of an Assistant Surgeon examined on behalf of the applicant was recorded and the case was adjourned to 6th July 1929. On 6th July 1929 the objector wished that the lady should be put under the observation of the Civil Surgeon and that he should be afforded an opportunity to examine the Civil Surgeon to rebut the evidence given by the Assistant Surgeon on behalf of the applicant. The case was next taken up on 3rd August 1929 on which date a letter was received from the Civil Surgeon demanding a fee of Rs. 170 for keeping the lady under observation for ten days. The case was accordingly adjourned to 6th September 1929 and the objector was directed to deposit the necessary amount before 20th August. When the case was taken up on 6th September 1929, the application was rejected on the grounds stated above. We fail to discover in the proceedings set forth above any conduct of the applicant calculated to delay the proceedings. The adjournments which took place were necessitated by the request made on behalf of the objector to have the lady examined by the Civil Surgeon.

Next as regards the applicant's refusal to let the lady undergo medical examination, the position seems to be this. The applicant in pursuance of the order of the District Judge took the lady to

the hospital but objected to her being examined without purdah. The Civil Surgeon on 31st August 1929 wrote to the District Judge saying that in order to enable him to form an opinion it was extremely necessary that there should be no purdah and that she should be examined repeatedly for a long time and at all hours without notice. We agree that such examination is necessary in order to enable the doctor to form a proper opinion as regards her mental condition but we are equally clear that the lady being a purdanashin could not be compelled to submit herself to such examination by a male doctor. S. 42, Lunacy Act lays down that the attendance and examination of the alleged lunatic, if she be a woman, who according to the manners and customs of the country ought not to be compelled to appear in public shall be regulated by the law and practice for the examination of such persons in other civil cases. The section in terms refers only to the attendance and examination of the lunatic in Court but the principle contained in the said section would apply equally to her attendance and examination before a doctor. Under the circumstances we find ourselves unable to agree with the learned District Judge in his opinion that the applicant was unreasonable in refusing to allow the lady to undergo medical examination by the Civil Surgeon. The proper course for the District Judge under the circumstances, would be to have the lady examined by a lady doctor.

For the above reasons we set aside the order of the lower Court and send the case back to the District Judge for disposal according to law. In the circumstances of the case, we order that the costs here and heretofore shall abide the result.

V.B./R.K.

Case remanded.

A. I. R. 1930 Oudh 302

PULLAN, J.

Tirbeni Sahai—Appellant.

v.

Jagdamba Sahai—Respondent.

Appeal No. 1 of 1930, Decided on 4th February 1930, from order of Sub-Judge, Lucknow, D/- 4th October 1929.

Decree—Execution—Compromise by way of family arrangement, granting one party allowance, incorporated in decree—Allow-

ance was to be recovered periodically in whatever manner person liked—No mention of execution proceeding—Allowance could be recovered by execution.

In the course of a partition suit *T* and *J*, father and son, executed a compromise by way of family settlement and a decree was passed in terms of the compromise. In that it was agreed that *J* should pay *T* a sum of Rs. 25 a month by way of maintenance and a provision was included in the compromise which was incorporated in the decree, that in the event of non-payment, *T* should be able to recover the amount from person and property of *J* in whatever manner he liked.

Held: although no execution proceeding was explicitly mentioned in the case, and although such proceedings were mentioned in connexion with an allowance of a third party to the suit, who was also party to the compromise, the decree was not merely declaratory decree and was capable of execution: 15 O.C. 99; *Dist.*; A.I.R. 1922 Oudh 34, *Ref.* [P 304 C 1]

Suraj Sahai—for Applicant.

D. K. Seth—for Respondent.

Judgment.—The appellant and the respondent are father and son. In the course of a partition suit they executed a compromise by way of family settlement and a decree was passed in the terms of the compromise. The present parties were originally both defendants in that suit. Between them it was agreed that the present respondent should pay the appellant a sum of Rs. 25 a month by way of maintenance and a provision was included in the compromise, which was incorporated in the decree, that in the event of non-payment the appellant should be able to recover the amount from the person and property of the respondent in whatever manner he liked. The lower Court held that this was a declaratory decree which could not be executed, basing its decision on a case reported in *Kashi Ram v. Sahibunnissa* (1). The question whether a decree is or is not a purely declaratory decree can only be decided by examination of the decree itself. In the case reported in 15 O. C. (1), the decree stopped short after ordering that the claim of the plaintiff for Rs. 240 a year against the defendant be decreed. No date was given, no suggestion was made as to execution and the Court found that this was clearly a declaratory decree. In the course of that judgment, many judgments of other Courts were cited and it appeared to the learned Additional Judicial Commissioners that the principal test for ascertaining whether

a decree was or was not purely declaratory, was whether there was or was not a date given in the decree on which it could be executed. This was accepted as the ratio decidendi of that and other cases in a judgment of the Oudh Judicial Commissioner's Court reported in *Bijai Raj Koer v. Jai Indra Bahadur Singh* (2). In that case a somewhat similar decree was under consideration, and the Judicial Commissioners found that it was not merely a declaratory decree. It is true that they were helped to this decision by the fact that there was an order of His Majesty in Council that the date on which the decree could be executed was the date of a testator's death, but they also observed that the date was well ascertained from the facts of the case. In the present case the date is clearly the date on which the decree was passed. No one has suggested that any other date should be considered. The respondent bound himself in his compromise to pay this sum presumably from the date on which the decree was passed until the day of his father's death, and no difficulty that I can see arises in execution from an omission in the decree to state that the sum was to accrue from that date. The sum decreed as maintenance was to become due monthly, and failing some provision enacting that it was not to become due until a certain time had elapsed, it must be presumed that the decree came into force at once. In the judgment to which I have referred *Bijai Raj Koer v. Jai Indra Bahadur Singh* (2) (at p. 10 of 9 O.L.J.), the learned Judicial Commissioners observed:

"The attitude which the judgment-debtor has taken in resisting the execution of the decree is manifestly unjust. It is our clear duty to avoid such construction of the deed in question which would hereafter result in multiplicity of suits between the parties."

These words apply with equal force to the case before me. The respondent does not attempt to deny that he agreed in a family settlement to pay his father Rs. 25 a month. He merely seeks on a fine question of law to force his father to file another suit in order to get paid. In my opinion the decree sufficiently contemplated execution proceedings in the words which I have cited above, where the present appellant was empowered to:

(1) [1912] 15 O.C. 99=15 I.C. 389.

(2) A.I.R. 1922 Oudh 34.

"realize the amount in any way he liked against the person and property of the respondent."

I have no doubt that these words refer to execution proceedings although such proceedings are not explicitly mentioned in this case, and although they were mentioned in connexion with an allowance awarded to a person who was plaintiff in that suit and who was also a party to the compromise. In my opinion this was not merely a declaratory decree and it is capable of execution. I therefore allow this appeal with costs, set aside the decree of the lower Court and order that the judgment-debtor's objection be dismissed with costs.

R.M./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 304

PULLAN, J.

Abdul Rahim—Plaintiff—Appellant.

v.

Wazir Ali—Defendant—Respondent.

Second Appeal No. 353 of 1929, Decided on 11th February 1930, from decree of Addl. Sub-Judge, Lucknow, D/- 13th September 1929.

Limitation Act, Art. 144—Mere planting of trees on another's land does not amount to dispossession unless there is denial of right of owner.

The mere planting of trees on another person's land does not amount to dispossession. In such cases a person who plants trees has either right of ownership or no right at all. Where therefore a person had planted trees on the landlord's land without permission and after doing so had asserted no possession either by using the trees or by using the land and he had no right to continue to enjoy the trees after the landlord has asserted his ownership over the land on which the trees were situated. The landlord is entitled to the possession of the land. Art. 144 applied to the case, not Arts. 32 and 142: S O.C. 177, *Rel. on*; A.I.R. 1922 Oudh 47, *Dist.* [P 304 C 2, P 305 C 1]

G. Hasan—for Appellant.

Naziruddin—for Respondent.

Judgment.—The plaintiff in this suit is the landlord of a plot numbered 1/1 in the village of Parigaon. He brought this suit for possession of a portion of that plot by demolition of 16 trees which were standing thereon. The Courts below have found that the plaintiff is entitled to the land, and in respect of 7 trees which were planted recently they have ordered the defendant to remove them. But as to the other 9 trees the Courts below have held that they were planted more than 12 years

ago, and have permitted the defendant to use the plot for the enjoyment of those trees. Both parties have appealed. The plaintiff claims that these 9 trees also should be removed and the defendant claims that he should be held to be the owner of the land covered by those trees. It is not easy to support the conclusion of the lower Courts in view of their findings. They have found definitely that this plot is waste land and that neither by planting trees nor by any other act has the defendant acquired adverse possession. The first Court held that the suit in respect of the trees planted more than 12 years ago was barred by limitation. The lower appellate Court expressed no opinion on this point except that Art. 32, Lim. Act, had no application. The judgment of the lower appellate Court is far from clear but I assume that there is a finding that the defendant's predecessor planted these 9 trees more than 12 years ago.

The mere planting of trees on another person's land does not amount to dispossession. Consequently the plaintiff is still in possession of the land irrespective of the fact that the trees had been planted by another person. There is no finding that the defendant made any assertion of a right to hold possession of any portion of the land even that on which the trees were planted, and the fact that he planted the trees more than 12 years ago has no effect in improving a title which only began to be asserted when he denied the right of the owner. Thus, in my opinion, it is inconsistent with the findings of the Court below to give to the defendant any right over the trees which his ancestors planted on the plaintiff's land without permission and over which he asserted no title. This is the view taken by the late Judicial Commissioner's Court in *Thakur Sheo Narain Singh v. Bodal Singh* (1) and this ruling has been consistently followed. I may say that these trees are nim trees and the defendant could not assert proprietary possession over them in the same manner as he might have asserted possession by collecting the fruit of mango or other fruit-bearing trees. As there was no dispossession of the landlord by the planting of the

(1) [1905] 8 O.C. 177.

A. I. R. 1930 Oudh 305

RAZA AND PULLAN, JJ.

Balkrishna and another—Appellants.

v.

Debi Prasad and others — Respondents.

Execution Decree Appeal No. 46 of 1929, Decided on 10th February 1930, against order of Sub-Judge, Lucknow, D/- 20th July 1929.

(a) Civil P. C. Ss 37, 38, 39 and O. 21, R. 28 — Objection by judgment-debtor in application for transfer as to executability of decree—Proper Court to decide objection is Court transferring decree — Transferrer Court retains jurisdiction over matters as to executability of decree and should decide such matter before transfer—But such Court has no power to execute or sell property outside its jurisdiction.

Where, in an application for transfer of a decree the judgment-debtor raises an objection as regards the executability of the decree the proper Court to decide such objection is the Court, which transfers the decree. The Court which passed a decree retains jurisdiction over all matters relating to the executability of the decree and should decide such matters before transferring the decree to the Court which has territorial jurisdiction over the property against which the decree-holder seeks to execute the decree but there the function of the Court passing the decree ceases. It has no power to attach or sell property outside its jurisdiction. 42 Mad. 821 (F. B.), A. I. R. 1929 Mad. 199, 673, Rel. on. [P 308 C 2, P 309 C 1]

(b) Civil P. C., S. 11—Execution.

The principle of res judicata applies in execution proceedings: A. I. R. 1925 Oudh 291; A. I. R. 1921 P. C. 11; A. I. R. 1926 All. 71; A. I. R. 1924 Bom. 495 and A. I. R. 1924 Mad. 673, Rel. on. [P 310 C 1]

M. Wasim and Girja Shankar Srivastava—for Appellants.

R. B. Lal and R. N. Shukla—for Respondents.

Judgment.—In order to understand the questions of law raised in these connected appeals, it is necessary, to give a brief account of the parties and of the facts leading up to these applications for execution. One Gajadhar Prasad, who died in the year 1924, had two sons Ganesh Prasad and Bisheshar Prasad. This Gajadhar Prasad executed a will on 5th December 1884 which he amended on three occasions, his final will being dated 4th November 1900. Under these wills he purported to bequeath the estate of Durjanpur to his son Ganesh Prasad for the latter's lifetime, to the sons of Ganesh Prasad for their lifetime and thereafter to his descendants in perpetuity. Ganesh Prasad executed a promissory note for Rs. 5,610

trees, I cannot accept the contention of the learned counsel for the defendant that Art. 142, Lim. Act, applies. The period of limitation in such a case can only arise from an assertion of adverse possession and the article that applies is Art. 144. The ruling reported in *Ghafur Khan v. Prag Narayan* (2), applies to a case where there has been dis-possession or at any rate an assertion of adverse possession from which a period can be calculated, and has no application to the present suit. This is not a case, as was observed by the Court below, in which Art. 32 can apply because Art. 32 refers only to the case of one who has a right to use property for specific purposes and perverts it to other purposes. There are findings of fact of both the Courts below by which I am bound to the effect that the defendant had no right to use this property for any purpose. The learned Judge of the Court below appears to have found a difficulty in allowing the right of enjoyment over these trees in spite of the finding that there was no adverse possession, and he has therefore attempted to differentiate between full possession and some intermediate right between "a full owner and a rank trespasser." It appears to me that in a case of this kind a person who plants trees has either a right of ownership or no right at all. In the present case the defendant has, in my opinion, acquired no right. He planted the trees without permission on somebody else's land and after doing so he asserted no possession either by using the trees or by using the land and he has no right now to continue to enjoy the trees after the landlord has asserted his ownership over the land on which they are situated. The landlord does not claim the trees. He merely asks that they should be removed. He is entitled to this relief and I therefore allow the plaintiff's appeal in appeal No. 353 with costs, and order that the decree be amended to this extent that the whole suit should be decreed with costs throughout.

For the reasons already given the cross appeal by defendant fails and is dismissed with costs.

R.M./R.K.

Order accordingly.

in favour of one Mansa Din, and after the death of Ganesh Prasad which took place in 1912, a decree was obtained by Debi Prasad, Ajodhya Prasad and Gajadhar Prasad, who represented Mansa Din, against the sons and grandsons of Ganesh Prasad for a sum of Rs. 10,000, made up of the consideration of the promote and interest thereon, and it was ordered that this decree should be realized from the entire joint family property of Ganesh Prasad and the defendants. The defendants were not themselves personally liable. This decree was obtained in the Court of the Subordinate Judge of Lucknow under whose jurisdiction the Durjanpur property was at that time situate. The decree-holders applied from time to time for execution of their decree, but we are concerned primarily with the application made by them on 25th May 1924.

In this application they sought for execution of the decree by attachment and sale of the entire property in the hands of the judgment-debtors specified in the list attached to the application. The list contained the names of all the villages of the Durjanpur estate. Objections were made to this execution by the sons of Ganesh Prasad. These sons were Balkishen, Lalji and Mahadeo. Balkishen and Mahadeo made a joint objection and Lalji made a separate objection. Lalji's wife Krishen Kuar also objected on the ground that certain property had been gifted to her by her husband. Her objection was dismissed, and she thereupon filed a regular suit which was heard together with the objections made by Balkishen and Mahadeo and Lalji. The questions which were then before the Court for decision were whether this was joint family property or the separate property obtained by these persons under the wills of Gajadhar Prasad and whether it was or was not liable to attachment and sale in execution of the decree. The decree-holders filed counter-objections as well as a written statement in the case brought by Mt. Krishen Kuar. They denied the wills and they pleaded that, even if the wills were executed, the property attached would not be the self-acquired property of the objectors so as to save it from execution and, even if it was held to be self-acquired property, it would still be liable to attachment and sale

and in one of the objections (Ex. 5) they said:

"That in any case the alleged wills and conditions do not create in favour of the objectors any interest in the property in question which will protect them from being attached and sold in execution."

This was the case that went before the Subordinate Judge. He decreed the suit of Krishen Kuar and allowed the objections in his judgment dated 1st December 1926, printed from p. 51 onwards in parts 1 and 2 of the printed book in First Appeal No. 51 of 1926. The finding of the Subordinate Judge was that the wills of Gajadhar Prasad were genuine, that they conferred a life-estate only on his son Ganesh Prasad, that on the death of Ganesh Prasad this interest came to end and his sons took the property under the terms of the will. The case went on appeal before a Bench of this Court of which one of us was a member and the judgment is reported in *Debi Prasad v. Krishna Kunwar* (1). In dismissing the appeal the Court interpreted the wills or more properly the last will, in the following manner:

"It devised the offices of lambardar and the corpus of the Durjanpur properties in moieties to the testator's sons Ganesh Prasad and Bisheshar Prasad without power of transfer. This can only mean that Ex. 4 made a gift of a life-estate in one-half to each son and we construe the deed to continue that on the deaths of Ganesh Prasad and Bisheshar Prasad in each instance a life interest is created in favour of the sons of Ganesh Prasad and the sons of Bisheshar Prasad. Upon the conclusion of these life estates other life estates were to arise in favour of grandsons, and the will undoubtedly purports to create a rule of succession in favour of unborn persons. In so far as it purports to create a rule of succession in favour of unborn persons its provisions are void. But in our opinion so far as it creates life-estate in favour of Ganesh Prasad and Bisheshar Prasad, the disposition is good and in so far as it creates life estates on the death of Ganesh Prasad and Bisheshar Prasad in favour of persons who were in existence at the time, such persons being the sons of Ganesh Prasad and Bisheshar Prasad, the bequest is also good. Raja Bhaiya alias Balkrishna, Lalji and Mahadeo Prasad were all born before 1900. How does the case then stand? On the death of Ganesh Prasad a life estate came into being in favour of Raja Bhaiya, Lalji, and Mahadeo Prasad, the sons of Ganesh Prasad. This is a life estate in self-acquired property and by no stretch of language can their interests in the same be said to be 'the joint family property of Ganesh Prasad and the defendants; Lalji was entitled to transfer his life interest to his wife and on the evidence he did so transfer it. To what extent the grandsons of Ganesh Prasad

(1) A. I. R. 1928 Oudh 26.

enjoy a life-interest in this property it is not necessary for us to decide. It is not necessary for us to decide whether they have any interest in the property during the lifetime of their fathers. We are only concerned here with one point. Is this property in question property which can be attached and sold in execution of the defendants-appellants decree? We decide that it cannot be attached and sold in execution of the appellants' decree."

We have quoted this finding in full as we have been again asked in these appeals to consider the effect of the wills of Gajadhar Prasad. The decree-holders sought leave to appeal to the Privy Council and para. 5 of the grounds of appeals runs as follows:

"That in any event there was intestacy either with regard to the entire property of Gajadhar Prasad or with regard to the remainder which devolved on his sons and grandsons as their joint ancestral property."

Leave was granted to appeal but was subsequently cancelled as the decree-holders decided to abandon the appeal. The date of the order cancelling the certificate is dated 23rd February 1928.

By Government Order No. 1131/7/429 of 1927, dated 6th September 1927, jurisdiction over the Malhiabad Tahsil and the Thanas of Hasanganj and Saadatganj was transferred from the Subordinate Judge of Lucknow to the Subordinate Judge of Malhiabad. On 3rd July 1928 the decree-holders applied to execute their decree against the moveable property of the judgment-debtors but they subsequently amended the application on 25th August 1928 praying for the attachment of the following property, namely, the estate in remainder after termination of the life-estate of Bal Kishen, Lalji Lal and Mahadeo Prasad, in the villages noted in the list, namely the Durjanpur estate. The judgment-debtors objected on the ground that the judgment of the Chief Court which we have already quoted operated as res judicata. In the meantime another decree-holder named Ganesh Bihari applied for execution of his decree against the same persons. His application which is dated 20th March 1929, mentioned that this property, that is the vested remainder after the death of Bal Kishen, Lalji and Mahadeo Prasad, had already been attached in the case of Pandit Debi Prasad and others, and the decree-holder requested that the same property should be attached also under his decree. The Court ordered attachment without issu-

ing notice to the judgment-debtors because the period of 12 years from the date of the decree was about to expire and consequently the objections were filed after the attachment. These objections raised for the first time the question of jurisdiction, the very first objection being that the villages of which attachment had been ordered are situate in Tahsil Malhiabad which is beyond the jurisdiction of the Court. They objected further to the fact that the order of attachment was passed ex parte, and added in brief other objections similar to those raised in the case of Debi Prasad and others. On 13th July the Court passed the following order:

"The pleader for the decree-holder states that this application be kept along with the execution application of Debi Prasad and that when the property is sold under that decree a rateable distribution should be made of the proceeds in his favour also. The question of jurisdiction in this application shall be decided in the same manner as in the other application. I order this execution case to remain pending to await the result of Debi Prasad's case in all matters. All objections including that of jurisdiction made by the judgment-debtors in this case shall be decided only after the final decisions in that other case are arrived at."

Now no objection as to jurisdiction had been made in the case of Debi Prasad until the 4th May 1929, which was the date on which the objection was filed in the case of Ganesh Bihari, and on that date the learned Subordinate Judge gave a decision on the question of jurisdiction holding that he had power to order attachment of this property. He had previously decided the questions of res judicata and limitation in favour of the decree-holders in an order dated 30th October 1928 and his final order was passed on the remainder of the case on 20th July 1929. On the same date he wrote at the foot of his judgment in Case No. 84 of 1928, that is, the case of Debi Prasad and others, the following order in the case of Ganesh Bihari:

"In view of my decisions on objections in Miscellaneous Case No. 84 of 1928, I dismiss these objections also. No order as to costs."

We have before us appeals by the judgment-debtors both against the decision in favour of Debi Prasad and others and also the decision in favour of Ganesh Bihari, and we must keep them distinct. The learned counsel who has

argued both appeals concedes that in the case of Debi Prasad and others he is debarred under S. 21, Act 5 of 1908, from raising the question of jurisdiction and he has, therefore, challenged the decision in that group of cases on other grounds, but in the case of Ganesh Bihari the objection as to jurisdiction was raised at the first possible moment and he has pressed the point before us. His argument is that a Court passing a decree has jurisdiction to entertain an execution application provided that the relief sought is within the jurisdiction of the Court but, if the relief sought is beyond the jurisdiction, the Court which passed the decree has no power except to transfer the decree to the Court having jurisdiction. On the other side we have been referred to certain decisions of the Calcutta High Court which went so far as to say that a decree could be executed by the Court which passed the decree against property outside its jurisdiction. We do not consider that either of these extreme views is correct. S. 37, Civil P. C., lays down that the expression "Court which passed a decree" includes, for the purpose of execution, the Court of first instance and where :

"the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Section 38 lays down the general rule that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and S. 39 lays down cases in which the Court which passed the decree may send it for execution to another Court. In our opinion these sections read together lay down the rule that the Court which passed the decree must execute it until it has lost jurisdiction to execute it, and it has lost jurisdiction to execute it when there is no property within its jurisdiction against which the decree can be executed. But this is far from saying that the Court which passed a decree is merely a clearing house to pass on the decree for execution without question to the Court in which the property sought to be attached is situated. The terms of R. 28, O. 21, are opposed to any such view and

clearly indicate that the Court which passed the decree can pass orders relating to the execution of such decree which are binding on the Court to which the decree is sent for execution. In our opinion there is nothing to debar a Court which passed the decree from deciding any matters which may arise in execution quite apart from the attachment or sale of property. It would be most improper in our opinion that a Court should forward to another Court for execution a decree which was barred by time or which for some other reason could not be executed, and indeed the Court forwarding a decree must send with it a certificate of non-execution as required by O. 21, R. 6, Civil P. C., and such a certificate must be based upon enquiry and must admit of adjudication of the dispute if any between the parties. As far as authorities are concerned, we do not think it would serve any good purpose to discuss decisions of the Calcutta High Court which are alleged to be at variance with the Full Bench ruling of that Court reported in *Prem Chand Dey v. Mokhada Debi* (2) where it was clearly held that a Court has no jurisdiction in execution of a decree to sell property over which it had no territorial jurisdiction at the time it passed the order of sale.

This view has been accepted by other High Courts, notably the High Court of Madras in a Full Bench decision reported in *Seeni Nandan v. Muthusamy Pillai* (3), and in that case also the view was taken that the Court which passed the decree was still the proper Court for execution, although it had no power to sell and attach property outside its jurisdiction. Very recently the view taken in the Madras High Court has been put forward in a judgment reported in *A. I. R. 1929 Mad. 199; S. N. Subramanian Chettiar v. Ramanadhan Chettiar*. The view expressed in that case was that where, in an application for transfer of a decree, the judgment-debtor raised objections as regards the executability of the decree, the proper Court to decide such objection is the Court which transfers

(2) [1890] 17 Cal. 699 (F.B.).

(3) [1919] 42 Mad. 821=37 M. L. J. 284=11 M. L. W. 63=53 I. C. 213=(1919) M. W. N. 640 (F.B.).

the decree. This is the view which commends itself to us. In our opinion the Court which executes a decree retains jurisdiction over all matters relating to the executability of the decree and should decide such matters before transferring the decree to the Court which has territorial jurisdiction over the property against which the decree-holder seeks to execute the decree, but there the function of the Court passing the decree ceases. It has no power to attach or sell property outside its jurisdiction. We cannot accept the view that the word "include" in S. 37, Civil P. C., confers powers upon two Courts to attach and sell property, namely the Court which passed the decree and the Court in which the property is situated and we find therefore, that the Court of the Subordinate Judge of Lucknow had no jurisdiction to pass an order attaching this property on the application of the decree-holder Ganesh Bihari.

But the order is vitiated also by the fact that, in our opinion, the case was never heard on its merits. We have reproduced above the order passed by the Judge on 13th July 1929. We cannot find that an order saying that the question of jurisdiction in this application shall be decided in the same manner as in the other application, referring to a decision of 5th May which was not passed in these proceedings, is in any way a decision of the question as between the judgment-debtors and Ganesh Bihari, nor can we find that an order that the case was to remain pending to await the result of the other cases, and that the objections were to be decided only after the final decision in the other case had been arrived at, are equivalent to saying that the two cases were to be tried together. On the contrary the cases were kept apart, and we are assured by the learned counsel who appeared in that case that he was under the impression that after the decision of Debi Prasad's case he would be allowed to argue the case as against Ganesh Bihari separately. In our opinion the statement of learned counsel is supported by the evidence obtainable from the record and we hold that, as far as the execution application made by Ganesh Bihari is concerned, the decision is incomplete, first because the Court had no jurisdiction to pass the

order of attachment and sale, and secondly, because there has been in fact no hearing of the case on its merits. We hold, therefore, that Appeal No. 55 of 1929 must succeed. The order of the Court below is valid to this extent only that it has transferred the decree to the Court having jurisdiction to execute it by attachment and sale of the property.

In the other appeals the chief point taken is that the application for execution is barred by the principle of *res judicata*. The learned counsel for the respondents have sought to dissociate the present application for attachment of what is described as the vested remainder in this property from his former application which was to attach all the interests of the judgment-debtors in the joint property. It is true that the words "vested remainder" were not used in the earlier proceedings until the application was made for leave to appeal to the Privy Council, but in that application it was not suggested that the question had not been raised. Rather the suggestion was the Courts ought to have decided that the ultimate remainder devolving on the sons and grandsons of Ganesh Prasad as their joint ancestral property was liable to attachment and sale. No doubt the appeal was not pressed in the Privy Council and no decision was given in express terms on the question raised therein, but the respondents themselves clearly believed that the question fell within the scope of the proceedings, and we do not consider that they were in error. We cannot follow the argument of the learned Subordinate Judge in his order dated 30th October 1928 in which he attempts to show that the estate in remainder was entirely separate from the estate which the decree-holders sought to attach in their former application. In our opinion they sought to attach all the interests possessed by the judgment-debtors in the joint estate. The Courts held that the interest which they possessed at present was not an interest in the joint estate. There was, therefore, nothing which the decree-holders could attach and sell. We are not prepared to differ from the view expressed by the Bench of this Court as to the construction of the will which we have already quoted, and we believe that the finding of the Court, namely that the property

in question was property that could not be attached and sold in execution of the decree, concluded the whole matter and covered the whole interest of the judgment-debtors in the property; but even if it can be held that this particular point was not separately taken and that it is possible for a decree-holder, having failed to attach the property as it stands in the possession of the judgment-debtors, to attach an interest in the property which can be determined only on their death when it becomes vested in their posterity, we are of opinion that the principle of constructive *res judicata* at least applies, and that this is a claim which if not made in the first instance should have been made and must be held to have been decided against the decree-holders. This question of constructive *res judicata* was treated very briefly by the learned Subordinate Judge as follows: "This is a point which must be held to have been decided by necessary implication." For the general rule that the principle of *res judicata* applies in execution proceedings, we need only refer to a recent decision of this Court reported in *Raghubar Singh v. Gokaran* (4) which is based on a decision in *Hook v. Administrator General of Bengal* (5) and a recent judgment of the Allahabad High Court reported in *Dip Prakash v. Bohra Dwarka Prasad* (6). The same view was taken by the High Courts of Madras and Bombay in *Gadigappa v. Shidappa Gurushidappa* (7) and *Rajitagiripathy v. Bhavani Sankaram* (8). Much of the judgment of the learned lower Court has been devoted to a discussion of the meaning of the wills of Gajadhar Prasad. In our opinion the wills are sufficiently interpreted by the judgment of this Court to which we have already referred, and we do not propose to reopen the question in these appeals.

In our opinion even if it can be held that the vested remainder is not implicitly included in the interest in the joint property which the decree-holders sought to attach in the first case, it was the duty of the decree-holders in their former application for

attachment to include this interest, and they can properly be met in the present proceedings by the plea of *res judicata*.

We find, therefore, that the appellants should succeed in these appeals also. We accordingly allow all these appeals with costs throughout. We uphold the objections of the judgment-debtors and we order the estate to be released from attachment.

R.M./R.K.

Order accordingly.

A. I. R. 1930 Oudh 310

SRIVASTAVA, J.

Yaqub Khan—Defendant—Appellant.
v.

Sheo Dularey and another—Plaintiffs—Respondents.

Second Appeal No. 299 of 1929, Decided on 19th February 1930, from decree of Addl. Sub-Judge, Unao, D/-1st August 1929.

(a) **Record-of-Rights—Entry in Record-of-Rights as regards succession is prima facie sufficient evidence.**

In the absence of any evidence to the contrary an entry in Record-of-Rights must be taken as sufficient evidence as regards particular succession and title. [P 311 C 2]

(b) **Limitation Act, Art. 144—Suit for possession based on title—Suit is governed by Art. 144 and if defendant sets up adverse possession, burden is on him to make out his case.**

A suit for possession based on the title is governed by Art. 144 and if the defendant set up a plea of adverse possession, it is for the defendant to make out his plea of adverse possession and not for the plaintiff to prove his possession within limitation. [P 311 C 2]

Zahur Ahmad—for Appellant.

Rampat Ram—for Respondent 1.

Judgment.—This is the defendant's appeal against the decision dated 1st August 1929 passed by the Additional Subordinate Judge of Unao, reversing the decision dated 1st October 1928 passed by the Munsif, South Unao. It arises out of a suit for possession in respect of a muafi plot 732 of the first regular settlement corresponding to 1182 of the second settlement and 1395 of the present settlement. The plaintiffs came into Court on the allegation that the plot in suit was held by Man Das plaintiff 2 as muafi khairati and that he had sold it to plaintiff 1, Sheo Dularey, under a sale deed dated 23rd September 1926, that plaintiff 1 had issued a notice of ejectment against the defendant but

(4) A. I. R. 1926 Oudh 291=1 Luck. 171.

(5) A. I. R. 1921 P. C. 11=48 Cal. 419=48 I. A. 187 (P.C.).

(6) A. I. R. 1926 All. 71=48 All. 201.

(7) A. I. R. 1924 Bom. 495=48 Bom. 638.

(8) A. I. R. 1924 Mad. 673=47 Mad. 641.

that the defendant instituted a suit contesting the notice of ejectment on the ground that he was not a tenant but had acquired ownership in the said land. The revenue Court decreed the suit on 10th January 1927 and cancelled the notice of ejectment. The plaintiffs based their cause of action on the aforesaid decision of the revenue Court passed on 10th January 1927 and accordingly instituted the present suit for possession in the civil Court. The defendant raised various pleas. He denied the title of plaintiff 2 and denied his possession in respect of the land in suit and pleaded that he had been in adverse possession for over twelve years.

The trial Court framed issues relating to the title of plaintiff 2, the validity of the sale deed executed by him in favour of plaintiff 1 and about the defendant having acquired title by adverse possession. The learned Munsif decided the issue with regard to adverse possession against the defendant but dismissed the suit on the finding that the plaintiffs had failed to prove that Man Das plaintiff 2 was the owner of the plot in suit. The plaintiffs appealed to the lower appellate Court and the learned Additional Subordinate Judge has disagreed with the finding of the trial Court on the question of the title of Man Das and has accordingly decreed the plaintiffs' suit. The learned Additional Subordinate Judge also says in his judgment that the defendant did not impugn the accuracy of the Munsif's finding as regards adverse possession. The defendant has come here in second appeal.

The learned counsel for the defendant appellant has in the first place challenged the correctness of the finding of the lower appellate Court as regards the title of Man Das. In my opinion the finding is a finding of fact which cannot be questioned in second appeal. The learned Additional Subordinate Judge has relied upon the evidence of plaintiff 2 as P. W. 1 and certain documents and found that the land in suit was originally the muafi of Baldeo Das who was the guru of Narain Das and that plaintiff 2 was the chela of Narain Das. The learned counsel on behalf of the defendant contends that even though the relationship of guru and chela between Baldeo Das and Narain Das and between Narain Das and Man

Das be established, yet it is not proved that in fact Narain Das succeeded Baldeo Das and Man Das succeeded Narain Das. I cannot see my way to accede to this contention. The names of these persons find place in the khasras which have been accepted by the lower appellate Court. This in the absence of any evidence to the contrary must be taken as sufficient to establish the succession of Narain Das and Man Das respectively. The finding is sufficiently supported by evidence and I can see no reason to go behind it in second appeal.

Next it was argued that the plaintiffs have failed to prove their possession within limitation and it was contended that the plaintiffs' suit must fail on that ground. In my opinion the contention is without substance. The claim as it was put forward in the plaint was not one of possession or dispossession but one based upon the plaintiffs' title. The plaintiffs claimed the defendant to be a tenant and it was only because the revenue Court had refused to recognize the relationship of landlord and tenant between the parties that the plaintiffs had to institute this suit in the civil Court. In such a case it was for the defendant to make out his plea of adverse possession and not for the plaintiff to prove his possession within limitation. Both the lower Courts have treated the case as one governed by Art. 144 and not by Art. 142. I think they were clearly right in doing so. The defendant also never in any of the two Courts below questioned the correctness of the issues framed by the trial Court nor pressed for any issue or inquiry as regards the plaintiffs' possession within limitation. So far as the plea of adverse possession goes the finding of the trial Court was against the defendant and this finding was accepted by him in the lower appellate Court. I must therefore, overrule this contention also.

The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 312

SRIVASTAVA AND NANAVUTTY, JJ.

Gauri Shankar Rao—Defendant—Appellant.

v.

Jawala Prasad and *others*—Plaintiffs and Defendant 2—Respondents.

Second Appeal No. 311 of 1929, Decided on 25th February 1930, from decree of Third Addl. Dist. Judge, Lucknow, D/- 12th August 1929.

(a) Contract Act, S. 196—Ratification and acquiescence when valid explained.

Acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction: *La Banque Jacques Cartier v. La Banque d'Epargne De Montreal*, (1887) 13 A. C. 111, *Fell. and Marsh v. Joseph*, (1897) 1 Ch. 213, *Rel. on.* [P 314 C 1]

(b) Contract Act, S. 230—Contract entered into by agent for principal not undisclosed and incompetent to contract cannot be enforced against agent personally.

Where an agent enters into a contract on behalf of his principal who is not undisclosed, and who is minor and hence incompetent to contract, the agent is not liable under the contract, nor can the creditor enforce the contract against such an agent: 22 O. C. 109, *Dist.* [P 314 C 1]

M. L. Saksena—for Appellant.*Radha Krishna* and *Mukund Behari Lal*—for Respondents 1 and 2.

Judgment.—This is a second appeal by defendant 1 Kunwar Gauri Shankar Rao, taluqdar of Nimgaon in the Kheri District. It arises out of a suit for recovery of the price of an electric plant and certain accessories alleged to have been supplied to the defendant-appellant. The plaintiffs are the proprietors of a firm styled the British and American Electric Co., dealing in electric plants and fittings. Their case was that the defendant-appellant purchased from them on credit an electric plant with accessories and other articles for Rs. 3,338-10-0 and that they made a cash advance of Rs. 30. They also claimed Rs. 294 as interest amounting to total Rs. 3,662-10-0. They admitted receipt of Rs. 900 and claimed to recover the balance of Rs. 2,762-10-0. Subsequently they impleaded Mr. Mac Grogan, Manager of the Nimgaon estate as defendant on the allegation that the purchases in suit had been made through him and claimed that if the defendant 1 be not held liable for the whole or any portion

of the claim, a decree for the same be passed against defendant 2. Rani Surat Kuar who is the certificated guardian of defendant 1, filed a written statement raising various pleas. One of these pleas was that defendant 1 was a minor and as such incompetent to make any valid contract. She also pleaded that the manager, defendant 2, had no power to make any purchases. Defendant 2, denied his being a party to the contract and said that his only concern with the transaction in suit was that he had as a servant of the estate, settled the price of the engine when there arose a dispute about it between the contracting parties. For the rest he adopted the pleas raised on behalf of defendant 1. The plaintiffs admitted that defendant 1 was a minor when the contract in suit was entered into but pleaded by way of rejoinder that the contract in question had been "ratified by the guardian of defendant 1 as she sent Rs. 900 towards the price."

The learned Subordinate Judge of Lucknow who tried the suit rejected most of the defences raised on behalf of the defendants. He found that the contract was in fact made between the estate of defendants 1 represented by the manager, on the one hand and the plaintiffs on the other, and that the manager's act even though unauthorized at first was ratified by the subsequent conduct of the mother of defendant 1. He fixed the total price of the goods supplied at Rs. 2,819-4-0 only and allowed interest at 12 per cent per annum. After deducting the sum of Rs. 900 paid to the plaintiffs he gave them a decree for Rs. 2,168-13-0. Defendant 1 appealed against the decree passed in the plaintiffs' favour and the plaintiffs also filed cross-objections. The learned Additional District Judge agreed with the trial Court that the contract had been entered into by defendant 2 as the manager of the estate and had subsequently been ratified by the certificated guardian of defendant 1 who was in charge of the estate. He also held that the purchases in question had been made in connexion with the marriage of defendant 1's sister which constituted a legal necessity. In the result he dismissed the appeal. As regards the cross-objections he found that the goods purchased were worth Rs. 3,338-10-0 as alleged by

the plaintiffs and that they were entitled also to future interest from the date of first Court's decree. He modified the decree accordingly.

The main contention urged on behalf of the defendant-appellant is that the Courts below have completely ignored the pleadings and made out an entirely new case for the plaintiffs in holding that the contract as made with the estate and that it was for legal necessity. We think that the contention is well founded. We have read and re-read the plaint as well as the statement made by the plaintiff's pleader in the course of oral pleadings recorded by the Court on the date of issues. We fail to discover one word therein which might even remotely suggest that the contract was made with the estate or that it was for any necessity. All that was alleged was that the purchase was made by defendant 1 through defendant 2 and that :

"the contract was settled by the defendant and they had both gone to the plaintiffs' shop for the purpose."

The issues which were framed on this point and in respect of which the parties went to trial were in the following terms:

"Whether the plaintiffs sold things per list attached to the plaint to defendant 1 through the agency of defendant 2 for Rs. 3,338-10-0 as alleged ?

2. (a) Whether defendant 1 was bound by the contract and whether his guardian ratified it ?

(b) If not whether defendant 1 is liable personally to the plaintiff to make good the price ?"

There is nothing in these issues either to suggest that the estate was a party to the contract or that it was made for legal necessity. Sital Prasad plaintiff 2 was the only witness examined on the plaintiffs' behalf. The learned counsel for the plaintiffs-respondents has not been able to refer as to anything in the statement of this witness which could support the view that the estate was a party to the contract. All that he did say was that the installation was required in connexion with the marriage of the sister of defendant 1; defendant 2 was examined as witness on his own behalf. He denied making any contract with the plaintiffs and said that he had authority to make purchase

up to Rs. 200 without consulting the Rani.

There is nothing in his evidence to suggest that the purchases in question were made with the consent of the Rani, or on behalf of the estate. It is striking that not a single question was put to defendant 2 in cross-examination about the alleged necessity. We are under the circumstances constrained to hold that the Courts below have acted wrongly in basing their decision on the findings that the contract was made with the estate and was for legal necessity when no such case was raised in the pleadings and when defendant 1 had no opportunity to answer any such pleas.

It was also argued on behalf of the appellants that the contract by defendant 1 who was a minor being void, no question of ratification arises and that even if it did, there was absolutely no evidence to establish the alleged ratification. We are of opinion that this contention also must succeed. As pointed out above there is absolutely no evidence to show that the estate was a party to the contract or that it was entered into on behalf of or with the consent of the Rani. If the contract was entered into by defendant 1, then it was clearly void and illegal as at the time of the making of the contract he was admittedly a minor. If on the other hand the contract, in spite of his having denied it on oath is supposed to have been entered into by defendant 2 even then according to his statement which stands unrebutted, he had no authority to make purchase in excess of Rs. 200 without consulting the Rani. There is no evidence about the Rani having been consulted or having authorised the purchases. It follows therefore that he had no authority to make the contract. In any case we are satisfied that the finding of the lower Court on the question of ratification is incorrect and cannot be accepted. The mother of defendant 1 is admittedly a *pardanashin* lady. There is absolutely no evidence to show that she had any knowledge of the transaction. In *La Banque Jacques Cartier v. La Banque d'Epargne De Montreal* (1) their Lordships of the Judicial Committee observed that :

(1) [1887] 13 A. C. 111=57 L. J. P. C. 42.

"acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction."

Again in *Marsh v. Joseph* (2) at 246 it was observed that :

"to constitute a binding, an adoption of acts a priori unauthorized, these conditions must exist : (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts are or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were."

The plaintiff in the oral pleadings already referred to pleaded ratification only on the ground that defendant 1 had sent Rs. 900 towards the price. There is absolutely no evidence to bring this home to defendant 1. The lower Courts have, however, relied upon the fact mentioned in the oral evidence that the electric fittings were made even in the house occupied by the mother of defendant 1. In the absence of any evidence at all to prove her knowledge of the transaction we are unable to make any inference of ratification from it. We are therefore of opinion that the plaintiffs had entirely failed to prove that the contract in question was ratified by the mother of the defendant-appellant.

The learned counsel for the plaintiffs-respondents also tried to support the decree passed in the plaintiffs' favour by reference to Ss. 68 and 70, Contract Act. No such case was set up in any of the Courts below and we find ourselves unable to allow them to set up this new case at such a late stage more particularly when it involves question of fact, evidence in respect of which is wholly wanting.

Lastly, he argued that if the plaintiff's case as against defendant 1 must fail, they might be given a decree against defendant 2. The position of defendant 2 so far as we can judge from the pleadings and evidence cannot at the very best be supposed to be anything more than that of an agent for a principal, who was not undisclosed and who was a minor and as such, incompetent to make a contract. Supposing

(2) [1897] 1 Ch. 218=67 L. J. Ch. 128=45 W. R. 209=75 L. T. 558.

it to be so, the learned counsel for the plaintiffs has been unable to refer us to any authority which would in such a case entitle the plaintiffs to a decree against the agent, when the contract is wholly void. Reliance was placed on *Ganga Prasad v. Hayat Mohammad* (3) but this case deals with the liability of a surety and is quite distinguishable.

The result therefore is that we allow the appeal, set aside the decision of the lower appellate Court and dismiss the plaintiffs' suit. In the circumstances of the case we direct that the parties will bear their own costs throughout.

V.R./R.K.

Appeal allowed.

(3) [1919] 22 O. C. 109=52 I. C. 88.

* A. I. R. 1930 Oudh 314

RAZA AND PULLAN, JJ.

Amjad Ali and others—Appellants.

v.

Nand Lal Tandon and others—Respondents.

Misc. Appeal No. 62 of 1929, Decided on 14th February 1930, from order of Third Addl. Dist. Judge, Lucknow.

(a) Provincial Insolvency Act, S. 53 — Release.

A deed of release accompanied by mutation and transfer of possession is a transfer,

[P 315 C 2]

(b) Provincial Insolvency Act, Ss. 4 and 53—Scope.

Section 4 is to be read subject to the provisions of the Act, and it gives to the Court full powers to decide all questions of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency coming within the cognizance of the Court. This section does not give to the insolvency Court any power wider than that which is contained in S. 53 to annul transfers executed more than two years before the date of adjudication on the ground of their being benami executed to defraud creditors. Transactions of such nature must be challenged if at all in ordinary civil Court : *A. I. R. 1927 Cal. 474; A. I. R. 1926 Mad. 359 Dist.; A. I. R. 1921 Mad. 204; 5 O. W. N. 664, Rel. on.; A. I. R. 1929 All. 105, (F.B.) not. Foll.*

[P 315 C 2 P 316 C 1, 2]

Hargovind Dayal Srivastava — for Appellants.

Sridhar Misra — for Respondent 1.

Judgment. — One Ahmad Ali was adjudicated an insolvent on 26th May 1927. On 24th April 1928, an application was made by one of the creditors making certain allegations as to insolvent's title in certain property and asking that a receiver should be ap-

pointed. As the result of this application the Official Receiver was appointed receiver and he made an application on 12th July 1928, which reproduces the allegations which had already been made by the creditor. The transactions which formed the basis of these applications are as follows. One Nisar Ali was an owner of immovable property. On his death the property was inherited by his three sons. One of these Nizam Ali died in the year 1915 and his one-third share was inherited by his widow, his two brothers and one sister. The widow and the sister relinquished their shares in favour of the two brothers Amjad Ali and Hamid Ali and they on 25th July 1916, made a deed of gift in favour of Mt. Rabia in respect of one-third of the one-third share of Nizam Ali. Mt. Rabia was the wife of Amjad Ali and the mother of the insolvent Ahmad Ali. The one-ninth share conferred upon Mt. Rabia by the deed of gift was inherited on her death by the insolvent and mutation was effected in his favour. For the purposes of this appeal it must be held that Ahmad Ali became the owner of this property. If he did not, the creditors can make no claim to it.

On 20th May 1924 Ahmad Ali executed a deed of release in favour of Amjad Ali and Hamid Ali, his father and uncle, and they on the same date transferred a portion of the property to Mt. Nasirunnisa, the wife of Ahmad Ali. The rest of the property so released passed into the possession of Amjad Ali and Hamid Ali and mutation was made in their favour. In this application the Official Receiver prays for the annulment of the deed of release. He also asks for a declaration that Mt. Nasirunnisa is the benamidar of her husband in respect of the property gifted to her and that the insolvent is the real owner of that property. No claim is made in this Court to the property now in possession of Nasirunnisa but the Official Receiver has obtained from the Courts below a decision that the deed of release in favour of Amjad Ali and Hamid Ali was fictitious and executed in order to defraud the creditors of Ahmad Ali and he has also obtained an order of the Court annulling that transaction. We have now to consider whether such an order could be

passed by an insolvency Court in view of the fact that the deed of release was executed more than two years before the adjudication of Ahmad Ali as an insolvent. We cannot accede to the argument of counsel that a deed of release accompanied by mutation and transfer of possession is not a transfer. It may have been a fraudulent transfer in order to defeat the creditors of the transferrer but it is none the less a transfer. An insolvency Court is given power under S. 53, Insolvency Act (5 of 1920), to annul any transfer of property not being a transfer made before and in consideration of marriage or made in favour of the purchaser or incumbrancer in good faith and for valuable consideration, if the transferrer is adjudicated insolvent within two years after the date of the transfer. This section reproduces, with only a verbal alteration which is immaterial to the purposes of this case, S. 36, Provincial Insolvency Act. 3 of 1907 and it is therefore clear that when the Act was amended in 1920 it was not intended to give to the insolvency Court the same powers in respect of transactions entered into more than two years before the adjudication as were conferred in the case of transfer within two years of the date of adjudication. There was, however, a new section added (S. 4) and it has been held by the Courts below that under that section they had jurisdiction to annul this transaction even although it was entered into more than two years before the date of adjudication. It appears that this section was enacted because of a conflict between the Allahabad and Calcutta High Courts. The former held that insolvency Courts had jurisdiction to decide questions of title and the Calcutta High Court held that it had not. But the section as framed does not purport to give the Court any powers beyond what is given by other sections of the Act but rather to make it clear what the powers of the Court are under the Act. The section is to be read subject to the provisions of the Act and it gives to the Court :

" full power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency coming within the cognisance of the Court, "

It is the opinion of the Madras High Court : *The Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (1) that S. 4 declares what has been the law all through, and in our opinion there is nothing in the section which leads to a contrary view. It states for the first time in clear terms that the Court has power to decide any question that may arise in the course of proceedings in order to ascertain what are the assets of the judgment-debtor which may be distributed amongst the creditors. In order to come to a proper decision on this question the Court must be able to go into evidence as to the title of the judgment-debtor in the property which may have been concealed by him in the insolvency proceedings. In pursuance of such an inquiry the Court may consider benami and other transactions which purport to vest in other persons what is really the property of the judgment-debtor. But we do not consider that this section gives to the insolvency Court a wider power than that which is contained in S. 53 to annul transfers executed more than two years before the date of adjudication. We have been asked to consider that a contrary view has been taken by the High Courts in Calcutta, Madras and Allahabad. But this is not the interpretation which we place upon the rulings of the two former Courts to which we have been referred.

The most recent ruling of the Calcutta High Court reported in *Phool Kumari Dasi v. Khirud Chandra Das* (2) deals with a case in which the District Judge had already held that the transfer challenged was benami and that there had been no transfer in fact nor was the Court required to annul the transfer. The judgment of the Madras High Court in *Chittamal v. Ponnuswami Naicker* (3) confines itself only to a statement that it is open to an insolvency Court on a proper application being made under S. 4 of the Act to try the issue whether the insolvent is entitled to property or not and this is in no way opposed to the view which we ourselves take. It is only in the Allahabad High Court that we find a

definite opinion expressed that transfers more than two years old which cannot be assailed under S. 53 can be assailed under S. 4, Insolvency Act. We refer to the judgments of a Full Bench of three Judges reported in *Anwar Khan v. Mohammad Khan* (4) and we find that while two of the learned Judges would give this extended power to the insolvency Court under S. 5 the third member of the Bench, Sen, J., after discussing all the case law on the subject came to the conclusion that an insolvency Court cannot try a question of title relating to a transfer which has taken place more than two years before the order of adjudication. The learned Judge has laid emphasis on the limited nature of the jurisdiction of the insolvency Court as clear from the Act itself and we would support this view by referring to the head note which appears in the Act over Ss. 51 to 55 inclusive. The head-note runs : "Effect of insolvency on antecedent transactions." We do not consider that where in S. 53 which is governed by this heading the Act gives the Court power to annul transactions entered into within two years we should go out of our way to find that a general section in the same Act gives power to the Court to annul transactions which may have been entered into at any time and which are voidable under the ordinary law under S. 53, T. P. Act. In our opinion transactions of this nature must be challenged, if at all, in an ordinary civil Court and not in the insolvency Court. This was the view expressed by a Bench of this Court in *Hinga Lal v. Jawahir Prasad* (5) (5 O. W. N. 964) and it appears from the judgment of the Full Bench of the Allahabad High Court to which we have referred that the Judges of that Court are far from being unanimous in holding the contrary view. We hold therefore that the deed of release being a transfer entered into by the insolvent more than two years before the adjudication cannot be annulled by the insolvency Court either under S. 53 or by the general powers given to the Court by S. 4, Insolvency Act (Act 5 of 1920). Thus the orders of the Court below are without jurisdiction and we allow the appeal, set aside the order of

(1) A. I. R. 1921 Mad. 204=44 Mad. 524.

(2) A. I. R. 1927 Cal. 474.

(3) A. I. R. 1926 Mad. 363=49 Mad. 762.

(4) A. I. R. 1929 All. 103=51 All. 510 (F.B.).

(5) [1923] 5 O. W. N. 964.

the Court below and dismiss the receiver's application, but having regard to all the facts and circumstances of the case we direct that the parties should bear their own costs throughout. We express no opinion as to whether the receiver can assail the transaction in some other Court, but it is no doubt open to him, if so advised, to apply to the insolvency Court for leave to sue under S. 28, Cl. (2) of the Act.

V.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 317

PULLAN, J.

Ram Dayal—Defendant—Applicant.

v.

Tribeni—Plaintiff—Opposite Party.

Civil Revn. Appln. No. 1 of 1930, Decided on 12th February 1930, against order of Sm. C. C. Judge, Ram Sanahi Ghat, Barabanki, D/- 30th September 1929.

Provincial Small Cause Courts Act, S. 35 (ii) Suit for damages for timber of tree alleged to be removed illegally—Remover believing bona fide to be purchaser and hence entitled to do so—Suit not removed from cognizance.

In a suit for damages in respect of a portion of tree which had been cut down by the opposite party and removed under the impression that he was bona fide purchaser of it and hence entitled in law to remove it, suit does not any the less change its civil nature so as to remove it from the cognizance of the Small Cause Court merely because the plaintiff described this taking away as illegal: *A. I. R. 1921 Oudh 144* and *A. I. R. 1923 All. 428, Ref.*; *A. I. R. 1926 All. 760, Diss. from.* [P 318 C 1]

Ghulam Imam—for Applicant.

R. B. Lall and Harish Chandra—for Opposite Party.

Judgment.—This is an application for revision of an order passed by a Court of Small Causes on the ground that the Judge had no jurisdiction to try the case. The plaintiff sued for damages in respect of a portion of a tree which had been cut and removed by the defendant. The defendant pleaded that this portion of the tree had been purchased by him at an auction and that it did not belong to the plaintiff. The question between the parties therefore was a purely civil question. I am asked in revision to hold on the authority of a Bench decision of the Allahabad High Court reported in *Deoki Rai v. Harakh Narain* (1) that the allegations in the plaintiff

amount to a case of theft and therefore I should find that this case is not cognizable by the Small Cause Court under the provisions of Art. 35 (ii), Small Cause Courts Act. The principle laid down by the Judges of the Allahabad High Court is that:

"to determine of what nature the suit is we have to see what is sued for, and that brings us to the plaintiff and there is no need to go any further."

This extreme view is not taken by the other Judges of the Allahabad High Court, for instance; Lindsay, J., in the case of *Kumdarpal v. Madan Mohan* (2), and it is not a view which has ever been expressed as far as I am aware by any Judge of this Court or by the Judicial Commissioner of Oudh. A contrary opinion was expressed by one of the late Judicial Commissioners in a case reported in *Kumdar Singh v. Ujagar* (3). Even, however, if the judgment to which I have been referred of the Bench of the Allahabad High Court in 24 A. L. J. 1017 (1) is to be followed I would not be prepared to say that the present case is removed from the jurisdiction of the Small Cause Court. It is true that in Cl. 4 of the plaintiff says that:

"One part of the tree fell down which the defendant with the help of his brother and other persons took away illegally."

Illegally does not necessarily mean criminally and there is nothing in this clause to suggest that the plaintiff wished to imply that the defendant was unable to set up an adverse title. He certainly affirmed that he had not a good title but this may be a title which is not good in civil law and does not imply necessarily that he was committing a criminal offence. The case was fought out between the parties as a civil matter and in my opinion it was a civil matter such as would fall under Chap. 4, I. P. C. (S. 79) which runs:

"Nothing is an offence which is done by any person who by reason of a mistake of fact believes himself to be justified by law in doing it."

We have no reason to suppose that the defendant when he removed this wood was purposely committing an act of theft. Indeed in face of his own defence he cannot properly make such an assertion now and I must suppose that he removed the wood under the im-

(2) A. I. R. 1923 All. 428.

(3) A. I. R. 1921 Oudh 144.

(1) A. I. R. 1926 All. 760.

pression that he was a bona fide purchaser and that he was entitled in law to remove it. Such a case would not have been entertained in a criminal Court and I am of opinion that the Small Cause Court had jurisdiction to try and dispose of it. There is no other ground for interference with the decree of the lower Courts and I dismiss this application with costs.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Oudh 318

PULLAN AND SRIVASTAVA, JJ.

Dhar Khan—Plaintiff—Appellant.

V.

Sheo Narain and another—Defendants—Respondents.

Second Appeal No. 241 of 1929, Decided on 2nd January 1930, from decree of Dist. Judge, Gonda, D/- 7th May 1929.

(a) Landlord and Tenant—Cosharer—Lease by one or more of cosharers without joining others—Lessee taking possession—Cosharer not joined has no right to come and dispossess tenant by force and his act in doing so is that of a trespasser.

A lease executed by one or more cosharers is not invalid merely because some other cosharer has not joined in it. It is a lease which authorises the lessee to take possession of the land and if he takes possession under that lease he is certainly entitled to cultivate the land and he will normally retain possession to the end of his tenancy unless he is ejected by law. Another cosharer who has not joined in the lease has no right to come and dispossess a tenant by force. A cosharer acting in this way is not acting in virtue of his right as a cosharer. He is acting outside the law and his possession is merely that of a trespasser. [P 319 C 1]

(b) Landlord and Tenant—Pukhtidars in village who are not cosharers of patti cannot interfere with lease by cosharers of fields in that patti.

The fact that certain persons are cosharers in the pakhtidari rights of the village does not give such persons any right to interfere in the lease executed by cosharers in full control of the patti with regard to fields in the patti in which these persons are not cosharers. [P 319 C 2]

St. G. Jackson—for Appellant.

H. N. Misra—for Respondents.

Judgment. — The plaintiff-appellant obtained a lease of agricultural land in the year 1925 from two persons Harpal Singh and Debi Singh. He obtained possession, a fact which is not denied, and was subsequently ousted by the two persons who are the defendants in this suit. He accordingly brought a

suit in the civil Court as he did not admit that these defendants had any title in the land. The case which they set up in defence was that they themselves were joint birtdars along with Debi Singh and Harpal Singh, that the lease was invalid and that they themselves having taken possession of the land as birtdars could not be ousted by the plaintiff.

The Court of first instance, the Additional Subordinate Judge of Gonda, decreed the plaintiff's suit. He found that the defendants had never let out the land to the plaintiff and consequently even if they were proved to be cosharers they could not raise the plea that the lease was invalid. The learned Subordinate Judge found :

"that if one cosharer lets out land belonging to him and another jointly and the other forcibly and wrongfully dispossesses the tenant such cosharer must be deemed to be a trespasser."

He did not find explicitly that the defendants were cosharers and an issue was remanded by the appellate Court on this point. It must, however, be noticed that the learned District Judge did not remand the broad question whether the defendants were cosharers or not, but merely whether they were cosharers by purchase. These words were added because at that time the defence set up was that one of the defendants Sheo Narain had purchased certain plots in what was known as patti Hanwant Singh. The finding on remand was that this purchase was not proved and the appeal came before another District Judge with this finding. Thus the lower Court did not even then decide that the defendants were cosharers. It had found only that they were birt-holders in a certain patti. In the judgment under appeal the learned District Judge brushed aside this question saying merely that on this point namely whether the defendants were or were not cosharers :

"there is sufficient evidence on the record to show that the appellants are cosharers in the land in dispute."

He does not say what that evidence is. He decided the question entirely on what he considered the other important point namely whether a lease is valid which is granted by some and not all of the cosharers in the village. On this question of law the Judge found

that such a lease is invalid. It is unfortunate that he relied upon a decision of a single member of the Board of Revenue reported only in Indian Cases which refers to the Agra Tenancy Act and has no application whatever to Oudh. We know no authority for the proposition that an ordinary agricultural lease must be granted by all the cosharers in the village or patti as the case may be. On the contrary the more important duties of landlords need not be performed by all of them. They are generally performed by lambardars in the case of an undivided village or special pattidars in the case of a divided village. Even if there is no lambardar and no special pattidar we are not prepared to hold that a lease executed by one or more cosharers is not invalid merely because some other cosharer has not joined in it. It is a lease which authorises the lessee to take possession of the land and if he takes possession under that lease he is certainly entitled to cultivate the land and he will normally retain possession to the end of his tenancy unless he is ejected by law. Another cosharer who has not joined in the lease has no right to come and dispossess a tenant by force. A cosharer acting in this way is not acting in virtue of his right as a cosharer. He is acting outside the law and his possession is merely that of a trespasser. It is no defence in a suit of this kind to say that the lease has not been executed by all the cosharers.

But on the question of fact, namely, whether the defendants are or are not cosharers we do not think that the learned Judge has fully understood the situation. We find that this village was given as a birt to certain persons in certain specific shares. This division dates from the time of the settlement as shown in the khatauni. There were actually three shares in the first instance which subsequently became four and the land in suit is contained in the first and last of these shares. The defendants own a small portion of what was originally the second patti namely that of Ram Dhan and though they are technically cosharers in the pukhtidari rights in this village they have never exercised any rights whatever over the land in suit. This land came into the possession of the lessors in two ways.

Their ancestor Udit Singh became the possessor by purchase of a portion of the first patti known as Patti Hanwant Singh, and by means of a theka from the Balrampur estate of the whole of the third patti known as patti Parag. It is true that there is no partition in the village by metes and bounds and there is nothing in the village papers to show exactly which fields belong to one patti or to the other. But it is clear from the finding on remand that as far as these two pattis are concerned the defendants are not cosharers and the mere fact that they are cosharers in the pukhtidari rights of the whole village does not give them any authority to interfere in the lease executed by those persons who are shown by documentary evidence to have been in full control of patti Hanwant Singh since the year 1884 and patti Parag since they obtained their theka from the Balrampur estate in the year 1924.

It follows from our finding above that the question of jurisdiction does not really arise. In no sense of the term can the defendants be held to be landlords of the plaintiff. He had no concern with them when he took the lease and they never had any concern with the land. The suit is not one brought by a tenant against his landlord and cannot be brought within the scope of the Oudh Rent Act. It is certainly one which can be brought only in civil Courts. We consider that the District Judge was wrong on both the points which he decided. The plaintiff was entitled to the decree which he obtained from the first Court.

We allow the appeal and set aside the decree of the District Judge and restore the decree of the Court of first instance with costs throughout.

V.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 319

WAZIR HASAN AND SRIVASTAVA, JJ.

Nur Ahmad—Plaintiff—Appellant.

v.

Muhammad Abbas Khan—Defendant—Respondent.

Second Rent Appeal No. 46 of 1929, Decided on 9th January 1930, against decree of Dist. Judge, Gonda, D/- 7th August 1929.

Cosharer—Lambardar is not liable where question of interpretation of law is involved.

A lambardar may be liable for his acts of negligence but he cannot be made liable in cases where the question of interpretation of a provision of law is involved. [P-320 C 2]

H. Husain and A. C. Mukerji—for Appellants.

Muhammad Ayub—for Respondent.

Judgment. — This is the plaintiff's appeal from the decree of the District Judge of Gonda dated 7th August 1929, affirming the decree of an Assistant Collector of First Class in the same district dated 10th June 1928 in a suit under Cl. (15), S. 108, Oudh Rent Act, 1886.

The only question urged in appeal before us is as to whether the defendant who is the lambardar of the village in respect of which the profits are claimed is liable to give a share to the plaintiff out of the local rates which he realized, as is contended by the plaintiff, from the under proprietors under Cl. (a), S. 8, U. P. Local Rates Act, 1914. The Courts below have held that the defendant is not liable for such local rates.

Clause (a) mentioned above fixes the under-proprietor's liability for rural police rate if such a rate was payable under the U. P. Local and Rural Police Rates Act, 1906, in respect of the under-proprietor's land. When we turn to the provisions of the Act of 1906 we find that the superior proprietor would be entitled to the rural police rate under that Act if the under-proprietor is bound by law, decree or contract to pay such rate. The Courts below are of opinion that there is no law, decree or contract in the present case under which the under-proprietor of the village in suit is liable to pay to the superior proprietor rural police rate. So far as the liability of the under-proprietor is concerned the opinion formed by the Courts below may or may not be correct but the chief obstacle in the success of the plaintiff's claim is that he has failed to establish that the defendant has realized rural police rate from the under-proprietor of the village which was payable by the latter under Cl. (a) S. 8, U. P. Act, 1914. This is the finding of both the Courts below and as a finding of fact is conclusive in second appeal. But it is argued by the learned advocate

for the plaintiff-appellant that the Court should construe in the present case Cl. (a), S. 8, U. P. Local Rates Act, 1914, in the sense that the under-proprietor of the village in question was liable under the U. P. Local and Rural Police Rates Act, 1906, to pay rural police rate to the superior proprietor by reason of a contract and if that construction is adopted it should be further held that the defendant who occupies the position of a lambardar is liable to pay to the plaintiff his share of such rates which he should have realized from the under-proprietor on a correct interpretation of Cl. (a) above referred to.

We are unable to accept this argument. A lambardar may be liable for his acts of negligence but we do not think that we can make him liable also in cases where the question of interpretation of a provision of law is involved. Previous to the years in suit no Court was called upon to interpret those provisions in law and consequently they have not so far been interpreted in the sense in which the appellant now contends. The argument really comes to this that the defendant lambardar should have interpreted those provisions as imposing a liability on the under-proprietor of the village in respect of the rural police rate and not having done so he is liable for his omission. As already said, we are not prepared to accept this argument. The appeal, therefore, fails and is dismissed with costs.

On behalf of the defendant-respondent certain cross-objections were filed but only one of them was pressed at the hearing of the appeal. It was argued in this connexion that the plaintiff's suit which has been partly decreed by the Courts below was premature in the sense that the defendant's liability to pay to the plaintiff his share of profits arose only in the beginning of August while the suit was instituted in July 1928. We are of opinion that the argument has no force, having regard to the fact that the decree was made long after the defendant's liability had arisen in law. The cross-objections are also dismissed with costs.

V B/.R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 321

RAZA, J.

Rangi Lall—Applicant.

v.

Emperor—Opposite Party.Criminal Revn. Appln. No. 34 of 1930,
Decided on 8th April 1930.(a) Criminal Trial—Duty of prosecution—
Burden lies on prosecution to establish
charge substantially and beyond reasonable
doubt—Suspicion is not sufficient.

The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The guilt of the accused must be proved beyond a reasonable doubt. The gravest suspicion against the accused will not suffice to convict him of a crime, unless evidence establishes it beyond doubt. [P 323, C 1]

(b) Penal Code, S. 408—Dishonesty is of
essence—Duty of Court in cases under S.
408 stated.

Mere retention of money or mere failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that the payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust are somewhat broadly stated, there is no doubt as to their meaning. The sections dealing with the offence of criminal breach of trust were intended to punish an offence of which dishonesty is the essence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law: 42 All. 522, Ref. [P 323 C 2]

R. F. Bahadurji and Jagat Narain Mathur—for Applicant.

Judgment.—This is an application for revision of an order dated 8th March 1930 passed by the learned Sessions Judge of Lucknow dismissing the applicant's appeal against the order dated 12th February 1930 passed by the special Magistrate, Lucknow convicting the applicant under S. 408, I. P. C. and sentencing him to three months R. I. and a fine of Rs. 100/- (or in default, one month's further simple imprisonment).

The applicant Rangi Lal is the son of one Brij Bihari Lal. Brij Bihari Lal and Rangi Lal both were charged with an offence punishable under S. 418, I. P. C. but Brij Bihari Lal was acquitted and his son Rangi Lal was convicted and punished under S. 408, I. P. C.

The case originally started on a complaint lodged by one Ram Dass on 25th November 1929. His case was that he

had purchased a lorry on the 'hire purchase system' from the Pioneer Motor Engineering Works, Lucknow, for Rs. 1,200/- on 6th September 1929, at the instance of Brij Bihari Lal and Rangi Lal, having paid the initial sum of Rs. 400/- out of Rs. 1,200/- on 2nd September 1929. The remaining Rs. 800/- were to be paid by monthly instalments of Rs. 80/-. Having got the lorry he employed Rangi Lal at the instance of Brij Bihari Lal to drive the lorry for him. Rangi Lal was to get Rs. 30/- p. m. and daily food. Rangi Lal was thus employed on 6th September 1929. He (Rangi Lal) drove the lorry daily till nearly the end of September when he was dismissed. Another man Ram Swarup was then appointed to drive the lorry, but he drove it for one day only, and after that was prevented from doing so by Brij Bihari Lal and Rangi Lal both. The lorry had been kept at the house of Brij Bihari Lal and Rangi Lal while it was being driven by Rangi Lal and they refused to part with it. As the other instalments had not been paid, according to the agreement executed in favour of the Pioneer Motor Engineering Works they took back the lorry ultimately in November 1929. The substance of the complaint was that Rangi Lal had retained all the money realised by him as hire of the lorry to the amount of Rs. 440/-.

Both the accused pleaded not guilty. It was stated in defence that the complainant Ram Dass and Brij Bihari Lal were partners in the lorry business and had purchased the lorry as such. It was not denied that Brij Bihari Lal and Rangi Lal had realised the hire of the lorry. It was stated that Rangi Lal was always ready to pay Ram Dass his share of the profits after payment of the expenses and wages etc., the account of which had not been settled. Rangi Lal had stated also on 17th December 1929 that he had paid the money received less daily expenses, to Ram Dass. It should be noted that six of the prosecution witnesses were examined on 17th December 1929 and the accused were also examined the same day. Two more witnesses were examined for the prosecution on 6th January 1930, but the accused were not examined after that, though they should have been examined as required by law.

A written statement was filed on 2nd February 1930. It purports to be a written statement on behalf of Brij Bihari Lal and Rangī Lall both, but it bears the signature of Brij Bihari Lal alone.

It was contended before the learned Sessions Judge that there was a genuine dispute as to accounts and no criminal intention; but the contention was not accepted by the learned Judge. The learned Judge was of opinion that Rangī Lall was bound to account for the money realised by him, and he withheld it with criminal intention.

Ordinarily, I do not enter into the merits of cases in revision, that is to say, I refuse to consider questions of fact but, I have to consider questions of fact in this case. The lower Courts have approached the case from a wrong point of view and the evidence which has been produced in this case has not received due consideration.

The learned Sessions Judge has not given any definite finding on the question of partnership. He was of opinion that it was perhaps outside the province of a criminal Court to inquire and determine whether any sort of partnership existed. I am unable to agree with him on this point. In my opinion the determination of that question has an important bearing on this case.

In my opinion there is sufficient reliable evidence on the record to show that Ram Dass and Brij Bihari Lal were partners in the lorry business and had purchased the lorry as such. Ex. A is the receipt for Rs. 400, which was given by the Pioneer Motor Works to Ram Dass and Brij Bihari Lal both on 2nd September 1929. This receipt shows clearly that Ram Dass and Brij Bihari Lal both had purchased the lorry from the Pioneer Motor Works. Ex. 2 is the deed of agreement which was executed by Ram Dass and Brij Bihari Lal both in favour of the Pioneer Motor Works. This document also shows that Ram Dass and Brij Bihari Lal had purchased the lorry as partners. Ram Dass' statement that he had got the name of Brij Bihari Lal entered in the agreement (Ex. 2) simply for his convenience, is not reliable at all and must be rejected. It is true that J. Franklen who is in the service of the Pioneer Motor Works Company gives evidence in favour

of Ram Dass in his examination-in-chief, but let us see what he states in his cross-examination. He admits in his cross-examination that Brij Bihari Lal and Rangī Lall both were present at the time the bargain was settled and that Ram Dass and Brij Bihari Lal both were present at the time Ram Dass had paid Rs. 400/- on 2nd September 1929. When the receipt, Ex. A, was shown to him he admitted that it was in the name of Ram Dass and Brij Bihari Lal both, that it was correct and that Brij Bihari Lal and Ram Dass both had paid the money for which the receipt was given to them. When the agreement Ex. 2 was shown to him he admitted that Ram Dass and Brij Bihari Lal both had signed it as purchasers in his presence and that both of them were bound to pay the money under that deed. The learned Magistrate was of opinion that Brij Bihari Lal had signed the agreement simply as a surety for Ram Dass, as he wanted to get a job for his son Rangī Lall. It is noticeable that this finding is not supported by any reliable evidence on the record. It was never alleged by Ram Dass himself that Brij Bihari Lal had signed the agreement in question simply as his surety. He states simply that he had obtained Brij Bihari Lal's signature on the deed for his convenience. This statement is surely untrue. If Brij Bihari Lal had signed the agreement simply for the convenience of Ram Dass, it is difficult to understand why the names of Brij Bihari Lal and Ram Dass were entered in the receipt Ex. A. Surely the name of Brij Bihari Lal was not entered in the receipt for the sake of Ram Dass' convenience. It should be borne in mind that the receipt had been given to Ram Dass and Brij Bihari Lal both some four days before the execution of the agreement. The fact is that both of them had paid the money to the Motor Works Company and so the names of both of them were entered in the receipt. J. Franklen, P. W. 2, had to admit in his cross-examination that Brij Bihari Lal and Ram Dass both had paid the money for which the receipt was given to them on 2nd September 1929. I am entirely unable to agree with the finding of the learned Magistrate which is purely conjectural and is inconsistent with the statement of

the complainant himself. I hold therefore that Ram Dass and Brij Bihari Lal were partners in the lorry business and had purchased the lorry from the Motor Works Company as such.

The next matter I have to consider is the question of the criminal liability of Rangi Lall applicant. His statement on some points may be untrue, but the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The guilt of the accused must be proved beyond a reasonable doubt. The gravest suspicion against the accused will not suffice to convict him of a crime, unless evidence establishes it beyond doubt. Ram Dass, complainant states in his cross-examination that at the time he had lodged the complaint, he knew that Brij Bihari Lal and Rangi Lall had realized Rs. 366 only as hire of the lorry, but as he had also paid Rs. 75 in cash to them, he had alleged in his complaint that they had misappropriated Rs. 440. He admits in his cross-examination that at the time he had demanded money from the accused they had said to him that they would pay money to him after deducting expenses, etc. He makes the following statement at the end of his cross-examination :

"I have not yet paid the pay due to Rangi Lall, as the accounts have not yet been settled. Rangi Lall himself has incurred expenses of petrol and mobil oil for the lorry over and above Rs. 25 (not Rs. 75 as stated before) which I had paid to him. Rangi Lall himself has paid the price of all the things which he has purchased (for the lorry). The dispute between me and Rangi Lal is this : Rangi Lal says that the income, after deducting the motor expenses and his pay and the expenses of his daily food, may be taken by me and Brij Bihari Lal in equal shares. However Rangi Lal, is wrong in saying so, as Rangi Lall's father is not my partner in business."

The statement made by the complainant shows clearly that Rangi Lall really never refused to pay the money which might be found due to the complainant on account of his share after deducting the necessary expenses and that he was always ready and willing to pay the income of the complainant's share to him on settlement of accounts. However, the complainant wanted to get the whole income and wanted also to keep the lorry in his exclusive possession. This is clear from the statement

of the complainant's witness, Ram Swarup, P. W. 6. He states that he was present at the time the dispute took place between Ram Dass and the accused over the income of the lorry. Rangi Lall had said at that time that he would pay money at the end of the month after deducting all the expenses, but Ram Dass had insisted on getting the whole income and on keeping the lorry in his own possession. Surely Ram Dass was wrong in doing so when he and Brij Bihari Lal were partners in business. The proposal which the accused had made to him was a reasonable proposal, but he was wrong in refusing to accept it and in demanding the whole income and in insisting on keeping the lorry in his exclusive possession. Ram Dass wanted to deprive Brij Bihari Lal and Rangi Lall of the amounts which were due to them and to which they were legally entitled. It is neither alleged nor shown that Rangi Lall was to pay the income to the complainant daily or within any particular period. He never refused to pay to the complainant the money which might be found due to him on settlement of accounts.

These are the facts which are established by the evidence in this case. In my opinion no charge is made out against Rangi Lal under S. 408, I. P. C. It should be borne in mind that mere retention of money or mere failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that the payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust are somewhat broadly stated, there is no doubt as to their meaning. The sections dealing with the offence of criminal breach of trust were intended to punish an offence of which dishonesty is the essence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law. As pointed out in the case of *Emperor v. Mohan Singh* (1), although transactions which

(1) [1920] 42 All. 522=59 I. C. 372=18 A.L.J. 633.

involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged. I say nothing about the civil liability of Rangī Lāl or his father Brij Bihari Lāl, but I am not satisfied that the charge under S. 408, I. P. C., is made out against Rangī Lāl. He should at all events be given the benefit of doubt.

The result is that I accept the application for revision and setting aside the conviction and sentence of Rangī Lāl direct that he be acquitted and released. His bail bond may be discharged.

V.B./R.K.

Conviction set aside.

A. I. R. 1930 Oudh 324

NANAVUTTY, J.

Chandrika Prasad—Accused—Applicant.

v

Emperor—Complainant—Opposite Party.

Criminal Revn. Appn. No. 19 of 1930, Decided on 31st March 1930.

(a) Penal Code, S. 409—Appropriation of money drawn from Bank for payment of one bill towards another bill of same firm does not amount to embezzlement.

Appropriation of money drawn from the Bank for payment of particular bill, towards payment of another bill due to the same firm or person does not amount to embezzlement of Government money; it may at the most amount to deliberate violation of the account rules making the person liable for departmental punishment. [P 325 C 2, P 326 C 1]

(b) Penal Code, S. 409—Wrong account and wrong entry do not by themselves prove criminal breach of trust.

The fact that the accounts have been wrongly kept will not of itself prove that the person keeping the account committed criminal breach of trust unless it can be shown that the person misappropriated proceeds of cheque or remittance transfer receipt or any cash proved to have been received by him; and the wrong entries may raise strong suspicion which may serve as a ground for scrutiny but cannot justify the conviction of the person for criminal breach of trust. [P 326 C 1, P 327 C 1]

(c) Evidence Act, S. 8—Subsequent conduct when relevant as proof of guilt explained.

Different persons are differently constituted and that some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and that some other innocent accused do equally foolish things

such as make a false admission of guilt or pay off the amount said to have been stolen or embezzled in the vain hope that they may escape a criminal prosecution or get off with a light punishment. Such subsequent conduct cannot dispense with the positive proof of the guilt of the accused, the burden of which lies upon the prosecution. When once the Crown has established the guilt of the accused by the evidence of prosecution witnesses then such subsequent conduct may be utilized as furnishing further proof of the correctness of the conclusion as to the guilt of the accused drawn from the evidence of the prosecution witnesses; by itself, however, it can furnish no legitimate proof of the guilt of the accused.

[P 327 C 2]

St. G. Jackson, and *W. A. Akhgar*—for Applicant.

H. K. Ghosh—for the Crown.

Judgment.—This is an application for revision of an appellate order of the learned Sessions Judge of Lucknow upholding the conviction and sentence passed upon the applicant Chandrika Prasad for an offence under S. 409 I. P. C. The charge framed against the applicant is to the effect that on 31st March 1927 while he was Head Clerk of the Government Technical School at Lucknow and as such entrusted with or having dominion over a sum of Rs. 183-11-0 on account of the price of books purchased for the school from Messrs. Thacker Spink & Co. of Calcutta he committed criminal breach of trust in respect of the said sum. There is absolutely no evidence on the record to prove that the applicant Chandrika Prasad was ever entrusted with this sum of Rs. 183-11-0 or ever had dominion or control over that amount. Even the learned City Magistrate concedes that fact when he writes in his judgment that :

"when there is no cash payment but only book transaction there can be no literal entrusting of money."

He, however, held that the accused had undoubtedly dominion over the money of the cheque Ex. 19. Ex. 19 is a cheque for Rs. 4,393-10-6 drawn by the Pay and Accounts Officer of Allahabad in favour of the Principal of the Government Technical School at Lucknow. It was in payments of three bills, one for Rs. 342-11-0 another for Rs. 2,214-2-0 and the third for Rs. 1,836-13-6. The Principal of the Government Technical School (Mr. Lyons) sent this cheque Ex. 19 duly endorsed to the Imperial Bank of India, Lucknow Branch, along with Rs. 86-0-2

in cash and asked the Bank that in lieu of the cheque Ex. 19 and the money remitted to the Bank nine drafts or remittance transfer receipts payable at sight in favour of the parties noted below should be sent to him by the Bank. The persons in whose favour these drafts were drawn are as under :

| | | | |
|---|-------|----|----|
| 1. Manager, Pioneer Press, Allahabad | Rs. | a. | p. |
| | 48 | 0 | 0 |
| 2. Messrs. Mather & Platt Ltd., Calcutta | 3,338 | 10 | 8 |
| 3. General Electric Co. Ltd., Calcutta | 120 | 11 | 9 |
| 4. Messrs. Martin & Co., Calcutta | 69 | 4 | 0 |
| 5. Messrs. Birkmyre Bros., Calcutta | 253 | 2 | 0 |
| 6. Messrs. Bishambhar Nath Niranjana Lal, Allahabad | 357 | 11 | 3 |
| 7. Messrs. Jaggi Lal Kamapat, Cawnpore | 64 | 0 | 0 |
| 8. Messrs. Jessop & Co., Calcutta | 72 | 11 | 0 |
| 9. Messrs. Thacker Spink & Co., Calcutta | 155 | 8 | 0 |
| Total ... | 4,479 | 10 | 8 |

It is admitted that Messrs. Thacker Spink & Co. of Calcutta received the cheque for Rs. 155-8-0 and realized the amount of that cheque and that all the eight other persons or firms in whose favour drafts were drawn received their money. It is thus clear that out of the sum of Rs. 4,479-10-8 which included the amount of the cheque Ex. 19 from the Pay and Accounts Officer of Allahabad, not a pie was received by the applicant Chandika Prasad but that the whole amount was paid off to the various firms and persons to whom the Government Technical School of Lucknow owed money.

It is argued on behalf of the Crown that while the applicant is not proved of having actually embezzled a single pie, he is nevertheless guilty of constructive criminal breach of trust in that he utilised the cheque of Rs. 155-8-0 to pay the money due to Messrs. Thacker Spink & Co. on their original bill for Rs. 183-11-0, whereas this cheque of Rs. 155-8-0 was meant for payment to that firm in respect of another bill for which the Government was liable. There is no clear and reliable evidence on this point. In the absence of any instructions to the contrary, Messrs. Thacker Spink & Co. would naturally

credit the amount of the cheque for Rs. 155-8-0 towards the payment of their oldest bill outstanding in order to save limitation. The mere fact that Messrs. Thacker Spink & Co's bill for Rs. 183-11-0 was paid off in part by the cheque of Rs. 155-8-0 which was drawn in respect of another bill for that amount due to that firm does not go to prove that the applicant Chandika Prasad embezzled the amount of the original bill for Rs. 183-11-0 (subsequently reduced to Rs. 172-6-0) due to that firm. The presumption of innocence in favour of the applicant must hold good until replaced by cogent and convincing evidence of his guilt. Unfortunately for the prosecution it has not been possible for the Crown to examine Mr. Lyons as a witness in this case to elucidate the crucial facts of the transaction in respect of which criminal breach of trust is said to have been committed. The Financial Hand Book, Vol. 5, p. 75, Art. 169 clearly lays down the responsibility of the head of the department in respect of all items of contract contingent grants. The learned City Magistrate has coolly assumed that Mr. Lyons, the late Principal of the Government Technical School was either an accomplice of the applicant Chandika Prasad or a mere dupe of his. In the circumstances of this case and in the absence of Mr. Lyons it is not permissible for any Court to make this sweeping allegation against one who is not on his defence and who is not in a position to defend himself. Every page and every item of the account books and registers of the school produced in the Court bear the signature or initials of Mr. Lyons, the late Principal of the School. He has not been given an opportunity to explain these entries in his account books which are said to evidence the commission of the alleged offence of embezzlement. It is argued on behalf of the prosecution that money drawn from the Bank for payment of a particular bill has been appropriated towards the payment of another bill due to the same firm or person. Even if this were proved to be the case I fail to see how such conduct amounts to embezzlement of Government money. Taking the matter in its most serious or worst light, I find that it only amounts to a deliberate

violation of the account rules on the subject on the part of the applicant and of his late Principal, Mr. Lyons, rendering them both liable to severe departmental punishment. But it does not prove that either of them committed the criminal offence of embezzlement. The present case against the applicant was started not upon the complaint of Mr. Lyons but upon a letter sent by Messrs. Thacker Spink & Co. to the present Principal of the School, Mr. Mathewe, asking for payment of Rs. 172-6 which had been long outstanding. This sum of Rs. 172-6 was in respect of items included in the bill for Rs. 342-11, Ex. 22. This bill of Rs. 342-11 is included in the cheque for Rs. 4,393-10-6 (Ex. 19), and when this cheque Ex. 19 was sent to the Imperial Bank of India at Lucknow under the orders of Mr. Lyons together with Rs. 86-0-2 in cash the Principal of the School requisitioned for 9 remittance transfer receipts, one of which was for Rs. 155-8-0 in favour of Messrs Thacker Spink & Co. The learned City Magistrate and the learned Sessions Judge have both laid stress upon the fact that the account books are muddled and that the entries in the cash books and other registers are incorrect.

The fact that the accounts have been wrongly kept will not of itself prove that the applicant committed criminal breach of trust unless it can be shown that the applicant Chandika Prasad misappropriated the proceeds of any cheque or remittance transfer receipt or any cash proved to have been received by him. It is admitted that no cheque was drawn in favour of the applicant Chandika Prasad and that all cheques and drafts or remittance transfer receipts drawn in favour of various persons and firms were duly received and cashed by those persons and firms and that not a pie out of these cheques or drafts came into the pockets of the applicant. Realizing the great difficulties in the way of the prosecution owing to the absence of Mr. Lyons from India the learned Sessions Judge has convicted the applicant not for the offence in respect of which the charge sheet has been framed by the learned City Magistrate but for embezzling certain sums of money said to have been received in hard cash by the applicant from one Ali Naqi. The

learned Sessions Judge himself concedes that the applicant is not charged with any offence in respect of the money said to have been received by him from Ali Naqi but he justifies himself by adding that it forms the basis of the present charge against the applicant. The learned counsel for the applicant, Mr. St. George Jackson, vehemently protested against the conduct of the lower appellate Court in convicting the applicant of an offence in respect of a sum of money said to have been received in cash from Ali Naqi when the charge framed against the accused made no mention at all of this matter. There is no doubt great force in this contention of the learned counsel for the applicant but apart from this technical objection I find that the evidence of Ali Naqi is not only vague but unreliable and does not prove the guilt of the applicant. Ali Naqi does not know the exact amount he gave to Chandika Prasad or when he made those payments in respect of the price of books sold by him. He deposes that Mr. Lyons had told him to sell the books and hand over the price to the applicant. He has produced no written order of Mr. Lyons to that effect and he took no receipts either from Mr. Lyons or from the applicant when he made the alleged payment of the price of the books to the applicant. For aught I know to the contrary, Ali Naqi may have himself embezzled the price of the books which were deposited with him to be sold to the students of the school. He deposes that he sold seventy books at Re. 1-8-0 a book and gave the price Rs. 105 to the applicant and he took no formal receipt or even an informal acknowledgment from Chandika Prasad. There is no documentary evidence of any kind to corroborate the story told by Ali Naqi and I am not prepared to believe implicitly his solitary and unsupported testimony against the applicant, in view of his own conduct in showing Mathura Prasad a retired clerk as still on the establishment working in the name of Ori Lal. If the testimony of Ali Naqi is rejected, there is no evidence to prove that any money in cash was ever received by the applicant. There remain then only the erroneous entries in the cash books and account registers of the school written in the handwriting of the applicant and initialled or signed

and verified by the late Principal of the School. These wrong entries no doubt raise strong suspicion against the applicant, but, as was well pointed out by their Lordships of the Privy Council, suspicion through a ground for scrutiny may not be the basis of a civil Court decree much less can it justify the conviction of an accused person in a criminal trial for an offence under the Penal Code. The case for the prosecution has so far not emerged from the region of suspicion into the arena of proved concrete facts constituting an offence punishable under S. 409, I. P. C. The absence of Mr. Lyons has been a great handicap to the prosecution. The difficulties of the prosecution, however, furnish no legal justification for the conviction of the applicant Chandika Prasad on mere suspicion. These suspicions moreover operate as strongly in the present case against the applicant as against his late principal Mr. Lyons. The learned Sessions Judge very rightly deprecates any expression of opinion as to Mr. Lyons' liability in respect of the sum of money said to have been embezzled. Unfortunately he holds the applicant guilty of criminal breach of trust inasmuch as under the signature of his principal Mr. Lyons he caused the remittance transfer receipt for Rs. 155-8 to be issued at the end of March 1927 in favour of Messrs. Thacker Spink and Co. for payment of a bill for Rs. 183-11 although the money represented by the remittance transfer receipt or draft for Rs. 155-8 had been drawn for payment of another bill to Messrs. Thacker Spink & Co. I regret I find myself unable to accept this reasoning. All that it amounts to is that money drawn by the Principal of the school for payment of a bill due to a particular firm has been under his order appropriated towards the payment of another bill due to the same firm. This may be a serious irregularity in the eyes of the Audit Officer but it does not amount to an offence under S. 409, I. P. C. because no money was actually embezzled by anybody and because no money in fact reached the hands of the accused Chandika Prasad.

The learned City Magistrate as well as the learned Sessions Judge have both laid stress upon the subsequent conduct of the applicant in paying off the amount

due to Messrs. Thacker Spink & Co. and have considered that the fact that this money was paid on behalf of the applicant to this Calcutta firm is further ample proof of the applicant's guilt. I find myself unable to accept this line of reasoning when there is no evidence on behalf of the Crown sufficient to justify the finding that the accused committed the offence of criminal breach of trust. The mere fact that on account of sheer timidity or on account of a desire to avoid running the risk of disgrace of a criminal trial and of dismissal from Government service, either the accused or someone on his behalf paid off the amount said to have been embezzled to the party to whom it was due would not furnish any proof of his guilt. Such subsequent conduct is equally consistent with the innocence of the accused; and no inference adverse to him ought legitimately to be drawn from it. The learned Sessions Judge writes:

"If the appellant (Chandrika Prasad) was not guilty I do not see why he should have caused the bill to be paid in this way".

The simple answer to this method of reasoning is that different persons are differently constituted and that some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and that some other innocent accused do equally foolish things such as make false admission of guilt or pay off the amount said to have been stolen or embezzled in the vain hope that they may escape a criminal prosecution or get off with a light punishment. Such subsequent conduct dispenses with the positive proof of the guilt of the accused, the burden of which lies upon the prosecution. When once the Crown has established the guilt of the accused by the evidence of prosecution witnesses then such subsequent conduct may be utilised as furnishing further proof of the correctness of the conclusion; as to guilt of the accused drawn from the evidence of the prosecution witnesses by itself, however, it can furnish no legitimate proof of the guilt of the accused.

For the reasons given above I allow this application for revision, set aside the conviction and sentence passed upon the applicant Chandika Prasad, acquit him of the offence charged and order his immediate release.

V.B./R.K.

Revision allowed.

* A. I. R. 1930 Oudh 328

RAZA AND PULLAN, JJ.

S. Kashif Husain—Appellant.

v.

B. Sashidhar Singh—Respondent.

Execution Decree Appeal No. 42 of 1929, Decided on 9th January 1930, against order of Sub-Judge, Rae Bareilly, D/- 30th July 1929.

* Civil P. C., O. 34, R. 10—Provision is imperative and applies to costs incurred before or after final decree.

Rule 10 is imperative and all costs incurred in connexion with the suit up to the time of the payment of the decree, whether before or after the final decree must be included in the sum which can be realized by the sale of the mortgaged property. Until it is found that the costs cannot be realized by sale of such property it cannot be realized personally under R. 6 : A. I. R. 1930 Oudh 167, Ref.; A. I. R. 1926 All. 68; A. I. R. 1926 All. 722, Diss from. [P 229 C 1]

Ali-i-Raza—for Appellant.

Sheo Dulare Misra—for Respondent.

Judgment.—This is an appeal from an order of the Subordinate Judge of Rae Bareilly in an execution matter. The decree holder obtained a decree for a very large sum against the judgment-debtor and it is admitted that he has sold certain property in execution of that decree and that other property remains to be sold. On the occasion of the sale an objection was made by the judgment-debtor. The objection was dismissed and the Court ordered that certain costs be paid to the decree-holder. The amount now due is Rs. 159. The decree-holder has sought to execute the decree by attachment and sale of certain personal property of the judgment-debtor and the latter pleads that the amount due on this decree should be realized from the property mortgaged. The learned Subordinate Judge holds that the provisions of S. 34, R. 10, do not apply to the case. He bases his finding on the fact that these costs relate to a miscellaneous appeal and that they were not charged on the property by the highest Court, that is to say, this Court which decided the appeal in the objection case. We are not satisfied that the learned Subordinate Judge has construed correctly the provisions of O. 34, R. 10. This rule runs as follows:

"In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-

money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment."

It does not appear that this Court has ever considered this question in any previous case and we have been shown no decision of any High Court which has been reported in any authorized law report. We have, however, been referred to a decision of Sulaiman, J., (now Sir Mohammad Sulaiman) of the Allahabad High Court which was reported in A. I. R. for 1926 at p. 68 and a decision of a Bench of that Court sitting in Letters Patent Appeal from his decision reported at p. 722 of the same volume. The learned Judge was considering a case exactly parallel to the one before us. He expressed the opinion that O. 34, R. 10 does not apply to costs incurred in execution proceedings. He wishes to confine the meaning of the words contained in R. 10 to costs incurred in the suit in carrying out the directions contained in the decree, and he gives as an example costs incurred by a mortgagee who has been ordered to deliver the title deeds of the property or to furnish accounts. His reason for excluding costs incurred as a result of an objection to a sale made by the judgment-debtor is that otherwise the result might be extremely disadvantageous for the mortgagee. He observes;

"costs incurred by the mortgagee in resisting objections in the execution department or resisting appeals to higher tribunals, if they are only to be added to the mortgage money and cannot be realized against the judgment-debtor personally, would merely create a further charge on the mortgaged property which may not be sufficient to meet even the original liability."

Now it appears to us in the first place that R. 6, O. 34 is designed to prevent the mortgagee suffering the hardship referred to by the learned Judge, and secondly, we cannot exclude the costs incurred by the decree-holder in this case from the definition of costs given by the learned Judge himself. These costs were incurred in defending the sale carried out under the directions of the decree and, as we are unable to exclude entirely from the suit the execution proceedings arising from that suit, we must hold that these are costs properly incurred in the suit in carrying out the directions contained in the decree. We would point out further that R. 10 specifically

refers to the final adjustment of the amount to be paid and contemplates costs incurred up to the time of actual payment. This means actual payment of the decretal amount, and we consider that all costs incurred in connexion with the suit up to the time of the payment of the decree, whether before or after the final decree, must be included in the sum which can be realized by sale of the mortgaged property. The provision as observed by Sulaiman, J., is in the interest of the decree-holder and the section is imperative. The decree-holder at least has no option in the matter. We can see no relevancy in the observation of the learned Subordinate Judge that the highest Court did not charge these costs on the property. It was not necessary for the Court to do so. On the contrary, it would rather have been necessary for the Court to say definitely if a personal decree was intended as this is contrary to ordinary procedure. This was the view taken by a Bench of this Court of which one of us was a member in *Jugal Kishore v. Jagmohan Das* (1). We do not consider that the decree-holder has in this matter any option of recovering the costs against the judgment-debtor personally unless and until it is found that the property itself is in sufficient for this purpose. If the property is insufficient, the decree-holder may fall back on another rule, also enacted in his interest, namely, R. 6, O. 34. We regret that we are unable to follow the decision of the Allahabad High Court. As we have observed above it is an unreported decision and we have been shown no other authority to the same effect. In our opinion R. 10, O. 34 is clear and directs the Court to include costs such as these in the amount to be realized by sale and precludes a personal decree until the decree is paid up and proceedings are taken under O. 34, R. 6.

We accordingly allow this appeal and setting aside the order of the lower Court allow the objections with costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 329

RAZA AND SRIVASTAVA, JJ.

Thakur Nirman Singh and others—Appellants.

v.

Shyam Narain and others — Respondents.

First Appeal No. 112 of 1929, Decided on 24th March 1930, against order of Sub-Judge, Bahraich, D/- 29th June 1929.

Court-fees Act, S. 7 (ix)—In appeals and cross-objections from decrees in redemption and foreclosure suits future interest should not be taken into account while determining court-fees.

In the case of appeals or cross-objections in suits for redemption or foreclosure in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objections should be valued and future interest should not be taken into account : 36 All. 40 (F. B.) ; 17 Bom. 41 ; 3 P. L. J. 443, Foll. ; 22 O. C. 1, not Foll. [P 329 C 2]

Zakur Ahmad and Mohd. Hafeez—for Appellants.

Judgment.—We have read the office report and heard the appellant's learned counsel. The appellant's learned counsel questions the correctness of the office report. He contends that the appellants should not be required to pay court-fee on future interest and refers to the following rulings in support of his contention : *Raghubir Prasad v. Shanker Bakhsh* (1), *Vithal Hari Athavle v. Govind Vasudeo Thosar* (2) and *Rowlins v. Lachmi Narain Jhan* (3).

The Allahabad case is a Full Bench case. It was held in that case that the criterion laid down in S. 7 (ix), Court-fees Act, 1879, for determining the court-fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit. In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objections should be valued, and future interest should not be taken into account. In this *Allaha-*

(1) [1914] 36 All. 40=21 I.C. 723=11 A.L.J. 1016 (F.B.).

(2) [1893] 17 Bom. 41.

(3) [1918] 3 Pat. L.J. 443=(1918) P.H.C.C. 264=42 I.C. 50=4 Pat. L.W. 223.

bad case the decree appealed against was a decree for sale passed under O. 34, R. 4, Civil P. C. It was held in the Bombay case that no additional stamp is required on account of the claim for interest from the date of the institution of the suit until payment. It stands on the same footing as future mesne profits which do not fall under S. 7, Court-fees Act (7 of 1879). The Allahabad case was followed in the Patna case mentioned above.

Our attention has also been drawn to a ruling of the late Court of the Judicial Commissioner of Oudh in the case of *Gobardhan Dass v. Narendra Bahadur Singh* (4). That ruling is against the contention of the appellant's learned counsel. After hearing the appellant's learned counsel at some length we are inclined to take the view which was taken by their Lordships of the Allahabad High Court in *I. L. R. 36 All. 407*. We hold therefore that the appellant should not be required to pay any court-fee on future interests. The court-fee paid by the appellant is therefore held to be sufficient in all these cases.

S.N./R.K. *Appeal allowed.*

(2) [1919] 22 O.C. 1=50 I.C. 798.

A. I. R. 1930 Oudh 330

SRIVASTAVA, J.

Krishna Kumar and others—Plaintiffs—Appellants.

v.

Manzoor Ali — Defendant — Respondent.

Second Appeal No. 294 of 1929, Decided on 20th December 1929, from decree of Sub-Judge, Malihabad, D/- 26th August 1929.

(a) *Wajibularz* — Binding effect—Custom recorded in *wajibularz*—Court can refuse to accept *wajibularz* as against tenant if custom is prejudicial to him and is recorded *ex parte* at instance of zamindar.

In a case in which the tenants are not parties to the preparation of a *wajibularz*, the value to be attached to customs prejudicial to their interests and recorded *ex parte* at the instance of the zamindars, cannot be the same as in other cases in which the zamindars are responsible for dictating customs which concern themselves and in such case the Court is fully justified in refusing to accept the *wajibularz* as conclusive evidence of the custom so far as it affects the tenants: *A. I. R. 1928 Oudh 265, Foll.; 32 All. 363 (P.C.). Ref.* [P 331 C 2]

(b) Civil P. C. S. 100—Custom—Value to be attached to evidence for proving custom

is entirely within jurisdiction of Court of first appeal and Court of second appeal cannot reverse finding.

It is entirely within the province of a Court of first appeal to determine the value to be attached to the evidence and if upon an examination of the entire evidence the lower appellate Court has found that a custom has not been established, it is not open to any party to question the correctness of the conclusion arrived at by that Court in second appeal: *A. I. R. 1923 P. C. 70; A. I. R. 1927 P. C. 113 and A. I. R. 1926 Oudh 53, Dist.* [P 332C 1]

(c) Civil P. C. S. 100—Question of fact—Decision of tribal or family custom is finding of fact.

The decision of any tribal or family custom is a finding of fact which cannot be disturbed in second appeal: *A. I. R. 1928 Oudh 301, Rel. on.* [P 332 C 2]

Harish Chandra and Bishambhar Dayal—for Appellants.

Akhtar Husain—for Respondent.

Judgment.—This is a second appeal against the decision dated 26th August 1929 passed by the Subordinate Judge of Malihabad, Lucknow, reversing the decision dated 11th February 1929 passed by the Second Munsiff of the same place.

The appeal arises out of a suit brought by the plaintiffs claiming the price of certain manure and rubbish alleged to have been removed by the defendant to another village. This, it was alleged, he was not entitled to do. The facts are that the plaintiffs are the zamindars of mohal Yaqoob Ali, mauza Chandan, tahsil Lucknow and the defendant is an ex-proprietary tenant in the said mohal. The plaintiffs' case was that there was a custom obtaining in the village of Chandan which prevented a ryot tenant in the village from removing manure and rubbish to another village. The plaintiffs averred that the defendant committed a breach of this custom in removing the manure and rubbish from village Chandan to village Nizamuddinpur, and that they were in consequence entitled to Rs. 35 on account of the price of the said manure and rubbish. The defendant denied the custom and pleaded that no such custom had ever been followed in the village.

The learned Munsiff relying upon the *wajibularz* of the village held the custom proved, and gave the plaintiff a decree for Rs. 6 which was the amount fixed by him for the price of the manure and rubbish removed to Nizamuddinpur. On appeal the lear-

ned Subordinate Judge has disageeed with the finding of the trial Court and held the custom not proved. As a result of this finding he has dismissed the plaintiffs' suit. The plaintiffs have come here in second appeal.

The main contention urged by the learned counsel for the plaintiffs appellants is that the lower appellate Court, in the circumstances of the present case, should have accepted the entry in the wajibularz as conclusive evidence of the custom set up by the plaintiffs. The relevant portion of the wajibularz is as follows :

"The tenant cultivators appropriate their manure and rubbish but have no right to sell them or remove them to another village. Nor can they of their own accord give them to another person. The manure and rubbish of tenants who are not cultivators are appropriated by the landlord. Cattle of the residents of the village graze in the banjar lands and no grazing rights are charged from them."

The learned Subordinate Judge was of opinion that the value of such a provision of the wajibularz in so far as it records a custom which is distinctly to the benefit of the zamindars and imposes liabilities on the tenants, who were no parties to the preparation of the wajibularz, was not as great as in any other case where the zamindars dictated customs affecting themselves. He referred to the decision of a Bench of this Court *Narpat v. Mohammad Rafi* (1) in support of his view and relying upon the said decision held that in such a case the proper course for him to adopt was to examine the entire evidence and to see whether upon such evidence the existence of the custom could be considered to be established. It has been argued by the learned counsel for the appellants that the case of *Narpat v. Mohammad Rafi* (1) is distinguishable from the present case as the custom which was the subject of consideration in that case was one-sided and entirely to the benefit of the zamindar and prejudicial to the interests of the tenants, whereas the custom relied upon by him is not one of such a character. He has contended that the restraint imposed against the tenants of village Chandan in respect of the removal of manure and refuse to another village or of its transfer to another person, is compensated by the free right of pasturage

which has been allowed to them. I do not think that the two customs, one relating to manure and rubbish and the other to the right of pasturage can be connected as cause and effect. However, be it as it may, the principle which seems to underlie the decision in *Narpat v. Mohammad Rafi* (1) is that in a case in which the tenants are not parties to the preparation of a wajibularz, the value to be attached to customs prejudicial to their interests and recorded ex parte at the instance of the zamindars, cannot be the same as in other cases in which the zamindars are responsible for dictating customs which concern themselves. In my opinion the principle laid down, if I may say so with respect, is unexceptionable, and in such case the lower appellate Court was fully justified in refusing to accept the wajibularz as conclusive evidence of the custom so far as it affected the tenants and in looking to the other evidence on the record for the purpose of determining whether the custom was established or not.

In *Anant Singh v. Durga Singh* (2), their Lordships of the Judicial Committee remarked that there is no class of evidence that is more likely to vary in value, according to circumstances, than that of wajibularaiz. In my opinion the fact that certain burdens have been imposed upon the tenants or certain restraints have been placed upon their rights, which burdens or restraints are obviously to the benefit of the zamindars responsible for dictating the custom without the tenants having been afforded an opportunity to confirm or repudiate the said custom, is a circumstance which may well discount the value of the wajibularz. I am therefore of opinion that no fault can be found with the lower appellate Court for its refusing, in the circumstances of the present case, to accept the wajibularz as evidence of conclusive evidence of the custom.

Next the lower appellate Court proceeded to discuss the other evidence in the case which consisted of the oral evidence of a few witnesses on each side. The learned Subordinate Judge after discussing the entire evidence

(1) A. 1. R. 1929 Oudh 265=3 Luck 478.

(2) [1910] 32 All. 363=6 I. C. 787=37 I. A. 191 (P.C.).

came to the conclusion that the evidence led on behalf of the plaintiffs was not reliable and that the defendant's evidence showed that the custom set up by the plaintiffs had never been acted upon or enforced in the village. As a result he came to the conclusion that the entry in the *wajibularz* could not be considered as sufficient to establish the custom and he therefore held that the plaintiff had failed to establish it. In my opinion this finding of the lower appellate Court is a finding of fact which is binding upon the plaintiffs in second appeal. It is entirely within the province of a Court of first appeal to determine the value to be attached to the evidence and if upon an examination of the entire evidence the lower appellate Court has found that a custom has not been established, it is not open to any party to question the correctness of the conclusion arrived at by that Court, in second appeal.

The learned counsel for the plaintiffs-appellants has cited a few cases in support of his contention that the finding of the lower appellate Court on the question of custom being contrary to the terms of the *wajibularz* ought to be set aside in second appeal. In my opinion none of these cases can help the plaintiffs. The first case cited was *Balgobind v. Badri Prasad* (3). In this case their Lordships of the Judicial Committee held that when it is not shown by reliable evidence that the Settlement Officer neglected to perform his duties or was misled in recording a custom and it does not appear that the custom is ambiguous, the record in *wajibularz* is most valuable evidence of it. This was a case in which the decisions of the Courts in this country on the question of custom had not been concurrent, and therefore the finding of the late Court of the Judicial Commissioner of Oudh on the question of custom was open for consideration by their Lordships. It might also be mentioned that the custom at issue in that case was one regarding the exclusion of daughters, in other words, one affecting the zamindars who were responsible for the *wajibularz* relied upon in that case.

The next case relied upon was *Sheo-*

(3) A.I.R. 1923, P.O. 70=26 O.C. 217=50 I.A. 196 (P.C.)

baran Singh v. Kulsumunnissa (4). The remarks made with respect to the previous case apply to this case also. The appeal before their Lordships of the Judicial Committee was against the decision of the Allahabad High Court which had reversed the decree of the Additional Subordinate Judge of Aligarh and the custom under consideration was a custom of pre-emption affecting the zamindars at whose instance the custom was recorded.

Lastly, reliance was placed on a case in *Raz Husain Khan v. Subhani* (5). This is a single Judge case of the late Court of the Judicial Commissioner of Oudh in which Mr. Dalal (now Dalal, J.) held that the question whether in any given instance the evidence led to prove the existence of attributes essential for a valid custom is adequate or inadequate proof of what the law requires is a question of law which can be discussed in second appeal. It is sufficient to say that the question in the present case is not regarding the existence of any of the attributes of a valid custom but regarding the existence of the custom itself.

The present case is covered by the decision of a Bench of this Court of *Rama Nand v. Maharaji* (6), in which it was held that the decision of any tribal or family custom is a finding of fact which cannot be disturbed in second appeal. This contention of the plaintiffs must therefore fail.

Next it was contended that the lower appellate Court has failed to consider the evidence of D. W. 1 Raghubar Dayal. This contention has no substance. The learned Subordinate Judge has discussed the evidence of this witness. It is not necessary that he should have referred to each and every sentence of his statement but in the face of the express reference to the testimony of this witness contained in the judgment of the lower appellate Court, it is not possible to say that his evidence has been ignored.

Lastly it was pointed out that the finding of the lower appellate Court that the manure in question was not stored in the plaintiff's mahal is not

(4) A.I.R. 1927 P. C. 113=49 All. 367=54 I.A. 204 (P. C.)

(5) A. I. R. 1926 Oudh. 53

(6) A. I. R. 1928 Oudh. 301

correct, and that in any case the question of the place of storage was immaterial. I am inclined to agree with the argument of the plaintiffs-appellants that on the terms of the *wajibularz*, the application of the custom mentioned therein is not affected by the place of storage. However, it is not necessary to discuss this matter at any length because in my opinion the appeal must fail on the finding of the lower appellate Court which has been accepted by me that the plaintiffs have failed to establish the custom set up by them.

I, therefore, dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 333

WAZIR HASAN, C. J., AND
SRIVASTAVA, J.

Ram Saran Misra — Plaintiff — Appellant.

v.

Jhullar Singh and others — Defendants — Respondents.

First Appeal No. 74 of 1929, Decided on 7th March 1930, from order of Sub-Judge, Fyzabad, D/- 15th April 1929.

Hindu Law—Joint family—Suit on mortgage by manager of joint family property—Court has power to enquire into propriety of transaction as also question of rate of excessive interest, onus of proving which lies on mortgage.

In a suit on a mortgage of the joint family property by the manager of the joint family, the Court has jurisdiction not only to enquire into the propriety of the transaction itself but also under the same issue to enquire into the question as to whether the rate of interest agreed upon by the managing member of a joint Hindu family was justifiable under the circumstances of the particular case. And the onus of establishing family necessity with regard to the excessive rate of interest lies on the mortgage: *A. I. R. 1919 P.C. 12* and *A. I. R. 1923 P. C. 37, Rel. on.* [P 333 C 2]

H. Husain—for Appellant.

Ghulam Imam and Ali Zaheer — for Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Fyzabad dated 15th April 1929. The suit, out of which this appeal arises, asking for the relief of foreclosure in respect of certain immovable property on the basis of a deed of mortgage dated 9th May 1912. The mortgage was executed by certain members of a joint Hindu family and the property mortgaged was the joint family property. These facts are no longer

disputed. The plaintiff has obtained a decree in terms of his prayer from the trial Court but the interest which was due to him under the terms of the mortgage on the principal sum advanced has been reduced by the learned Judge of that Court. The rate of interest provided in the deed of mortgage was 24 per cent. per annum compound with yearly rests. The learned Judge of the trial Court has reduced it to 9 per cent per annum simple. The appeal before us challenges the propriety of this part of the decree only. The defendants have accepted the decree passed by the lower Court.

The argument in appeal is that the learned Judge of the trial Court has done two wrongs to the plaintiff by one stroke of pen. He has not only reduced the rate of interest but has also eliminated the condition as to the yearly rests altogether and this he should not have done.

We are of opinion that the argument is more ingenious than substantial. It is settled law that the Court has jurisdiction in a transaction of this nature not only to inquire into the propriety of the transaction itself but also under the same issue to inquire into the question as to whether the rate of interest agreed upon by the managing member of a joint Hindu family was justifiable under the circumstances of a particular case. In *Nazir Begam v. Raghunath Singh* (1), Lord Phillimore, in delivering the judgment of their Lordships of the Judicial Committee, observed :

"It remains, therefore, that there was necessity and in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority."

"What the particular rate of interest should be, and whether the money could have been borrowed at simple, instead of compound, interest are matters of detail upon which the High Court with its local knowledge can well be left to decide, and their Lordships are not disposed to interfere with the decision upon points such as these."

The trial Judge is of opinion that the adult member of the family in this case exceeded authority in borrowing money on these terms of interest. He points out that the bulk of the consideration for the mortgage in suit was utilized for

(1) *A. I. R. 1919 P. C. 12 = 41 All. 571 = 46 I. A. 145 (P.C.).*

the redemption of the earlier mortgages which were possessory in their nature and carried very low rate of interest. He also points out that no evidence had been given by the mortgagee to show circumstances which might have justified the manager in agreeing to borrow on such terms as these. He further observes that there was no evidence that the creditors of the earlier mortgages were pressing for payment of their debts or that money could not be obtained elsewhere on easier and more reasonable rates. He thinks that the terms of the deed of mortgage in suit relating to interest are not only exorbitant but are also usurious. We are wholly unable to contradict these observations of the learned Judge of the trial Court or even to say that they have little or no force.

The view of law which underlies the opinion of the learned Judge of the trial Court that the onus of establishing family necessity with regard to the excessive rate of interest was on the plaintiff is clearly right: *Ram Bujhawan Prasad Singh v. Nathu Ram* (2) and the view of evidence that the plaintiff has failed to discharge that onus is one with which we are not prepared to disagree.

The appeal, therefore, fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(2) A. I. R. 1923 P. C. 37=2 Pat. 285 = 50
I. A. 14 (P.C.).

A. I. R. 1930 Oudh 334 (1)

STUART, C. J.

Taen—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 117 of 1929. Decided on 19th December 1929, from order of Sess. Judge, Sitapur, D/- 30th October 1929.

Criminal P. C., S. 423—Appeal should not be dismissed in default but should be enquired into.

A Sessions Judge should not dismiss an appeal for default under the provisions of S. 423, but should enquire into the merits of the case and see if there is any force in it. [P 334 C 1]

Zafar Hussain—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The learned Sessions Judge should not have dismissed the appeal in default under the provisions of S. 423, Criminal P. C., but should have inquired into the merits. But I

do not propose to send it back to him for rehearing for I have looked into the merits and I find that there was no force in the appeal at all. The case was a very clear one against all the persons convicted and the sentences are not excessive. In these circumstances I do not propose to interfere and dismiss this application.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Oudh 334 (2)

STUART, C. J., AND RAZA, J.

Emperor

v.

Chiraunji Lal—Accused.

Criminal Ref. No. 1 of 1930, Decided on 31st January 1930.

Criminal P. C., S. 307 — Charge good — Verdict of jury unanimous but Judge disagreeing—Jury's view not bad or impossible —High Court is unable to reverse verdict of jury.

Where the charge is good and verdict of the jury unanimous but Judge disagrees, provided the jury's view is neither bad nor impossible one, High Court should not reverse the verdict. [P 334 C 2]

H. K. Ghose—for the Crown.

J. Jackson—for Accused.

Raza, J.—This is a reference from the learned Third Additional Sessions Judge of Lucknow against a jury verdict acquitting a certain Chiraunji Lal. The case was tried by the learned Judge and a jury who unanimously acquitted Chiraunji Lal. We have been through the record. The learned Judge tried the case very carefully and very fairly. The charge to the jury was a good charge. The jury unanimously acquitted Chiraunji Lal. This is a case in which a great deal could be said on both sides. The Sessions Judge's view is a good view and a possible view but we cannot go so far as to say that the jury's view was a bad view or an impossible view. The case was undoubtedly not free from difficulty and the evidence of the complainant Chhotey Lal was open to considerable criticism. The jury took the view that the evidence was unreliable. We do not say that they were right but we certainly cannot say that they were wrong and in these circumstances we are unable to reverse their verdict. The result is that we acquit Chiraunji Lal and direct him to be set at liberty.

V.B./R.K. *Accused acquitted.*

A. I. R. 1930 Oudh 335WAZIR HASAN, C. J. AND
SRIVASTAVA, J.*Bijai Bahadur Singh and another—*
Defendants—Appellants.

v.

Bhagwan Bakhsh Singh—Plaintiff—
Respondent.Second Rent Appeal No. 36 of 1929,
Decided on 7th March 1930, from decree
of Dist. Judge, Fyzabad, D/- 26th April
1929.Civil P. C., S. 11—Even *ex parte* decision
in previous rent suit involving questions of
status and rate of rent operates as *res judi-*
cata as regards these questions.If in a previous suit by landlord against the
tenant for rent the questions of status and rate
of annual rent were directly and substantially
in issue; they operate as *res judicata* in subse-
quent rent suit between the same parties or the
landlord and the tenant's assignees or trans-
ferees, and this is the case even though the de-
cree in the previous case be *ex parte*: *A. I. R.*
1927 All. 552; *A. I. R.* 1925 Mad. 378; 7 O. C.
169, *Rel. on.* [P 335:C 2]*H. Husain—*for Appellants.*R. D. Sinha—*for Respondent.**Judgment.**--This is an appeal from
the decree of the District Judge of
Fyzabad dated 26th April 1929, affirm-
ing the decree of an Assistant Collector
of the First Class, Sultanpur, dated 29th
September 1928.In the plaint of the suit, out of which
this appeal arises, the plaintiff-respon-
dent prays for a decree for arrears of
rent for three years against the defen-
dants-appellants at the rate of Rs.
162-10-9 a year. The status assigned to
the defendants in relation to the hold-
ing for which the rent is claimed is that
of a mere tenant. There were several
defences raised to this, suit but for the
purpose of deciding the appeal it is
necessary to refer only to one of such
defences. The defendants denied that
they were mere tenants and alleged that
they were perpetual lessees liable to
pay rent at a much lower rate than that
claimed in the plaint. This defence has
been rejected by the Courts below on
the ground *inter alia* that it is barred
by *res judicata*. We are of opinion that
the decision of the lower Court is cor-
rect and it is agreed that on that con-
clusion the appeal fails.At the previous hearing of this appeal
the learned counsel for the parties ad-
mitted that on the record of the appeal
material for determining the question
of *res judicata* as set forth above wasscanty and both sides asked for leave to
produce additional documentary evi-
dence in that behalf. We granted leave
prayed for and the result has been that
fresh documents in support of the plea
of *res judicata* have been produced and
admitted in evidence. Ex. 2 is a certi-
fied copy of a plaint in a suit instituted
in the year 1918 by the plaintiff-respon-
dent Raja Bhagwan Bakhsh Singh,
against the predecessor-in-interest of the
defendants-respondents in the Court of
an Assistant Collector of the First Class
for the recovery of arrears of rent in
respect of the same holding for which
the plaintiff claims in the present suit.
Ex. 2 is a certified copy of the decree
which the Court passed on 8th August
1918 in respect of the claim embodied in
the plaint just now mentioned. The
claim was decreed *ex parte* to its full
extent. Ex. 3 is a certified copy of a
plaint of another suit of a similar nature
instituted in the year 1924 by the plain-
tiff Raja Bhagwan Bakhsh Singh
against the defendants-appellants. The
suit was again decreed *ex parte* on 31st
July 1924 (Ex. 3.)It will be seen from what we have
stated above that on both occasions the
defendants were treated as mere tenants
and not perpetual lessees and the rate
of rent was Rs. 162-10-9 a year. On that
footing and at that rate of rent claims
were decreed. The present suit is ex-
actly of the same nature. The plaintiff
now, as he had done before, assigns the
status of ordinary tenants to the defen-
dants and claims rent at the same rate
of R. 162-10-9 a year. The two issues
therefore as to the status of the defen-
dants and the rate of annual rent were
directly and substantially in issue be-
tween the same parties and were adjudi-
cated by a competent Court in favour of
the plaintiff on both the previous occa-
sions. The decisions on those issues
therefore constitute *res judicata* in res-
pect of the same issues now raised.
There is ample support in decided cases
for the view which we are taking and
we may refer to *Mahomed Karamat Ali*
Khan v. Ganeshi Lal (1), *Govindoss*
Krishnadass v. Manikyanayanim Varu
(2) and *Partab Narain Singh v. Ragho*
Behari (3). But apart from precedents(1) *A. I. R.* 1927 All. 552=49 All. 658.(2) *A. I. R.* 1925 Mad. 378.

(3) [1904] 7 O. C. 169.

the matter is quite simple and no arguments were addressed to us against it by the learned advocate for the appellants.

We accordingly dismiss this appeal with costs.

V.B./R.K. •• *Appeal dismissed.*

***A. I. R. 1930 Oudh 336**

SRIVASTAVA, J.

Mathura and others—Defendants—Appellants.

v.

Bindra—Plaintiff—Respondent.

Second Appeal No. 344 of 1929, Decided on 27th March 1930, against decree of Addl. Sub-Judge, Bahraich, D/- 29th August 1929.

* Hindu Law—Partition—Reunion—*D* separated and subsequently reunited with his father—*D* dying in state of reunion leaving behind father and separated whole brothers—Brothers succeed to property which fell to *D*'s share at partition in preference to father.

Where a certain property falls to the share of *D* at the time of partition and *D* subsequently reunites with his father and dies in the state of the reunion leaving behind him his reunited father and two separated whole brothers, the brothers succeed to the property of *D* which fell to his share at partition in preference to father even though *D* had reunited with his father. [P 336 C 2]

Murli Manohar—for Appellants.

S. M. Ahmad—for Respondent.

Judgment.—The facts of the case which has given rise to this appeal have been stated by me sufficiently in my order of remand. I need not therefore re-state them again. The finding returned by the trial Court is that of the two houses in suit: house 1 fell to the share of Dwarka and house 2 to the share of Ratan at the partition. The correctness of this finding is accepted by both the parties. The result therefore is that the defendants-appellants can have no claim in respect of the house 2 which fell to the share of Ratan. The decree passed by the lower appellate Court in favour of the plaintiff in respect of that house must therefore be accepted as correct.

As regards the house which had fallen to the share of Dwarka, the position as it emerges from admitted and proved facts is this. The house in question fell to the share of Dwarka at the partition. Dwarka subsequently reunited with his father. He died in the

state of reunion leaving behind him his reunited father Ratan and two separated whole brothers Mathura and Bharat. Mathura and his sons who are the defendants-appellants claim that Mathura has a preferential right to succeed to the house belonging to Dwarka as against his father Ratan. I think this contention is correct and must be accepted. Ch. 4 of Viramitrodaya deals with the subject of reunion. S. 4 of this chapter lays down the order of succession thus:

"In default of the brothers, the father; in his default, the mother; in her default the senior wife."

(Translation by Golapchandra Sarkar Edn. 1879, pp. 214 and 215). The summary of the order of succession governing the estate of a person who died without male issue after reunion is also to be found in the index at p. 280 of the above translation. It will appear that an unassociated whole brother ranks higher than a reunited father in the order of succession. The Mitakshara, Ch. 2, S. 9, also deals with the reunion of kinsmen after partition. Para. 9 of this section shows that relationship by the whole blood is a reason for the succession of the brother though not reunited in coparcenary. The order of succession among reunited persons is also to be found in Sarkar's Hindu Law, sixth edition, on p. 493: A separated full brother comes in the fifth class whereas a reunited father finds place in the seventh class in this table. On the same page the learned author also remarks as follows:

"Nor can there be any doubt that a separated full brother of a person who became reunited with the parents or the paternal uncle is entitled to succeed to that person's estate in preference to the parents or the paternal uncle who became reunited with him."

Mayne's Hindu law, Edn. 9, p. 865 also supports the same view. The learned author observes that:

"in default of reunited brothers of the half blood or of any brothers of the whole blood, succession passes in order to the father or paternal uncle if reunited."

It is hardly necessary for me to enter into an academic discussion of the question whether the rule of survivorship applies to the estate of reunited coparceners or not. If it does, the rule in favour of the succession of the brother of the whole blood in preference to a reunited father, must be regarded as an

exception to it. I have therefore no hesitation in holding that Mathura and Bharat are entitled to succeed to the house which fell to the share of Dwarka on partition in preference to their father Ratan in spite of the fact that Dwarka had reunited with the latter. The plaintiff bases his claim on the deed of gift executed in his favour by Ratan. As Ratan had no title to this house the deed of gift in respect of it must fail. The result therefore is that I allow the appeal and modify the decision of the lower appellate Court by dismissing the plaintiff's claim in respect of house 1, mentioned in the plaint. As the victory has been evenly divided between the parties I direct that they should bear their own costs throughout.

P.N./R.K.

Decision modified.

A. I. R. 1930 Oudh 337

NANAVUTTY AND SRIVASTAVA, JJ.

Qasim Bux—Plaintiff—Appellant.

v.

Bhagwandeem and *another*—Defendants—Respondents.

Second Appeal No. 360 of 1929, Decided on 25th February 1930, from decree of the Sub-Judge, South Unao, D/- 7th November 1929.

Transfer of Property Act, S. 72—Usufructuary mortgage of house—House in precarious condition and deed authorizing mortgagee to rebuild it if it fell in the rains—House falling and mortgagee rebuilding former katcha house pucca but of same size—Mortgagee is entitled to rebuild it in the manner he did and must be allowed to recover reasonable costs of improvements.

In allowing costs of improvements the Court must naturally be on its guard against extravagant and unfounded claims and should enquire strictly into the facts and fairness of the claim in each particular case: 43 *Bom.* 69; 78 *P. R.* 1919, *Foll.*

A usufructuary mortgage deed in view of the precarious condition of the house tumbling down in the rains authorized mortgagee to rebuild any portion of the house that may fall down. The house fell down in the rains and the mortgagee rebuilt the former katcha house with pucca materials, the house being of the same size and pattern.

Held: that the mortgagee was entitled to rebuild the former katcha house in a more substantial manner as he did, so as to avoid the constant expenses for repairs and was entitled to recover the reasonable expenses incurred by him. [P 338 C 2]

Zahur Ahmad—for Appellant.*Radha Krishna*—for Respondents.

1930 O/43 & 44

Judgment.—This is the plaintiff's appeal from an appellate judgment and decree of the Court of the Subordinate Judge of South Unao confirming the judgment and decree of the Munsiff of North Unao. The facts out of which this appeal has arisen are briefly as follows: The plaintiff Kasim Beg brought a suit for redemption of his house situated in the town of Unao. The house was mortgaged by his father Karim Baksh in favour of Bhagwandin Barhi, defendant 1 for Rs. 90, on 5th September 1911. Jagannath, son of Pancham, defendant 2, has purchased the mortgagee rights of Bhagwandin in respect of a portion of the mortgaged house by means of registered sale deed dated 11th July 1921. The two daughters of the mortgagor were impleaded as pro forma defendants 3 and 4, as they were said to be excluded from inheritance by custom. Only defendants 1 and 2 contested the suit. They pleaded that the plaintiff's father really sold the house in suit to defendant 1, that it had fallen down during the monsoon of 1915 and was rebuilt by him and that, in any case plaintiff cannot redeem his house except on payment of Rs. 2,920.

The learned Munsiff gave the plaintiff a decree for redemption of his house on payment of Rs. 887. The plaintiff appealed but the learned Additional Subordinate Judge of Unao dismissed the appeal and confirmed the judgment and decree of the Munsiff. In second appeal the learned counsel for the plaintiff-appellant has contended before us that the mortgagee was not legally entitled to build a pucca house in place of the katcha house mortgaged to him, that the mortgagee cannot in law be permitted to improve the mortgagor out of his estate, that no part of the brick work or wood work was actually necessary having regard to the kind of building that existed on the date of the mortgage in 1911 and that the sum of Rs. 396 allowed as interest on the principal sum of Rs. 301 found due to the defendants by the lower Courts was too large a sum for the plaintiff-appellant who is a poor man to pay and that it virtually made the redemption of the house impossible for him.

The principal point for determination in this second appeal is.

On payment of what sum of money should the plaintiff be allowed to redeem his house ?

It was strenuously argued before us that the mortgagee was not entitled to turn the old katcha house into a pucca one and to charge the mortgagor with the cost of such new construction at the time of redemption, thereby virtually improving the mortgagor out of his estate. In support of this contention reliance was placed upon a ruling of the Madras High Court reported in *Arunachalla Chetty v. Sithayi Ammal* (1) in which it was held that S. 72 (b), T. P. Act, did not permit a mortgagee in possession to effect improvements, and that consequently in a suit for redemption the cost of such improvements cannot be legally charged against the mortgagor seeking to redeem his mortgage. The same principle was re-affirmed in a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Jangi Ram v. Ch. Sheoraj Singh* (2) in which it was held that S. 72, T. P. Act, did not permit a mortgagee to make improvements at the expense of the mortgagor with the object of deriving a greater benefit from the mortgaged property during the period of his enjoyment and to add the costs of the same to the mortgage money and in *Gauri Shankar v. Badri Nath* A. I. R. 1925 Oudh 685 it was held that a mortgagee of a katcha house could not convert the same into a pucca building without the clear consent of the mortgagor. The learned counsel for the plaintiff-appellant also relied upon two rulings of the Allahabad High Court reported in *Rupan Singh v. Champalal* (3) and in *Rahmat Ullah v. Yusuf Ali* (4). In the ruling last quoted it was held that the mortgagee who had expended money on making additions to the mortgaged premises would be entitled in a suit for redemption to be repaid the expenses so incurred by him provided the additions made were "accessions" within the meaning of S. 63, T. P. Act, or were necessary for the preservation of the property or were lasting improvements reasonably made for the benefit of the property which added to its selling value.

(1) [1896] 19 Mad. 827.

(2) [1915] 2 O. L. J. 338=30 I. C. 294.

(3) [1915] 37 All. 981=26 I. C. 521=13 A. L. J. 14.

(4) [1912] 10 A. L. J. 124=16 I. C. 635, .

We will now turn to discuss the applicability of the ruling cited by the learned counsel for the appellants to the facts of the present case. It is found by both the lower Courts that the mortgaged house fell down in the rains of 1915 and was rebuilt pucca some time in 1915 or 1916. Further the terms of the mortgage deed (Ex. 1) dated 5th September 1911, upon which the plaintiff bases his suit for redemption expressly authorize the mortgagee to rebuild any portion of the house that may fall down during the rains. In fact the parties to the mortgage-deed in view of the precarious condition of the old katcha house, themselves contemplated the possibility of the house tumbling down in the rains in any year and made provision for the same in their deed. They further set aside a lump sum of Rs. 10 a year for the annual repairs to the house. In these circumstances we cannot agree with the argument of the learned counsel for the plaintiff-appellant that the mortgagee was bound to rebuild the house with katcha materials. In our opinion he was entitled to rebuild it in a more substantial manner so as to avoid the constant expense for repairs and we do not think that the sum allowed by the lower Courts to the mortgagee as the amount spent on the work of reconstruction is excessive. In fact the scrutiny exercised by the learned Judge of the trial Court in allowing only what was absolutely necessary for brick-work and wood-work and mud-work is in our opinion very searching and quite fair to both parties. In the present case it must be borne in mind that the present pucca building erected over the ruins of the old katcha house is not a bigger house than the old one. It is of the same size and pattern as the old katcha house and the difference in the materials used is of no real legal significance provided the new construction be deemed :

"a lasting improvement reasonably made for the benefit of the property and has added to its selling value."

This view is supported by a ruling of the Bombay High Court reported in *Nijalingappa v. Chanbasawa* (5) in which it was held that in allowing costs of improvements the Court must naturally be on its guard against extravagant and

(5) [1919] 43 Bom. 69=47 I. C. 751=20 Bom. L. R. 895.

unfounded claims and should enquire strictly into the facts and fairness of the claim in each particular case. The same principle was laid down in *Rikhi Kesh v. Jwala Sahoy* (6).

Upon a careful consideration of all the facts of the case and in particular the terms of the mortgage deed, we are clearly of opinion that the mortgagee is entitled to recover Rs. 301 on account of the new pucca house. He is also clearly entitled to Rs. 90 on account of the consideration entered in the mortgage deed now sought to be redeemed as also to a sum of Rs. 100 on account of annual repairs at the rate of Rs. 10 a year. The next question for determination is as to the amount of interest which the mortgagee should be allowed on the sum of Rs. 301 which the mortgagor has to pay as costs of the new construction. The lower Courts have allowed the mortgagee the large sum of Rs. 396 as interest on this principal sum of Rs. 301. We consider that the equities of the case will be met if the mortgagee is allowed interest on Rs. 301 for 11 years at 9 p. c. per annum. This comes to Rs. 298. The total amount which the plaintiff will have to pay before he is allowed to redeem the house thus comes to Rs. 789 and is made up as under :

| | |
|---------|--|
| Rs. 90 | On account of principal. |
| Rs. 100 | On account of repairs. |
| Rs. 301 | On account of new construction. |
| Rs. 298 | On account of interest for 11 years on Rs. 301 at 9 p. c. per annum. |

Total Rs. 789

We accordingly partially allow this appeal, modify the judgment and decree of the lower appellate Court and give the plaintiff a decree for redemption of the house in suit on payment of Rs. 789. The plaintiff will be allowed six months from today to deposit the amount in Court. If he fails to do so he will be for ever debarred from redeeming the property in suit. A preliminary decree for redemption will be prepared under O. 34, R. 7, Civil P. C. Defendants 1 and 2 will get their proportionate costs in all Courts from the plaintiff-appellant.

P.N./R.K.

Order accordingly.

(6) [1919] 78 P. R. 1919=52 I. C. 862.

A. I. R. 1930 Oudh 339

WAZIR HASAN, Ag. C. J. AND PULLAN, J.
Chandi Singh and others—Plaintiffs—Appellants.

v.

Gur Prasad Singh and others—Defendants—Respondents.

First Appeal No. 18 of 1929, Decided on 27th February 1930, against decree of Sub-Judge, Malihabad, Lucknow, D/- 3rd October 1928.

(a) *Wajibularz—Binding effect—Statement of proprietors and interested persons as to practice they would wish to prevail and not ascertained facts of well established custom is not record of custom.*

Where *ex facie* entries in the *wajibularz* are not entries made by a Settlement Officer as a result of his enquiry which he was enjoined by law to make, but are reproductions of the statements of the proprietors of the village and partly of the *patwari*, and it is established that it was not unusual at the period of time when the particular *wajibularz* was prepared for the Settlement Officer to allow the statements of the proprietors of the village as such to go into the record in the *wajibularz*, the statements cannot be claimed after a lapse of 50 years as official record of custom when in truth they were merely statements of interested parties and views of individuals as to the practice that they would wish to see prevailing, and not ascertained facts of well established custom, and they are not entitled to the same sanctity as attach to a record of custom made by the Settlement Officer presumably after judicial or quasi-judicial enquiry: 15 Cal. 20 (P.C.); A. I. R. 1930 P. C. 35; A. I. R. 1923 P. C. 70; 26 Cal. 81 (P.C.) and 32 All. 363, (P.C.), *Ref.* [P 342 C 1, 2]

(b) *Hindu Law—Custom—Adoption—Custom of adoption recorded silent on point of husband's permission which is sine qua non of validity of adoption—Entry cannot supersede general law.*

If an entry in *wajibularz* with regard to custom of adoption by Hindu widow is silent on the question of husband's permission which is the *sine qua non* of the validity of adoption by a Hindu widow, the entry cannot supersede the general law that a Hindu widow can make an adoption only with permission of her husband: 12 M. I. A. 523; 29 Cal. 828 (P.C.); A. I. R. 1921 P. C. 62; 14 M. I. A. 570 and 3 I. A. 259, *Ref.* A. I. R. 1923 P. C. 90, *Dist.*

[P 345 C 1]

(c) *Hindu Law—Widow—Alienation—Consent of reversioners.*

Where entire body of reversioners is a party to an alienation made by a widow, the act of joining in execution of deeds of transfer is the highest and the most unequivocal form of consent which they can give to the alienation and they are estopped from impugning it: A. I. R. 1918 P. C. 196, A. I. R. 1923 P. C. 189, *Rel. on.*

[P 350 C 2]

(d) *Limitation Act, Art. 141—Suit by reversioner of deceased proprietor challenging*

alienation made by widow and mother holding jointly with rights of survivorship—Art. 141 applies.

Where mother and the widow both hold property of the deceased jointly without proprietary rights in the same but with rights of survivorship, a suit by reversioner impeaching alienations made by the survivor of the two on the death of the survivor is governed by Art. 141: 23 Bom. 725 (P.C.) and A.I.R. 1929 P.C. 166, Ref. [P 348 C 2]

M. Wasim, Ali Zaheer, Hakim Uddin, B. P. Misra and D. K. Seth—for Appellants.

P. L. Banerji, Makund Behari Lal, Balaram Krishna, Pyare Lal Varma, Lakshman Prasad Srivastava, Ali Jawad and Mohammad Azhar Ali—for Respondents.

Judgment.—This is the plaintiffs' appeal from the decree of Subordinate Judge of Malihabad dated 30th October 1928.

The plaintiffs claim title to the property in suit as Hindu reversioners to the estate of one Munnu Singh, whose widow, Mt. Bhagana, died on 24th August 1927. They challenge the adoption made by Mt. Bhagana of Rampal Singh, minor defendant, both as to its factum and validity. Mt. Bhagana executed a deed of adoption on 8th July 1927 (Ex. C-1). The ground of challenge against the adoption is twofold: (1) that Mt. Bhagana had no permission from her husband, Munnu Singh, and (2) that it was induced by undue influence exercised on her by Beni Madho Singh, father of Rampal Singh, and Jagmohan Singh, brother of Beni Madho Singh. The plaintiffs also challenge certain alienations made by Mt. Bhagana alone or by her and Mt. Rajjo, widow of Ganesh Singh, father of Munnu Singh, in favour of one Durga Singh, grandfather of Gur Prasad, defendant 1, and father-in-law of Mt. Chhutku, defendant 2, and in favour of Jangi Singh, father of Gur Prasad. It will now be convenient to state the family pedigree.

(For pedigree table see p. 341.).

In this Court at the hearing of the appeal the following facts were agreed to by the counsel on both sides. (1) That Ganesh Singh died some time in the year 1865 and that Munnu Singh survived him. (2) That Munnu Singh died 20 or 21 days after the death of his father, Ganesh Singh. (3) That Mt. Rajjo, widow of Ganesh Singh and mother of Munnu Singh, died in the

year 1884. (4) That Mt. Bhagana, widow of Munnu Singh, died on 24th September 1927. (5) That the plaintiffs at the date of Mt. Bhagana's death were the nearest reversioners to the estate of Munnu Singh. (6) That the alleged adoption was made by Mt. Bhagana without her having had the permission of her deceased husband, Munnu Singh.

The plaintiffs' case therefore is a simple case of Hindu reversioners entitled to succeed to the estate of their collateral on the death of the widow of such a collateral. Their claim is, however, resisted on several pleas raised by the defendants in their written statements. Those pleas may be briefly stated as follows:

1. That by reason of the custom of the family Mt. Bhagana was competent to make an adoption even in the absence of authority from her husband and therefore the adoption was valid and that it was not vitiated by undue influence.

2. That Mt. Rajjo acquired absolute title to one-half of the estate of Munnu Singh by prescription and succession to that portion of the estate opened on her death in the year 1884 and as in the circumstances of the case her husband's heirs were heirs to her personal property and they not having sued within 12 years from her death the plaintiffs' title to the said half-share was extinguished by the rule of limitation.

3. That by reason of the custom of the family Mt. Bhagana held the estate of her husband in absolute proprietary title and therefore the alienations made by her are valid and subsisting.

4. That the plaintiffs Bhagwant Singh and Bharat Singh are estopped from claiming any share in that portion of the estate of Munnu Singh to the alienation of which by Mt. Bhagana they had given their consent. Admittedly this plea of estoppel refers to the eight annas share in village Salehnagar, pargana Malihabad, district Lucknow, which is covered by the sale-deed of 2nd February 1897 in favour of Jangi Singh, father of Gur Prasad defendant 1 (Ex. 1.).

The plaintiffs' special reply as regards pleas 2, 3 and 4 is that they are excluded by res judicata arising out of the judgment of the late Court of the Judicial Commissioner of Oudh dated 12th January 1905 (Ex. 2).

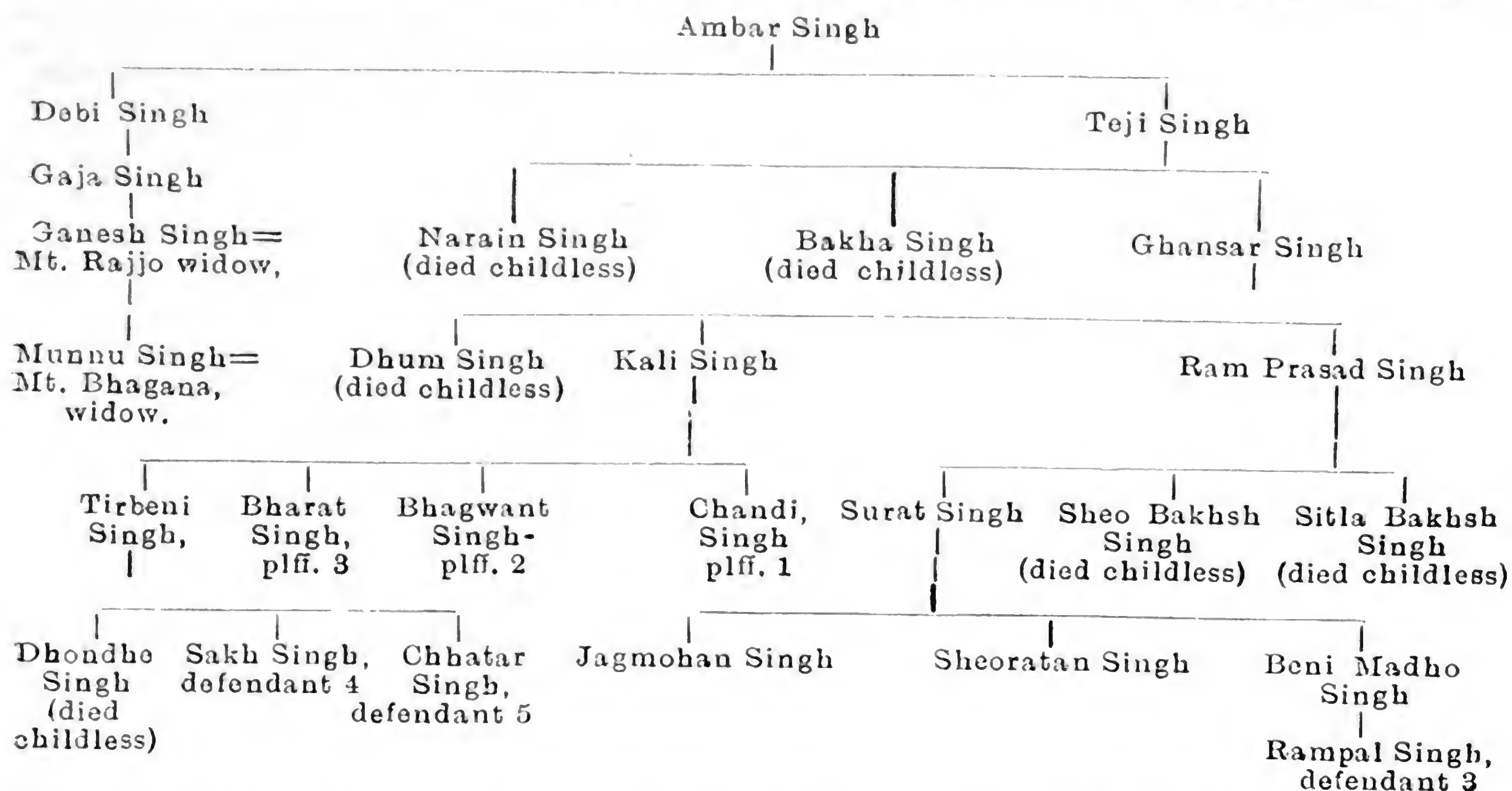
The learned Subordinate Judge has found in favour of the defendants as to the factum of adoption and has also accepted every one of the pleas raised by them in defence. He has therefore dismissed the plaintiffs' suit in its entirety. These findings of the Court below are challenged in appeal before us.

If the plea of adoption both as to its factum and validity succeeds it follows that the plaintiffs' suit fails. This therefore is the question which we first propose to decide in this appeal.

As to the fact of adoption, we are in complete agreement with the learned Subordinate Judge that it has been fully established by oral and documentary evidence. The controversy between the parties on the question of adoption was embodied in issue 6 and in discussing its aspect which we are now considering the learned Subordinate Judge has referred in great detail to the evidence in proof of the performance of the ceremony of adoption. The evidence is direct and is

the learned Subordinate Judge on the question of the factum of adoption we need say no more on this point

On the plea of undue influence in relation to the adoption made by the plaintiffs we agree with the learned Subordinate Judge that there is no case of undue influence. In the course of the arguments on behalf of the plaintiffs much stress was laid on the fact that Beni Madho Singh, the father of Rampal Singh, the adopted boy, and Beni Madho Singh's brother, Jagmohan Singh, were the mukhtars (agents) of Mt. Bhagana and stress was also laid on the facts that they were living with her and that she was over 75 years of age at the time of adoption. These



accepted as truthful by the learned Subordinate Judge. We have heard nothing in the arguments to induce us to take a different view of the evidence on this part of the case. Then there is the deed of adoption (Ex. C1), which Mt. Bhagana executed on 8th July 1927. The deed was registered at her house on 14th July 1927 with all the attendant formalities. Its execution has been proved by Munna Singh (D. W. 2) and Sitla Bakhsh Singh (D. W. 3). The deed bears the signatures of these persons as attesting witnesses. At the registration of the deed Mt. Bhagana was identified by Kunwar Singh (D. W. 1). He has proved the identification. As we are in agreement with

were the only facts which were urged before us in support of the plea of undue influence and they were not disputed by the learned advocate for the defendants.

There is evidence in the case that the desire to make the adoption was spontaneous on the part of Mt. Bhagana. It was a natural desire and having regard to the circumstances of the family at the time, Rampal Singh, who was then about 11 years of age, was the most suitable person for adoption. In the conduct of Beni Madho Singh and Jagmohan Singh, as brought out in the evidence produced by the defendants, we are unable to find any trace of any unconscionable element or that they had in

any manner unduly influenced the lady's choice in this behalf. As pointed out by the learned Subordinate Judge the adoption was made with greatest publicity and was attended by a large number of respectable witnesses. The fact alleged in the plaint that Mt. Bhagana was ill at the time of and before the adoption and found by the Court below against the plaintiffs was not relied upon before us and the negative evidence produced by the plaintiffs has been disbelieved by the learned Subordinate Judge. The evidence also proved that Mt. Bhagana had brought up the boy from his infancy and in doing so she presumably had had the intention of adopting him at a suitable period of time. We therefore reject the plaintiffs' case that the adoption is vitiated by undue influence.

As to the validity of the adoption in spite of the absence of the husband's permission it rests on the plea in defence that there is a custom in the family which authorizes adoption without such a permission. The learned Subordinate Judge, as we have already said, is of opinion that the pleaded custom has been established. After giving our very anxious consideration to this part of the case we find ourselves unable to agree with the Court below. There is no trustworthy evidence and none was relied upon before us in proof of this custom except one solitary *wajibularz* of the village of Salehnagar (Ex. C2).

This *wajibularz* appears to have been verified in the Court of the Extra Assistant Commissioner on 20th March 1869 by :

"Ram Prasad, Kali Singh, Surat Singh and Mt. Bhagana along with other cosharers and the patwari of the village."

As the subject matter of the verification clause shows, the entries must have been made some time before 20th March 1869 and *ex facie* these entries, as they are before us in paras. 1 and 4, are not entries made by the Settlement Officer as the result of his inquiries which he was enjoined by law to make ; in other words, these paragraphs are not the record of the history and of the customs of the village made by the Settlement Officer. They merely contain the statements of the proprietors of the village. Paragraph 1 relating to the history of the village opens as follows :

"At first this village was not inhabited. About 300 years ago that one Khande, our common ancestor coming out of the village Mal, populated this village. The history of Salehnagar runs thus that our ancestor having a dispute and quarrel over the share had a fight with his brothers and all the men on either side were killed."

It is unnecessary to quote any more from para. 1 of this *wajibularz* but from almost every line of the paragraph emerges the fact that it is a reproduction of the statements of the proprietors of the village and partly of the patwari presumably with respect to the settlement of the village and the revenue thereof. This is equally true of the contents of para. 4 relating to the right of transfer and right of inheritance. It says :

"Every cosharer entered in the *khewat* has power to transfer his share by sale and the mode of division of inheritance in our family, according to the number of wives, is"

This view is strengthened by the following statement in the same paragraph :

"If the share be divided then the widow remains in proprietary possession over the share of her husband such as Mt. Rajjo is the owner and *lambardar* of her husband's share."

This personal reference to Mt. Rajjo is extremely significant in view of the fact that in the judgment of the settlement Court, Mt. Rajjo was granted, according to our interpretation, only a life interest in one-half of the estate of Munnu Singh with a right of survivorship between her and Mt. Bhagana (Ex. C7, p. 14, at p. 17 of the paper book).

This being the true nature of the entries of the *wajibularz* we are not disposed to attach to it the same sanctity as we would have attached to a record of custom made by the Settlement Officer presumably after judicial or quasi-judicial inquiry. At the period of time at which this particular *wajibularz* was prepared it was not unusual for the Settlement Officers to allow statements of the proprietors of the village as such to go into the record of the several paragraphs of the *wajibularz*. This was pointed out by their Lordships of the Judicial Committee in *Uman Prashad v. Gandharp Singh* (1).

In relation to the *wajibularz* produced in that case their Lordships of the Judicial Committee made the following observations :

(1) [1888] 15 Cal. 20=14 I. A. 127=5 Sar. 71 (P. C.).

"Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A *wajibularz* has been considered to be an official record, of more or less weight according to circumstances, but still an official record, of the local customs of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In the case cited from 7th Indian Appeals it is stated that these documents are entered on record in the office. They must be taken upon the evidence, which is general evidence, to have been regularly entered, and kept there as authentic *wajibularz* papers. In that case effect was given to the *wajibularz* produced. In this case the Judicial Commissioner has treated the *wajibularz* in question as a document of weight, which must be taken as shewing local customs until some proof to the contrary is produced. But on looking at the evidence their Lordships find that this *wajibularz* was the concoction of Fattah Kunwar herself, received by the Settlement Officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views; they are entered as the official record of a custom. And supposing 50 years had gone by, and then a dispute arose, about the family or the local custom, this would probably have been produced from the office as an entry made 50 years ago, under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it deliberately stated (though there was an appeal from the entry of this *wajibularz*) by the Oudh Courts that the proprietor has the right to enter his own views upon the village records, and local customs. Well that is an exceedingly startling thing, and their Lordships think that the attention of the Local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless—they are worse than useless—they are absolutely misleading, because they are evidence concocted by one party in his own interest."

The above observations were if we may say so prophetic in their nature and what was apprehended then has come to pass in the present case. After a lapse of over 50 years these entries in the *wajibularz* are claimed as official record of custom, but in truth, as shown above, they are merely statements of interested parties. Recently the decision of their Lordships just now quoted was referred to in *Roshan Ali Khan v. Asghar Ali* (2) by Sir John Wallis, who delivered the judgment on behalf of the Judicial Committee. His Lordship said:

"On the other hand, as observed by their Lordships in *Uman Parshad v. Gandharp Singh* (1), they, at times, as is the case here, contain statements which would appear to

have been concocted by the persons making them in their own interest and are therefore disregarded being worse than useless."

In marked contrast to the entries in the present *wajibularz* was the entry noted by their Lordships of the Judicial Committee in the case of *Balgobind v. Badri Prasad* (3) made in the *wajibularz* of a village called Binduli in the district of Gonda, Oudh.

The particular portion of para. 4 of the *wajibularz* of village Salehnagar is as follows:

"A widow has power to take into adoption a person from the family of her husband and that adopted son will inherit the property like her own real son and shall not get the share of his real father."

This portion together with the rest of the contents of the paragraph must therefore be taken to be the expression of the wishes of the dictators of the *wajibularz*. It will be noticed that the preceding sentence clothes the widow with the ownership of her husband's share and the adopted son is to inherit the property of the adoptive mother. The object of vesting the widow with the power of adoption was therefore to emphasize her status as an absolute proprietor and this was clearly both in the interest of Mt. Rajjo, who was then alive, and of Mt. Bhagana, who is stated to have been one of the persons verifying the *wajibularz*. The limitation that the power of adoption could be exercised only in favour of "a person from the family of her husband" was clearly to the interest of Ram Prasad, Kali Singh and Surat Singh, who were the members of the same family as Ganesh Singh, the deceased husband of Mt. Rajjo, and of Munnu Singh, the deceased husband of Mt. Bhagana. Under the settlement decree, already referred to, Ram Prasad and his cosharers had acquired half of the village of Salehnagar and the other half was decreed to the heirs of Ganesh Singh. Kali Singh as a brother and Surat Singh as a son of Ram Prasad Singh were his cosharers. The statements in the *wajibularz* were therefore made by the father, the son and the brother of the former. They had no interest in the half-share of Mannu Singh on the date of the *wajibularz*. Presumably therefore they must have made the statements as to the widow's ownership and power of adoption in expecta-

(2) A. I. R. 1930 P. C. 35=57 I. A. 29 (P.O.).

(3) A. I. R. 1923 P. C. 70=26 O. C. 217=45 All. 413=50 I. A. 196 (P.C.).

tion of acts of bounty on the part of Mt. Rajjo and Mt. Bhagana either by way of alienation in favour of one or the other or adoption in favour of a descendant of theirs. The learned Subordinate Judge is not insensible to this view of the conduct of these persons. He says:

"It shows that the verifiers of the *wajibularz* had in their contemplation the desire that the property of the deceased husband should not go out of his own family. But they certainly must have meant that if a son was adopted from the family he shall exclude the next reversioners of the deceased husband of the adoptive mother."

As events have happened Ram Prasad's expectations have been realized by the adoption of his grandson, Rampal Singh, defendant 3.

In the case of *Muhammad Imam Ali Khan v. Sardar Husain Khan* (4) their Lordships of the Judicial Committee, with reference to the *wajibularz* of a village in Oudh, said:

"This class of document is always admissible in evidence, being an official village record. Its weight may be slight or may be considerable according to circumstances."

The *wajibularz* in the present case, as we have shown, is not an official record, but is a record of the statements of the proprietors of the village. It is of no weight whatsoever for the simple reason that it connotes the wishes of interested persons. It appears to us that the observations of their Lordships of the Judicial Committee in *Anant Singh v. Durga Singh* (5) are wholly apposite to the *wajibularz* relied upon in the present case. Lord Collins said:

"It has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances than that of the *wajibularzes*: *Muyammad Imam Ali Khan v. Husain Khan* (4) and *Parbati Kunwar v. Chandrapal Kunwar* (6); and where, as here, from internal evidence it seems probable that the entries recorded connote the views of individuals as to practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed."

We have already stated that in para. 4 of the *wajibularz* in question there occurs the following statement:

(4) [1899] 26 Cal. 11=25 I. A. 161=7 Sar. 432 (P.C.).

(5) [1910] 32 All. 363=6 I. C. 787=37 I. A. 191 (P.C.).

(6) [1909] 31 All. 457=12 O. C. 204=4 I. C. 25=36 I. A. 125 (P.C.).

"If the share be divided then the widow remains in proprietary possession over the share of her husband, such as Mt. Rajjo is the owner and lambarbar of her husband's share."

Having regard to the judgment of the settlement Court of 22nd December 1868 (Ex.C7) this statement is wholly untrue. The judgment was given in the litigation between Mt. Rajjo, widow of Ganesh Singh, and Mt. Bhagana, widow of Munnu Singh, as to the title to the 8-annas share in the village owned by Mannu Singh at the time of his death. The operative portion of the judgment is as follows:

"This is therefore ordered by the Court that in the *khewat* ten *biswas* be entered against the name of Mt. Rajjo, wife of Ganesh Singh, and Mt. Bhagana, wife of Munnu Singh, in equal shares. After the death of one co-sharer, the other can (shall?) be the owner of the whole."

On a plain interpretation of this judgment there can be no doubt that Mt. Rajjo was not the owner of any share in the village nor was Mt. Bhagana. To invest them with the status of absolute proprietors in the village was a pure concoction. Further, in the matter of the nature of the widow's interest in her husband's estate, there is a glaring inconsistency in the provisions of the *wajibularz*. If all the

"wives are issueless then all the wives shall remain in possession in equal shares during their lifetime: after their death the real heir of their husband shall become the owner."

We are of opinion that the plural "wives" must include the singular "wife". According to this clause therefore a sonless widow has no higher interest in the estate of her husband than a widow under the ordinary Hindu Law. We hold therefore that the *wajibularz* is not reliable evidence either of the custom of the power of adoption without the consent of the husband of the widow or of the ownership of a widow in the estate of her husband.

On the alternative question as to the evidential effect of the *wajibularz* in the matter of the custom of adoption without the consent of husband, we are of opinion that the entry relied upon by the defendants does not prove the custom. The defendants lie under the obligation of proving not only that a widow can adopt a son to inherit property of her husband but also that she can adopt even in the absence of her husband's permission. In the *wajibularz* before us she is given the power to adopt a son

who will inherit her own absolute property. But if the property now in suit is not her absolute property but is the property of her husband which the widow held in the character of a Hindu female for her life only then the custom relied upon and as recorded in the *wajibularz* is not the custom which the defendants have to prove in the present case. Further even on the construction which the defendants ask us to place on the entry in question we are quite clear in our mind that the entry does not prove the custom abrogating the Hindu Law as to the necessity of husband's permission. There is not a single word in the entry in question which goes to the length of establishing the custom of the absence of such permission. We are unable to read this entry either by inference or by implication as if it were that:

"a widow has power to take into adoption even in the absense of her husband's permission . . . a person."

We think that it would be wholly correct to say that the entry in question is altogether silent on the question of husband's permission, which permission is a *sine qua non* of the validity of an adoption by a Hindu widow. We are therefore of opinion that the entry in question does not supersede the rule of general law that a Hindu widow can make an adoption only with the permission of her husband.

In the case of *Neelkisto Deb Burmōno v. Beerchunder* (7) Lord Chelmsford, in delivering the judgment of their Lordships of the Judicial Committee, said :

"There is no trustworthy evidence that the custom supersedes the general law as to the precedence of the whole over the half blood. The custom is silent on that point. Where a custom is proved to exist it supersedes the general law, which, however, still regulates all beyond the custom: also see *Ram Nundun Singh v. Maharani Janki Koer* (8) and *Baij Nath Prasad Singh v. Tej Bali Singh* (9)."

We hold therefore that the general rule as to the necessity of husband's permission still controls the adoption in question in the present case. At the least the evidence fur-

nished by the entry in the *wajibularz* on the question under consideration is in our opinion neither clear nor unambiguous: vide *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (10). The law requires that the custom pleaded by the defendants being in derogation of the general rule of law must be construed strictly: *Hurpurshad v. Sheo Dayal* (11).

On this part of the case the learned advocate for the defendants pressed us hard with the decision of their Lordships of the Judicial Committee in the case of *Bishwa Nath Singh v. Jugal Kishore* (12). Indeed he argued that that case completely covers the case before us. We are of opinion that the decision relied upon is quite distinguishable from the present case and was given on its own merits. The question was one of sufficiency of evidence as to the custom of adoption by a Hindu widow without the permission of her husband. To quote the words of their Lordships :

"The evidence that there was such a custom in this family consisted of statements as to the right of widows to adopt sons to their deceased husbands contained in the *wajibularz* of eight villages which had been recorded in the settlement of 1871 . . . There was also some oral evidence of witnesses in support of the custom. In the *wajibularz* of Bamhna-wan and in some of the other *wajibularzes* it was stated that widows could adopt sons to their deceased husbands without having had the authority of their husbands to adopt. In the other *wajibularzes* it was simply stated that widows could adopt."

On this state of evidence the appellate Court in India came to the conclusion that the mere statement in a *wajibularz* that a widow could adopt meant that a widow who had the authority of her husband to adopt could make an adoption to him and consequently held that the statements as to the custom were not consistent and that the custom was not proved. Their Lordships held that the statements in such of the *wajibularzes* which simply stated that widows could adopt meant the same thing as was stated in the other *wajibularzes* that she could adopt without having

(7) [1867-69] 12 M. I. A. 523=2 Suther 243 =2 Sar. 467 (P. C.).

(8) [1902] 29 Cal. 828=29 I. A. 178=3 Sar. 351 (P. C.).

(9) A. I. R. 1921 P. C. 62=43 All. 228=43 I. A. 195 (P. C.).

(10) [1870-72] 14 M. I. A. 570=17 W. R. 552 I. A. Sup. Vol. 1=3 Sar. 103 (P. C.).

(11) [1877] 3 I. A. 259=26 W. R. 55=3 Suther. 304=3 Sar. 611 (P. C.).

(12) A. I. R. 1923 P. C. 90=26 O. C. 228=50 I. A. 179 (P. C.).

had the authority of her husband to adopt. In the case before us there is not one iota of evidence either oral or documentary to support the interpretation of the clause in the *wajibularz* produced in this case that the adoption could be made without the authority of the husband. We think that the gravamen of their Lordships' decision is that the two classes of evidence in that case meant one and the same thing. In the case before us we have only one piece of evidence and that does not state that the adoption could be made without the authority of the husband. Much stress was laid on the following passage in the judgment of their Lordships of the Judicial Committee in that case :

"It did not occur to the learned Judges of the appellate Court that if the statement that a widow could adopt meant that she could adopt if she had had the authority of her husband to adopt, the statement was not a statement of a special family custom, and was unnecessary, as it would be merely a statement of a right which a Hindu widow of a sonless Hindu enjoys everywhere in India, except possibly in families governed by the law of the Mithila School."

It is argued that this passage in the judgment of the Judicial Committee lays down a formula of law applicable to all cases of similar nature. We do not think so. In our judgment the passage quoted above simply expresses one of the reasons on which the interpretation of some of the *wajibularz* was based. This is clear from what follows immediately that passage :

"Their Lordships are of opinion that the custom was proved and that the adoption of the appellant was valid. It may be mentioned that the learned Judges of the appellate Court did not doubt the credibility of the witnesses as to the custom, whose evidence the Subordinate Judge has accepted as true, but they thought that it had not been proved that these witnesses belonged to the family to which Baldeo Bakhsh Singh had belonged."

From the passage in the judgment of their Lordships of the Judicial Committee on which the learned advocate for the defendants laid stress and which we have quoted above, we infer that in the particular *wajibularz* produced in that case no statement was recorded which was merely a statement of the written law as distinguished from the unwritten customary law. One of us has had to deal with innumerable *wajibularz* during his career at the Bar and on the Bench for over 25 years. On the

authority of the experience thus gained it may safely be stated that a statement of the rules of written law coupled with the rules of the Customary Law is generally found in the *wajibularz* of the province of Oudh and that the absence of such a combination is an exception.

What are the terms of the *wajibularz* in the present case? In para. 4 of this *wajibularz* the number of statements of the rules of Hindu Law as contained in the *Mitakshara* is much greater than of the rules of unwritten Customary Law. We propose to classify these rules separately.

A. Rules of the *Mitakshara*.

1. Every cosharer has power to transfer his share by sale.
2. If out of several wedded wives one has got issue while all the others are issueless then only the sons will get the shares.
3. Issueless wife will get her maintenance from the issue (son) of the other wife.
4. If all the wives are issueless then all the wives shall remain in possession in equal shares during their lifetime.
5. After the death of the widows the real heir of their husband shall become the owner.
6. If two brothers are joint in mess and out of them one brother dies leaving behind his wife then such a widow cannot enter into the possession of the share. She shall get only the maintenance.
7. The person in possession of the share shall be responsible to her necessary requirements.
8. The unwedded wife and her issues cannot get any share except maintenance.

B. Rules of Customary Law.

1. The mode of division of inheritance is that if a cosharer has got two wedded wives, one having one son and the other more than one then that one son will get half share and all the others will possess the other half in equal shares.
2. The widow remains in proprietary possession over the share of her husband.
3. A widow has power to take into adoption a person from the family of her husband and that adopted son will inherit the property like her own real son and shall not get the share of his real father.

It need hardly be mentioned that the two last mentioned rules of custom are in controversy in the present case, but for the purposes of classification we have assumed them as clear and sufficient statement of the rules of custom now pleaded. To us it is a matter of no surprise whatsoever that a large bulk of *wajibularz* prepared at the first regular settlement of the province of Oudh contain in para. 4, a statement either by the proprietors themselves or a record by the Settlement Officer embracing

within it both the written and the unwritten rules relating to :

"the custom and usages of the village as affecting the rights of the proprietor."

The words within inverted commas have been quoted by us from the Settlement Circular No. 20 of 1863, S. 3. In sub-S. 4, S. 3 the heading is: "Right of transfer and succession" and this is the same as we find at the top of para. 4 of the *wajibularz* before us. It appears to us that this description of the contents of sub-S. 4 may well contain both the written and the unwritten law. Indeed the last sentence of sub-S. 4 :

"The general custom of the village in regard to succession will of course be noted"

lays emphasis on the necessity of not omitting to note the general custom of the village with regard to succession. This may mean either of the two things; that the "right of succession" may include the rules of written law or in recording the rules of succession the unwritten rules must also be noted. It will be remembered that this was the circular in pursuance of which entries under several headings of a *wajibularz* were recorded. In the early days of the annexation of the province of Oudh and also at the time when the first regular settlement of that province commenced, the distinction between the unwritten and the written Hindu Law was not so well realized either in the minds of the Settlement Officer or of the people of Oudh as it has since been by reason of judicial decisions and the passing of the Oudh Laws Act in 1876. We take the liberty, at the risk of being accused of a little pedantry, of pointing out that it is a popular notion both amongst the versed and the unversed in Hindu Law that the entire Hindu Law is Customary Law partly written and partly unwritten, the Divine will revealing itself in the conduct of the people. In the well-known judgment of their Lordships of the Judicial Committee in the case of *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (13), it was distinctly pointed out that the authority of the commentators, on *Smiriti*, though they may be wrong having been recognized in certain provinces, the law laid down by them should be enforced as sanctioned by custom. Again in *Bhyah Ram Singh v.*

Bhyah Agar Singh (14), at p. 390, their Lordships, speaking of the *Mitakshara*, said:

"The digest subordinates in more than one place the language of texts to custom and approved usage."

Before taking leave of this part of the case we may state that we are not forgetful of the fact that the defendants produced two witnesses, Jagmohan (D. W. 13) and Baldeo Singh (D. W. 15) in support of the plea of the custom of adoption without the authority of the husband; but we have taken no notice of their evidence in our judgment for the reason that it was not relied upon at the hearing of the appeal before us nor does it appear to have been relied upon in the judgment of the learned Subordinate Judge. On the question of adoption therefore our finding is that it was invalid on account of the absence of husband's authority.

The finding recorded above necessitates the decision of every other plea raised by the defendants in the case. Plea 3 as stated before is as follows:

"That by reason of the custom of the family Mt. Bhagana held the estate of her husband in absolute proprietary title and, therefore, the alienations made by her are valid and binding."

The evidence in support of this plea is again the same *wajibularz* of the village of Salehnagar (Ex. C-2), with which we have exhaustively dealt in deciding the question of adoption. There is no other evidence. In the preceding portion of our judgment we have held that the statement of custom in Cl. 4 of the *wajibularz* as to the ownership of a widow of the share of her husband in the village is a pure concoction and wholly unreliable. We have given reasons for our opinion which need not be repeated. We, therefore, reject this plea. This issue having been decided in favour of the plaintiffs it is not necessary to consider and decide the plaintiffs case as to the bar of *res judicata* in respect of this issue.

We now proceed to decide plea 2. The facts bearing on that part of the case are as follows:

Presumably Ganesh Singh died either immediately before or after the beginning of the settlement in the district. By the judgment dated 11th October

(13) [1867-69] 12 M. I. A. 397=10 W. R. 17=2 Suther 185=2 Sar. 361 (P.C.).

(14) [1869-70] 13 M. I. A. 373=14 W. R. 1=2 Suther 330=2 Sar. 566 (P.C.).

1866 (Ex. C-3) the title in the proprietary rights of the village of Salehnagar was decided by the settlement Court. The claim of those who set up title adverse to the family of Ganesh Singh was negatived and a decree was made in respect of the proprietary right in favour of (1) Ram Prasad, (2) heir of Ganesh Singh and (3) their cosharers. A formal decree followed which is Ex. C-4 on the record of this case. In the ordinary course of business khewat (Ex. 14) in accordance with the the judgment was prepared. Ram Prasad and his brother, Kali Singh, were shown to be the owners of one moiety and the other moiety was entered in the name of Mt. Bhagana, widow of Munnu Singh. The recognition of Mt. Bhagana's title by the settlement in the khewat to the estate of her deceased husband, Munnu Singh, was therefore consistent with the ordinary Hindu Law. Mt. Rajjo, the widow of Ganesh Singh, however, seems to have protested against this some time in the year 1868. The result was that a litigation ensued between them in the settlement Court. On the record of the present case we have certain papers connected with that litigation. Ex. 4 dated 11th November 1868 is the application of Mt. Bhagana. We gather from this application that Mt. Rajjo had asked the Court that the name of Mt. Bhagana be removed altogether from the khewat of the village of Salehnagar. The application then refers to an amicable settlement between Mt. Rajjo and Mt. Bhagana whereby Mt. Bhagana relinquished all claims in the village for the lifetime of Mt. Rajjo. We have the record of the statement of Mt. Rajjo in that case. In this statement she repeated the terms of the settlement that the entire eight-annas share be recorded in her name in the khewat and on her death the name of Mt. Bhagana would be substituted (Ex. 5).

Then we have the judgment of the Court dated 22nd December 1868 (Ex. C-7). The judgment is very much wanting in perspicuity. In the end, however, it substantially conforms with the terms of the settlement already stated by us except in this respect that instead of Mst. Rajjo's name alone the names of both the widows were to be entered together in equal shares with a right of survivorship and each was restrained

from transferring the property without the consent of the other.

On the above facts, it appears to us that there is no room for any plea of title by adverse possession in favour of Mt. Rajjo in respect of the half share as against which her name was entered in the khewat of the village. Having regard to the events that have happened the article of limitation applicable to the case is Art. 141, Sch. 1, Lim. Act, 1908, and not Art. 144 of the same schedule : *Runchordas Vandrawandas v. Parvati-bhai* (15) and *Jagoo Bai v. Utsava Lal* (16). Whatever might have been the effect of Mt. Rajjo's possession over half of the estate of Munnu Singh, if that possession had been adverse to the title of Mt. Bhagana in the estate of her husband is wholly immaterial in view of the settlement and the judgment already referred to. The half over which Mt. Rajjo held possession came to be vested on her death in Mt. Bhagana as a survivor under the terms of the settlement and the judgment. Mt. Bhagana entered into the possession of that half in the same right in which she held possession of the other half from the very beginning, that is, in the right of a Hindu widow. The settlement between the two ladies clearly excluded full proprietary right both when they held the property jointly and also when one of them held the whole as a survivor. The judgment of the settlement Court clearly places each on the footing of a Hindu widow of her deceased husband and no more and treats them both as if they were two widows of the husband with a right of survivorship. The argument before us is that the limitations as to the right of survivorship and on the power of transfer contained in the judgment should be treated as non-existent for the reason that they are not reiterated in the decree which followed the judgment (Ex. C-5). We are unable to give effect to this argument. There is nothing in the entries made in the decree inconsistent with those limitations, and having regard to the laxity of rules of procedure in those days, it might be that the decree reproduced only that portion of the judgment which

(15) [1899] 23 Bom. 725=26 I. A. 71=7 Sar. 543 (P.C.).

(16) A. I. R. 1929 P. C. 166=51 All. 439=56 I. A. 267 (P.C.).

had a bearing on the circumstances then existing. The decree directed that "the 10 biswas share be recorded in the names of the 'parties in equal shares' and that was the only portion of the judgment which was of immediate consequence. Accordingly an entry was made in the khewat of the village in pursuance of the terms of the decree (Ex. A-2), but in the column of remarks of the khewat we clearly find a reference to the order of 22nd December 1868 on which the entry rests. We therefore decide the plea against the defendants and in favour of the plaintiffs.

This being our decision it is not necessary to consider the plaintiffs' case as *res judicata* in relation to this plea. The only matter which now remains for decision is the plea of estoppel raised by the defendants in respect of the alienation of 8 annas share of the village of Salehnagar made by Mt. Bhagana under the deed of sale dated 2nd February 1897 in favour of Jangi Singh, father of Gur Prasad, defendant 1. The facts bearing on this part of the case are as follows.: On 20th January 1890 Mt. Bhagana executed a deed of mortgage in favour of Durga Singh in consideration of a sum of Rs. 8,500 in respect of a $6\frac{1}{2}$ annas zamindari share in the village of Chakrandia (i. e. Salehnagar) (Ex. A-13). Kali Singh, Surat Singh and Sitla Bakhsh Singh joined Mt. Bhagana in the execution of the deed of mortgage as co-executants. It is admitted that Kali Singh, Surat Singh and Sitla Baksh Singh were the nearest reversioners on the date of the mortgage entitled to succeed to the estate of Munnu Singh, if Munnu Singh's widow, Mt. Bhagana, had died on that date. All these reversioners have since died. The three plaintiffs, Chandi Singh, Bhagwant Singh and Bharat Singh of the present suit are the sons of Kali Singh. On the following day, that is 21st January 1890, Mt. Bhagana, Kali Singh, Surat Singh and Sitla Bakhsh Singh again executed a deed of mortgage in respect of a one anna six pies share in the same village in favour of the same person, Durga Singh, in consideration of Rs. 2,000 (Ex. A-14).

The reason why the entire share of 8 annas was not mortgaged on the previous day for a total consideration of Rs. 10,500 is stated in the deed to be

that a stamp of proper value was not available. On the same day the same persons executed a third mortgage by way of a deed of further charge in favour of the same person in respect of the entire 8 annas share for a sum of Rs. 201 (Ex. A-15). On the death of Durga Singh mortgagee his interests in the deeds mentioned above devolved upon his two sons, Jangi Singh and Sardar Singh. They instituted a suit in the Court of the Subordinate Judge of Lucknow on 12th December 1896 against Mt. Bhagana, the sons of Kali Singh (Chandi Singh, Bhagwant Singh and Bharat Singh, plaintiffs 1, 2 and 3 respectively of the present suit); Tirbeni Singh, another son of Kali Singh, and Surat Singh on the foot of the three mortgages of 20th and 21st January 1890, Kali Singh having died some time in 1890 and Sitla Bakhsh Singh a year afterwards (Ex. A-16).

The relief prayed for in the suit was of possession of the eight annas share of the village. It came up for hearing on 4th February 1897. The defendants absented themselves and the Court passed a decree with costs in favour of the plaintiffs (Ex. A-17). The reason for the absence of the defendants is obvious. Two days previous to the hearing of the cases, that is on 2nd February 1897, the defendants of that suit, that is, Mt. Bhagana, Surat Singh and Tirbeni Singh, Bharat Singh, Bhagwant Singh and Chandi Singh, minor under the guardianship of his brother, Bharat Singh, sons of Kali Singh, had executed a deed of sale in respect of the entire eight annas share in favour of Jangi Singh in consideration of a sum of Rs. 19,000. The bulk of the consideration, as detailed in the deed of sale, was the money due under the previous mortgages (Ex. 1). The deed states that Surat Singh also received a sum of Rs. 100 and Tirbeni Singh, Bharat Singh, Bhagwant Singh and Chandi Singh received another sum of like amount. This is the deed of sale which the plaintiffs impeach in the present suit and having regard to the events, which we shall hereafter state, it is admitted that Chandi Singh's share in the property sold is not affected by the alienation, and if the defendants, other pleas against Chandi Singh's claim fail he is entitled to succeed in

respect of 'a one-third share in the 8 annas estate of Munnu Singh in the village of Salehnagar. The question of estoppel, which we are considering at present, only affects the claim of Bhagwant Singh and Bharat Singh, plaintiffs 2 and 3 respectively.

The argument on behalf of the defendants is presented before us in two aspects: The first aspect is that the entire body of the presumptive reversionary heirs elected to hold the alienation good by their act of joining Mt. Bhagana as co-executant in the deed of sale. The second aspect is that this act of theirs proves legal necessity for the alienation and that there being no rebutting evidence the alienation should be upheld as justified under the rules of the Mitakshara.

We prefer to decide this question on consideration of the second aspect of the argument. We are of opinion that it is a valid argument and should be upheld. The question is concluded by the decision of their Lordships of the Judicial Committee in the case of *Rangaswami Gounden v. Nachiappa Gounden* (17). Lord Dunedin, in delivering the judgment of their Lordships said:

"When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

The argument on behalf of the plaintiffs is that the present case is not one of consent by reversioners to an alienation by a Hindu widow but is a case of an alienation by the reversioners themselves of their interest which being a mere spes successionis is void in law. That a transfer or an agreement to transfer reversionary interest is void in law cannot be doubted: see *Annada Mohan Roy v. Gour Mohan Mullick* (18). The alienation in question may be void in so far as it is an alienation of such interests, but we are of opinion that the transaction mentioned above has a more substantial effect flowing from the

fact that the entire body of the reversioners was a party to the alienation made by the widow, Mt. Bhagana. The act of joining Mt. Bhagana in the execution of the deeds of mortgage and the deed of sale was the highest and the most unequivocal form of consent which they gave to the alienations made by Mt. Bhagana. Indeed in the sale deed of 2nd February 1897 it is recited that the executants other than Mt. Bhagana:

"have got our names put down in this sale deed for the satisfaction of the vendees because after the death of Mt. Bhagana, owner of the property, we shall be heirs to the property and so we have entered in the sale deed our respective right of inheritance also, now we also neither have nor shall have in future any claim with respect to the property sold."

(The italics are ours). In the preceding portion of the sale deed occurs the following:

"If per chance any one of the heirs of the vendors bring any claim or make dispute whatsoever against the vendees or heirs of vendees then that claim shall be false and untenable by the presiding officer of the time."

We hold, therefore, that the alienation in question is a proper alienation and is binding on Bhagwant Singh plaintiff 2, and Bharat Singh, plaintiff 3 but as admitted by the parties it is not binding on Chandi Singh plaintiff 1.

We now propose to state the facts which admittedly have had the effect of exonerating Chandi Singh's share from the alienation of 2nd February 1897. It will be remembered that Chandi Singh was a minor on the date of the sale and his brother, Bharat Singh, acted as his guardian in the sale transaction. In the year 1904 Chandi Singh after attaining majority instituted a suit against Jangi Singh and his brother, Sardar Singh, and Mt. Bhagana. In this suit he claimed the relief of a declaration that his one anna 7 pies 4 kirants share in the village of Salehnagar was not affected by the deed of sale dated 2nd February 1897 (Ex. A-18). The Court of first instance, the District Judge of Lucknow, dismissed the suit on 15th September 1904 (Ex. 12). On appeal by Chandi Singh the late Court of the Judicial Commissioner of Oudh reversed the decree of the Court of first instance and granted a declaration in favour of Chandi Singh in the following terms:

"That the sale in question is not binding upon the plaintiff or his interests (Ex. 2).

(17) A. I. R. 1918 P. O. 196=42 Mad. 523=46 I. A. 72 (P. C.).

(18) A. I. R. 1923 P. C. 189=50 Cal. 929=50 I. A. 239 (P. O.).

As we have already said it is agreed that the decision of the Court of the Judicial Commissioner just now mentioned is binding on the defendants and in virtue of that Chandi Singh is entitled to a decree for his share in the 8 annas estate of Munnu Singh in the village of Salehnagar if his claim is not otherwise barred. Having regard to our decision on other issues we hold that Chandi Singh is entitled to a decree in respect of his one-third share in the 8 annas of Salehnagar. On behalf of the plaintiffs the argument is that the decision of the Court of the Judicial Commissioner dated 12th January 1905 was a decision in a representative suit and has the effect of setting aside the alienation of 2nd February 1897 also as regards the interest of the other two plaintiffs. We are unable to accept this argument. Chandi Singh's suit was essentially a suit for relief in respect of his own share and the decree which he obtained from the Court of the Judicial Commissioner was restricted to his share in the property sold. It also follows from our findings recorded above that all the three plaintiffs are entitled to a decree for possession in respect of the other properties in suit, that is properties 2 and 3 stated in the plaint.

We accordingly reverse the decree of the Court below and grant a decree to the plaintiffs as just now stated. Chandi Singh will be entitled to his full costs in both the Courts and the other two plaintiffs will be entitled to one half of their costs in both the Courts and they shall pay half of the costs of the defendants in both Courts.

It may be noted that a portion of the lands of Salehnagar was acquired by the Government for public purposes and defendants 1 and 2 receive a sum of Rs. 300 as compensation thereof. Chandi Singh will, therefore, in lieu of those lands be entitled to his one-third share of the compensation money. The decree will provide for this.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Oudh 351

RAZA AND PULLAN, JJ.

(*Bhaya*) *Ram Bakhsh Singh*—Applicant.

v.

(*Mahant*) *Harkarangir and others*—Opposite Parties.

Civil Revn. Appln. No. 7 of 1930, Decided on 17th April 1930.

Civil P. C., O. 17, R. 3—Order for proceedings *ex parte* against absent defendant set aside at adjourned hearing on condition of payment of costs—Costs not paid, whereupon Court decided case on merits—Decision of case held to be under O. 17, R. 3.

On the first date fixed for disposal of a suit only two out of three defendants were present and order was passed for *ex parte* proceedings against defendant 3 but the case was adjourned. On the date of adjourned hearing defendant 3 appeared and put in application for setting aside the order of *ex parte* proceedings against him. The application was allowed subject to payment of costs. On the date fixed the defendant pleaded inability to pay costs and hence the Court decided the case in a lengthy judgment.

Held: that the decision of the case was not an order under O. 9, R. 6, but a decree under O. 17, R. 3. [P 352 C 2]

H. D. Chandra—for Applicant.

Ghulam Hasan—for Opposite Parties.

Judgment.—This is an application in revision of an order of the District Judge of Gonda setting aside an order of the Subordinate Judge of the same place. The facts which gave rise to these proceedings are as follows: The plaintiff, who is the appellant before us, filed a suit on the basis of a promissory note against three persons whom we shall describe as D-1, D-2 and D-3. D-2 alone was present on the first date fixed for disposal, namely, 27th June, at the commencement of the proceedings, and an order was passed by the Judge that the case will proceed *ex parte* against both D-1 and D-3. Later on the same day D-3 had this order set aside as against himself and was allowed to contest the suit. The case was adjourned to 29th June for disposal and on that date D-1 also appeared through his agent and requested the Court to set aside the order passed against him for *ex parte* hearing. His application was allowed. As the plaintiff did not oppose but asked only for his costs the Court ordered that D-1 will be allowed to contest the case on payment of Rs. 60 by way of costs and fixed 12th July for final disposal.

On 12th July D-1 professed his inability to pay the sum of Rs. 60 and the Court proceeded to decide the case in a lengthy judgment dated 18th July. D-1 then made an application on 14th August for setting aside the *ex parte* decree by which he means the decree of 18th July, purporting to act under O. 9, R. 13, Civil P. C. The Subordinate Judge decided that this was not properly speak-

ing an application under O. 9, R. 13, because there had been no ex parte decree and interpreted his own order of 18th July 1929, as being a decree passed under O. 17, R. 3. Against this order there was an appeal and the learned District Judge allowed this appeal holding that the Subordinate Judge had passed an order which amounted to a refusal to set aside an ex parte decree under O. 9, R. 13. The learned District Judge considered that the order of the Subordinate Judge, dated 18th July 1929, was not an order passed under O. 17, R. 3, but an order passed under O. 9, R. 6. In revision we have been asked to consider that the order of the learned District Judge is without jurisdiction.

The sole question for determination is whether the order of the Subordinate Judge dated 18th July 1929 was in fact an order passed under O. 17, R. 3 or an order passed under O. 9, R. 6. If it was an order passed under O. 17, R. 3 there were only two courses of procedure open: The first was an appeal and the second was an application for review. No appeal was filed and if it could be taken that the application made by D-1 was an application for review the proceedings stopped there and no further appeal was possible. If on the other hand the order of the Subordinate Judge was an order passed under O. 9, R. 6, there was an appeal and the District Judge had no doubt jurisdiction to interfere with the order. The chief point in favour of the respondent before us is that the Subordinate Judge described his own order of 18th July as being an order under O. 9, R. 6, but when the matter came before him for reconsideration he pointed out that this was a mistake and that his order of 18th July 1929 was in reality a decree passed under O. 17, R. 3. In our opinion the view now taken by the Subordinate Judge is right. On 29th June, when the Court of the Subordinate Judge had before it the application of D-1 and accepted that application, the Court must in our opinion have been acting under O. 9, R. 7. This was clearly a case where the Court had adjourned the hearing of the suit ex parte and the defendant at that hearing appeared and assigned cause for his previous non-appearance.

As the Court accepted his application

we must assume that he assigned "good" cause and it is clear that the Court went on to pass an order permitting this defendant upon such terms as he directed to be heard in answer to the suit. We have now got to consider what the proceedings were on 12th July. It is contended for the respondent that when his client failed to produce the sum of Rs. 60 as required by the order of the Court of 29th June the order subsequently passed by the Court was a refusal to set aside the ex parte decree. In our opinion this is not so. The ex parte proceedings had already been set aside by the order passed under O. 9, R. 7 and the defendant was now no longer in the position of a person against whom ex parte proceedings were pending, but was a party as described in R. 3, O. 18 as drafted by the Chief Court, that is to say, he was a party to whom time had been granted and

"who failed without reasonable cause to comply with a previous order or perform some other act necessary to the further progress of the suit for which time had been allowed."

When the defendant had stepped into this position it was only open to the Court to act under the same rule and to decide the suit on its merits. A perusal of the order passed by the learned Subordinate Judge shows clearly enough that it was a decision of the suit on its merits and this being so, it cannot be held, that it was an order passed under O. 9, R. 6. It can only be a decree passed under O. 17, R. 3 and this is the view now taken by the learned Judge himself. In our opinion the learned Subordinate Judge is right and the order against which an appeal was preferred to the District Judge was an order against which no appeal lay. There was no order refusing to set aside an ex parte decree. There was perhaps an order interpreting the previous decree as being a decree under O. 17, R. 3 and not an ex parte decree under O. 9, R. 6 but such an order gives no right of appeal. We are of opinion therefore that the District Judge acted without jurisdiction. The reasons given by him for holding that the order of 18th July 1929 was not a decree under O. 17, R. 3 are not satisfactory. We therefore allow this application with costs. The order of the Subordinate Judge dated 25th November 1929 will be restored.

V.B./R.K.

Application allowed.

A. I. R. 1930 Oudh 353**RAZA AND NANAVUTTY, JJ.***Hazari and others—Prisoners—Appellants.*

v.

Emperor

Criminal Appeal No. 116 of 1930, Decided on 22nd March 1930, against order of Sess. Judge, Sitapur, D/- 15th February 1930.

(a) Criminal P. C., S. 237—Charge under Penal Code S. 397—Conviction under S. 412 is not improper.

If a person is charged under S. 397 on the fact that he was found in possession of the stolen property, which possession he has failed to account for, it is not improper to convict the person under S. 412, if the charge under S. 397 fails for want of identification or any reliable evidence for the presence of the person at the dacoity: *A. I. R. 1925 P. C. 130, Ref.*

[P 356 C 1]

(b) Evidence Act, S. 24—Confession after being warned—Accused is bound down by language of confession.

When a man of sound mind and full age makes a confessional statement in ordinary simple language after he has been warned, he must be bound by the language of the statement and by its ordinary plain meaning: *A. I. R. 1927 Oudh 17, Foll.*

[P 355 C 1]

(c) Evidence Act, S. 114—Person found in possession of stolen articles soon after theft—Presumption.

When a person is found in possession of stolen articles soon after the theft, the law presumes that such person must either be the thief or the receiver of the stolen goods. The identity of the stolen articles being established, the identity of the thief or the receiver of the stolen goods is presumed to be established.

[P 356 C 1]

(d) Evidence Act, S. 114 (b) and S. 133—Conviction on uncorroborated evidence is rarely justifiable and evidence in corroboration must be independent testimony.

Although it is not illegal to convict on the uncorroborated evidence of an accomplice, a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime, but the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime.

[P 356 C 2]

(e) Evidence Act, S. 30—Retracted confession of accused when material for conviction of co-accused.

The retracted confession alone of an accused is not sufficient to justify the conviction of a co-accused, but where such confession stands unrebutted, and there is nothing to show that the accused had any reason for naming other men falsely, and his story fits in exactly with the facts known or proved and is corroborated sufficiently by material evidence against the co-accused, the confession is admissible, and

may be a strong piece of evidence against the co-accused. [P 356 C 2].

*M. H. Qidwai and S. N. Misra—*for Appellants.

*H. K. Ghosh—*for the Crown.

Judgment.—These appeals (Nos. 116 and 131 to 137) arise out of a dacoity case tried by the learned Sessions Judge of Sitapur.

The evidence on record shows that a serious dacoity was committed in the house of Beni Madho, at Basantapur Thana Tambaur, district Sitapur, on 7th June 1929 at about 9 p. m. It appears that Beni Madho was the head of a well-to-do Brahman family residing in Basantapur. Some thirty dacoits raided the house, belaboured the inmates, robbed the females of their ornaments, broke open boxes etc., and carried away property worth Rs. 5,000 nearly. The following were the inmates of the house at the time of the occurrence;

1. Beni Madho.
2. Beni Madho's wife
3. Sheo Nandan (P. W. 1) son of Beni Madho.
4. Shiam Kali (P. W. 10), wife of Sheo Nandan.
5. Mt. Sunder (P. W. 7), widowed daughter-in-law of Sheo Nandan.
6. Ajodhya (P. W. 11), brother of Sheo Nandan.
7. Mt. Bitan or Bittan (P. W. 8), wife of Ajodhya.
8. Mt. Churai (P. W. 9), widowed daughter-in-law of Beni Madho.
9. Deota Din (P. W. 4), brother of Beni Madho. Their servants, Nageshar P. W. 6 and Jehangir, P. W. 3 were also present there at that time. All these persons, except Beni Madho (deceased) and his wife, have been examined as witnesses in this case. Shiam Lal, P. W. 2 and Chandrabhal, P. W. 5, the neighbours of Beni Madho, also give evidence about the dacoity. It is in evidence that one of the dacoits was armed with a gun. He took his post under the roof from where he fired several shots. Sheo Nandan, who was in the courtyard shouting to the women to escape, was fired at by the man on the roof. He was struck in the head by several pellets. He received injuries, and one of the pellets caused a small depressed fracture of the skull. Grievous hurt was caused to Beni Madho.

also, but we do not know who caused the injury. He was found lying unconscious in the Barotha after the dacoits left the house. He eventually died some 13 or 14 days after the occurrence, but no post-mortem examination was or could be held, as the body was cremated before any action could be taken by the police. Sheo Nandan made a report at the Police Station, Tambaur on 8th June at about 9 a. m. Tambaur is some 12 miles away from Basantapur. The police investigation started without any unnecessary delay and the result was that 19 men, including Sone, were sent up for trial. Sone was granted pardon and was then examined as a witness in the case. Thus 18 men were committed to the Sessions for trial. Of these seven persons, namely Din Band Badlu, Tore, Khunnu, Bhauwa, Jodhe and Zamin Ali were acquitted. The remaining 11 were convicted and punished. Salaru was sentenced to transportation for life under S. 397, I. P. C. Mahadeo was sentenced to eight years rigorous imprisonment and Nabi Baksh to six years rigorous imprisonment under S. 412, I. P. C. The remaining eight persons, namely (1) Hazari, (2) Sunder Lal, (3) Mansa Din, (4) Amjad, (5) Ram Autar, (6) Ram Dayal, (7) Bans Gopal and (8) Hira Lal were sentenced to ten years rigorous imprisonment each.

All these persons have appealed. Hazari, Sunder Lal, Mansa Din, Mahadeo and Ram Dayal submitted their appeals from jail and filed their appeals through counsel also. The remaining six persons, namely Nabi, Amjad, Ram Autar, Salaru, Bans Gopal and Hira Lal submitted their appeals from jail only. Nabi Baksh, however, was represented by a counsel at the hearing of these appeals.

It is amply proved that a serious and daring dacoity was committed in Beni Madho's house. The factum of dacoity is not disputed in these appeals before us. It may be taken as satisfactorily established that a dacoity did take place at the house of Beni Madho and what we have to consider is whether the evidence on record is sufficient to justify the conclusion that the appellants were concerned in the crime. We should like to note that Sone, Sunder Lal, Amjad and Ram Autar had made con-

fessions. Sone was granted pardon and was then examined as a witness for the prosecution. Sunder Lal, Amjad and Ram Autar retracted their confessions in the Court of the committing Magistrate. Now we take up the appeals of the appellants named above individually.

1. *Hazari*.—This man is a cousin of Sone, approver. The direct evidence against him consists of the statements of Sone and also of the three confessing accused. It should be noted that Sone, Amjad and Sunder Lal had named this man in their confessions long before he was arrested. This man was identified in jail by only one person, namely Mt. Churai, but her evidence of identification is quite worthless and must be rejected. It is in evidence that Nageshar had struck one of the dacoits with a spear at the beginning of the dacoity. The approver Sone and the three confessing accused all stated in their confessions that it was Hazari who was struck with a spear at the time of the occurrence. When Hazari was arrested on 15th August 1929 it was found that he had a large triangular scar on his forearm. The injury was examined by the learned Sessions Judge and the assessors, and they found that it was the mark of a serious wound. The Civil Surgeon also had examined the injury on 26th August 1929. He could not give the cause of the injury definitely, but he stated that it was consistent with a wound from a spear. Hazari tried to explain away this injury by stating that he had a fall from a bullock cart and the injury was caused by an arhar stem. The defence, while it has the merit of ingenuity, is quite unsatisfactory and unconvincing. It is noticeable that the Civil Surgeon was not asked in cross-examination whether the injury in question could have been caused by an arhar stem, but was asked whether it could have been caused by the horn of a bull. We think the defence which was put up by Hazari to explain away the injury was false and an after-thought. We are of opinion that the learned Sessions Judge and the assessors were perfectly right in coming to the conclusion that Hazari had really received the injury at the time of the occurrence and that his defence was quite untrue. Nageshar, P. W. 6, states

clearly that he had struck a dacoit with his spear and the dacoit had then retired outside the door. It is true that this witness did not show his spear to the Sub-Inspector, but he told the Sub-Inspector that he had injured a dacoit with his spear. The mere fact that he did not show his spear to the Sub-Inspector does not show that the story is untrue. In our opinion there is an important piece of circumstantial evidence in support of the direct evidence of the approver and the statement of the confessing co-accused against this man. The evidence, which was produced against this man was believed by the learned Sessions Judge and the assessors. We see no sufficient reason to reject the evidence which shows that this man was concerned in the crime. He was rightly convicted and punished. His appeal fails and must be dismissed.

2. *Sunder Lal*—The evidence against this man consists of (1) his own confession, (2) the evidence of Sone, (3) the statement of one of the confessing accused, (4) the recovery from his house of two dopattas, two dhotis and a silver hamel and a gold "nathni" which have been proved to be stolen property and (5) the identification made by some seven witnesses. The evidence of identification may not be safely relied upon, but the remaining evidence is quite sufficient to justify the conclusion that this man was concerned in the crime. His own confession is a very strong piece of evidence against him under the circumstances of the case. He had made the confession after he was duly warned by the Magistrate. His confession (Ex. 30) is very circumstantial and full of detail. When a man of sound mind and full age makes a confessional statement in ordinary simple language after he has been warned, he must be bound by the language of the statement and by its ordinary plain meaning: see *Raja Bahadur Singh v. Emperor* (1). It is true that the confession has been retracted, but that is of no importance. Admissions of guilt made by an accused in full possession of his faculties in his confession to a Magistrate do not, where the accused is utterly unable to show how he made the admissions if they

were not true, become ineffective, because they are subsequently retracted: see *Emperor v. Raj Kali* (2).

The property which has been recovered from his house has been satisfactorily identified. It is amply proved that articles forming part of the proceeds of the dacoity were found in his possession. He was also identified in jail by seven witnesses. Their evidence of identification may not be relied upon but the remaining evidence shows clearly that he was concerned in the crime. We are of opinion that he has been rightly convicted and punished. His appeal therefore fails and must be dismissed. (His Lordship then considered evidence against Mansadin, accused 3, whose appeal was allowed, and proceeded.)

(4) *Mahadeo*—This man is the uncle of Sunder Lal, accused. The only evidence against him, besides the statement of Sone, approver, is that the Sub-Inspector recovered from his possession four silver ornaments and a skirt which have been identified as having been stolen in the dacoity. It should be noted that Sone simply identifies Mahadeo, but does not name him and he is not named by any of the three confessing accused also. There is no reliable evidence to show that this man was present at the dacoity. However, it is satisfactorily proved that the articles forming part of the proceeds of the dacoity were found in his possession. He has therefore been convicted by the learned Sessions Judge under S. 412, I. P. C. The learned counsel who appeared for this man has put up as good arguments on his behalf as could be put up, but we are not at all impressed with his criticism of the prosecution evidence. Our attention has been drawn to the list of the stolen property, given by Sheo Nandan to the police on 9th June 1929. The list is in Urdu and bears the signature of Sheo Nandan in Hindi. The learned counsel has attempted to show that the articles in question do not tally with the list. It is true there is some difference in some particulars (weights, etc.), but the fact remains that the articles are there, and it is too much to expect that the list should have contained an exact description of all the articles which had been carried away by the dacoits. It

(1) A.I.R. 1927 Oudh 17.

(2) A.I.R. 1926 Oudh 622=29 O.C. 29c.

was almost impossible for Sheo Nandan to give the exact weight and the exact price of the articles which had been stolen away. Most of the articles are of a distinctive nature and have been satisfactorily identified. We are not prepared to disagree with the finding of the learned Sessions Judge on this point. When a person is found in possession of stolen articles soon after the theft, the law presumes that such person must either be the thief or the receiver of the stolen goods. The identity of the stolen articles being established, the identity of the thief or the receiver of the stolen goods is presumed to be established. Mahadeo has attempted to prove that the articles in question belonged to his family. The evidence given by the defence witnesses on this point appears to have been manufactured and has been properly rejected by the learned Sessions Judge. Mahadeo has failed to account for his possession of the articles in question and he has been rightly convicted by the learned Sessions Judge under S. 412, I. P. C. He was not of course charged under S. 412, I. P. C. but he could rightly be convicted under that section on the facts found by the learned Judge: see S. 237, Criminal P. C., illustration, and also the principle of decision in *Begu v. Emperor* (3). His appeal fails and must be dismissed. (His Lordship here discussed evidence against accused 5 to 10).

11. *Hira Lal*—This man was successfully picked out by almost all the eyewitnesses to the dacoity. The learned Judge did not think it safe to base his finding on the evidence of identification as this man suffers from a species of leucoderma in his hands and feet. However, the remaining evidence on record is sufficient to justify the conclusion that this man was also concerned in the crime. He has been named by Sone and all the three confessing accused as having taken part in the dacoity. It appears that this man had absconded after the occurrence. He was arrested in Bombay and he has not explained satisfactorily why he was there. It is also in evidence that soon after the dacoity he paid Rs. 25, as rent in pice and small change. As observed by the learned Judge a man normally does not carry this amount of

small change. The explanation for that is that among the loot shared by the dacoits there was a certain sum of money in small change which had been collected from the ghat. The family of Beni Madho and Sheo Nandan held a theka of ghat and had got Rs. 1,500 in small change as the toll. This amount also was carried away by the dacoits. This circumstance is quite sufficient to corroborate the statement of the four accomplices that Hira Lal also had taken part in the dacoity. As pointed out in the case of *Ram Prasad v. Emperor* (4), although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime; but the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime. The retracted confession alone of an accused is not sufficient to justify the conviction of a co-accused, but where such confession stands unrebutted, and there is nothing to show that the accused had any reason for naming other men falsely, and his story fits in exactly with the facts shown or proved and is corroborated sufficiently by material evidence against the co-accused, the confession is admissible, and may be a strong piece of evidence against the co-accused: see *Sheo Ratan v. Emperor* (5). We think the learned Sessions Judge and the assessors were justified in coming to the conclusion that this man was also concerned in the crime. His appeal also fails and must be dismissed.

The result is that we dismiss all the appeals except that of Mansa Din. We allow the appeal of Mansa Din, set aside his conviction and sentence and direct that he be acquitted and released, unless his presence is required in any other case.

R.M./R.K.

Appeal dismissed.

(3) A.I.R. 1925 P.C. 130=6 Lah. 226=52 I.A. 191 (P.C.).

(4) A.I.R. 1927 Oudh 269=2 Luck. 631.
(5) A.I.R. 1929 Oudh 167.

A. I. R. 1930 Oudh 357

WAZIR HASAN, C. J., AND PULLAN, J.

Jai Singh and others--Accused--Applicants.

v.

Emperor — Complainant — Opposite Party.

Criminal Revn. No. 21 of 1930, Decided on 24th March 1930, against order of Sess. Judge, Hardoi, D/- 18th November 1929.

(a) Criminal P. C., S. 110—In proceedings under S. 110 instances of specific crimes are admissible, although they are not supported by evidence of such amount or value as would secure a conviction for substantive offence.

In a case under S. 110 the Court is not considering whether the accused person has or has not committed a specific offence but whether his general reputation is such that security should be taken for his good behaviour. When evidence is taken as to reputation of bad behaviour the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person, and if their opinion is based wholly or partly on the belief that the accused person committed a crime which has not been brought home to him the Court cannot rule out as inadmissible all evidence on which the belief of the witnesses is based. Hence instances of specific crimes are admissible in evidence in these proceedings although they are not supported by evidence of such amount and value as would secure a conviction for the substantive offence: *A. I. R. 1922 Oudh 26, Appr. A. I. R. 1925 All. 691. Rel. on.* [P 358 C 1, 2]

(b) Criminal P. C., S. 110—Scope.

An isolated instance of violence of a young zamindar on which no report was made would not be a sufficient cause for taking action against him under S. 110. [P 359 C 1]

(c) Criminal P. C., S. 110—Belief of prosecution witnesses of accused being man of desperate and dangerous character based upon suspicion that accused committed crime and certain acts of oppression—But Court holding suspicion not proved and acts of violence only youthful frolics—Many other persons including accused's tenants deposing to his being peaceful citizen and good landlord—Court should not demand security.

General reputation means the opinion of those members of the public who are in a position to know the man's character. Where a large number of persons come forward and swear that they believe a man to be of a desperate and dangerous character and there is little or no counter evidence of good character such evidence will possibly justify a Court in taking action even if the grounds of belief are indefinite. But when an equal or greater number of persons in the same class or classes depose that the same man is of good character the Court must sift closely the grounds on which the prosecution witnesses have based their belief. If it is found that their belief is based on

their suspicion that the accused has committed a crime and certain acts of oppression and the Court holds that the suspicion is unjustified and the so called acts of oppression are merely "youthful frolics" the Court will be reluctant to demand security, and the position of the accused if he is a landlord is much strengthened when a large body of public opinion, including many of his tenants finds him to be a good landlord and a peaceful citizen. [P 360 C 1]

J. Jackson, Ali Mohammad and Avadh Behari Varma—for Applicants.

H. K. Ghose—for the Crown.

Judgment.—This is an application in revision of an order of the learned Sessions Judge of Hardoi requiring the applicants to give security for their good behaviour or in default to undergo rigorous imprisonment for a period of three years under S. 123 read with S. 110, Criminal P. C. The applicants are Jai Singh, a zamindar, and his three servants Mata Din, Anandi Din and Murli. The charge against them is that they are dangerous characters and that their being at large without security is hazardous to the community. It is not alleged that Jai Singh gave any signs that he was a dangerous character before the year 1926 and it is admitted by the Sub-Inspector who took proceedings against him that the proceedings were only taken because the Sub-Inspector could not find enough evidence to bring a charge of murder against Jai Singh and his servants. The murder in question was committed on 21st May 1928. The victims were Mt. Deo Kuari, her daughter, two maid servants and their two children. These three women and three children were cut to pieces with a sword and their dead bodies partially burnt in their house in the middle of a large village of Raigaon in the middle of the night. At that time of the year the whole village community must have been asleep outside their houses in or in the neighbourhood of the village and we cannot believe that the murder and the fire which consumed two whole kothris were unnoticed by the villagers. Yet not a shred of evidence was obtained by the police to lead directly to the perpetrator or perpetrators of the crime. The fact that such an atrocity could be committed under such circumstances and that no evidence should be forthcoming which could lead to the conviction of any of the persons who took part therein is a black spot on the administration of criminal justice in

Hardoi District. We have, however, only to consider whether the proceedings instituted against Jai Singh and his servants under S. 110, Criminal P. C., are justified or whether the order passed by the Sessions Judge is a proper order. The learned Judge has stated the law dealing with the admissibility of evidence as to particular crimes in cases of bad livelihood. In our opinion the law was correctly stated by the Judicial Commissioner of Oudh in *Bhagwat Prasad v. Emperor* (1) in the following passage :

" This Court, and indeed every High Court, always looks with grave suspicion on cases in which proceedings are started against an accused because the police have failed to procure evidence against him on a charge of substantive offence. The badmashi sections were not intended for furnishing the police with the means of detaining persons against whom a definite charge has been made but has broken down."

But we also accept what is stated by a Bench of the Allahabad High Court in *Emperor v. Budhan* (2) :

" that it is impossible to accept the proposition that the evidence going to show that a substantive offence had been committed or which might form the basis of a charge of a substantive offence is necessarily to be excluded in proceedings under S. 110 and cannot form the basis of an order under S. 112, Criminal P. C."

Under certain circumstances even an order of acquittal must not be held to be conclusive and the reason for this view is that in a case under S. 110 the Court is not considering whether the accused person has or has not committed a specific offence but whether his general reputation is such that security should be taken for his good behaviour. When evidence is taken as to reputation of bad behaviour, the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person, and if their opinion is based wholly or partly on the belief that the accused person committed a crime which has not been brought home to him the Court cannot rule out as inadmissible all evidence on which the belief of the witnesses is based. We are not therefore prepared to dissent from the view which he expresses :

" that instances of specific crimes are admissible in evidence in these proceedings although they are not supported by evidence of such amount and value as would secure a conviction for the substantive offence."

This is not a case in which Jai Singh and his supporters had been put on their trial and either acquitted or discharged. There was not sufficient evidence to put them on their trial, but evidence has now been given to the effect that Jai Singh was in the village on the night of the crime, that the lady Mt. Deo Kuari was his widowed sister-in-law, that she was in receipt of an allowance paid by him, and that he was under an obligation to carry out the marriage of her daughter. On these facts the theory is built up that he had a motive for the murder and therefore may have been concerned in it, and the Judge not altogether properly in our opinion, drew deductions from the conduct of Jai Singh in the morning after the murder pointing out that he left undone certain things which he might have been expected to do had he been innocent. In our opinion it is unwise to draw conclusions from the conduct of a person in face of a terrible calamity such as this. Whether innocent or guilty he might very well fail to act with that prudence which might commend itself to an educated person considering the circumstances afterwards at leisure. It is true that the suggested motive is a possible motive and had there been evidence sufficient to put Jai Singh on his trial for murder it might have been fairly alleged that he was actuated by that motive, but where there is no evidence that he committed the murder there is no evidence that he acted on the motive, and as a matter of fact there is nothing to show that he wished to discontinue the allowance to his sister-in-law or to repudiate his liability to pay for her daughter's marriage. The evidence therefore that Jai Singh and his servants were guilty of this murder is not more than a vague suspicion and as such it must take its place along with the other evidence as to the general repute of the applicants before us. The suggestion is that Jai Singh's character took a change for the worse in the year 1926 and that he became oppressive to his tenants and so desperate and dangerous that he should not be allowed at liberty without

(1) A. I. R. 1922 Oudh 26=65 I. C. 551 = 23 Cr. L. J. 119=24 O. C. 317.
 (2) A. I. R. 1925 All. 694 = 88 I. C. 362 = 26 Cr. L. J. 1130=47 All. 733.

security. Specific instances have been adduced to show his oppressive nature and an attempt has also been made to produce witnesses of general reputation. The year 1926 was chosen as the starting point because from the year 1915 to 1926 Jai Singh had the strongest support of two officers of police. Mr. Young and Rai Bahadur Man Singh, both officers of the greatest experience who held a high opinion of Jai Singh during their tenure of the office of Superintendent of Police in the Hardoi district. We have considered very carefully the specific instances of so-called "desperate and dangerous" behaviour. The Magistrate remarked of these incidents that

"they might be connived at or ignored as petty frolics and privileges of a zamindar of his position and influence"

and the Judge has accepted this view. It appears that like many other zamindars Jai Singh had some disputes with his tenants and that on occasions he acted with some severity. But many of the examples have been excluded by the learned Judge and of those that he retained the only one which appears to us of any importance is the incident of one Inayet Khan who states that he had purchased a jungle and a grove and offered the wood for sale. Because he demanded Rs. 24 per chatta and Jai Singh only offered Rs. 14 Inayet says that he was taken to Jai Singh by Murli and Mata Din and kicked and assaulted and his cart-load of wood emptied at the accused's bhatta. This incident is corroborated by a witness described as unreliable, but we must accept it as proved and it is certainly an instance of violence. On the other hand no report was made of it and we cannot resist the conclusion that the incident was perhaps exaggerated and if it be taken as an isolated act of a young zamindar it would certainly not be a sufficient cause for taking action against him under S. 110, Criminal P. C. There are also some instances in which tenants have complained against Jai Singh. One of them, Mewa Ram, complained that his field had been trampled by his elephant, but Mewa Ram was a man who attempted to cultivate the fields as a sub-tenant against the wish of the zamindar and he was subsequently compensated by another field. Another tenant named Chheda made a report of forcible

dispossession of his field, but this man appears to have attempted to assert a claim of tenancy two and a half months after Jai Singh had reported the land to be abandoned under S. 21, Oudh Rent Act. In our opinion such incidents are of common occurrence and there are few zamindars who have not at one time or another had similar disputes with their tenants and there is no special feature of guilt or oppression in these instances as they have been described which would lead us to connect the conduct of Jai Singh in his dealings with the tenants with the conduct of the person or persons who committed the horrible murder of three women and three children on 21st May 1928. Indeed we have on the one hand suspicion of an atrocious crime and on the other hand evidence pointing to a young zamindar who is inclined to use drastic measures in dealing with tenants. The two pictures do not coincide and we cannot disregard the fact that Jai Singh was able to produce in his defence no less than 74 tenants of whom 29 come from the village of Raigacn, and his witnesses in all represent 54 villages in a radius of twelve miles. All these persons describe him as a good landlord and deny that he is a man of violent or desperate character. In fact the only tenants who give evidence against him are those who speak to the specific incidents to which we have already referred.

The learned Judge deals very briefly with the evidence of general bad character and we have been referred to the evidence of one Qazim Husain who is clearly influenced by malice and who stated, in our opinion quite falsely, that Jai Singh had at the time when he agreed to pay the allowance to his sister-in-law threatened to lock her up in a kothri and murder her. This is not the only instance of evidence of an apparently vindictive nature brought forward in this case. The prosecution also relied upon the fact that Jai Singh's servants had been suspected of another murder, but in that case not only were they acquitted but the Court held that it was a false case got up by one of the witnesses for the prosecution in the present case.

We would also point out that the general evidence as to character in this

case hardly goes beyond the statement of the specific instances to which we have already referred. General reputation means the opinion of those members of the public who are in a position to know the man's character. Where a large number of persons come forward and swear that they believe a man to be of a desperate and dangerous character, and there is little or no counter-evidence of good character, such evidence will possibly justify a Court in taking action even if the grounds of belief are indefinite. But when an equal or greater number of persons in the same class or classes depose that the same man is of good character the Court must sift closely the grounds on which the prosecution witnesses have based their belief. If it is found that their belief is based on their suspicion that the accused has committed a crime and certain acts of oppression and the Court holds that the suspicion in the former case is unjustified and the so-called acts of oppression are merely "youthful frolics" the Court will be reluctant to demand security; and the position of the accused is much strengthened when, as in the present case a large body of public opinion finds him to be a good landlord and a peaceful citizen. In our opinion the evidence in the present case comes to this. A number of persons believe that Jai Singh and his servants are responsible for the murder of Mt. Deo Kuari, her daughter and her servants and they also consider that Jai Singh is an oppressive zamindar. On the other hand a great number of persons do not believe that Jai Singh and his servants were concerned in the murder and they consider that he is not an oppressive zamindar. Among these witnesses is included a vast majority of his own tenants. In our opinion Jai Singh is not shown to be unusually oppressive as a zamindar and there is insufficient reason for suspecting him of complicity in the murder. Thus there is no foundation for finding that he is so desperate and dangerous as to render his being at large without security hazardous to the community. Admittedly the case of the servants depends on that of the master. It is not suggested that independently of Jai Singh they are in any way dangerous to the

community. We therefore allow this application and set aside the order requiring security.

P.N./R.K.

Revisions allowed.

A. I. R. 1930 Oudh 360

RAZA, J.

Mohammad Raza—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 32 of 1930, Decided on 16th April 1930, against order of Sess. Judge, Lucknow, D/- 13th January 1930.

(a) Penal Code, S. 482—Trade-mark used as distinctive mark for over ten years—Firm using it acquires property in it so as to constitute deliberate and dishonest imitation offence under S. 482—Registration of mark is immaterial.

Where a trade-mark in question is a distinctive mark which the firm has been using for over ten years, the firm using it acquires property in that mark as indicating that all goods which bear it have been manufactured by the firm and any flagrant imitation of the same with deliberate and dishonest intention will bring the act within the purview of S. 482. Registration of the mark is not necessary to complete the title to trade-mark in India: *A. I. R. 1928 Lah. 186, Ref.* [P 361 C 1]

(b) Trade-mark — Infringement of trade mark—Although criminal Court has discretion to stay its own hands and direct aggrieved party to establish his right in civil Court, aggrieved party cannot be compelled to seek his remedy in civil Court—Penal Code, S. 482.

Although the criminal Court has a discretion in view of the peculiar circumstances of a particular case, e. g., if there exists a bona fide dispute as to the right to use a trade-mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a civil Court, it is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court. [P 361 C 2]

H. C. Dutt and *S. M. Ahmad*—for Applicant.

Iqbal Ahmad, Malik Chand Jain, and Mohammad Hussain Usmani and *H. K. Ghosh*—for the Crown.

Judgment.—This is an application in criminal revision. The applicant Mohammad Raza alias Shamshad has been convicted of an offence under S. 482, I. P. C., and sentenced to a fine of Rs. 100 (or in default, two months rigorous imprisonment). His appeal was dismissed by the learned Sessions Judge of Lucknow on 13th January 1930.

It has been found that the applicant used the trade-mark of the firm of Anwar Khan Mahboob who manufacture biris in Jubbulpore, with deliberate and dishonest intention and with the object of passing his biris off as if they had been manufactured by that firm. The learned Sessions Judge has made the following observations in his judgment:

"The learned Magistrate who tried the case found that both the label and the green strip used by the appellant are deliberate imitations of those used by the firm of Anwar Khan Mahboob and before dealing with the points raised in the arguments addressed to me it will be convenient to record at once that I entirely agree with the view taken by the learned Magistrate. In my opinion both the label and green strip are flagrant imitations of those used by Anwar Khan Mahboob, and in my opinion they are imitations used with deliberate and dishonest intention. The imitation is deliberate and the purpose of using the label and strip was to make it appear that the biris sold by the appellant were made by the Jubbulpore firm it is a question of fact whether the imitation has been such as to cause it to be believed that the goods on which it is used were the goods of someone else. We are concerned rather with what, as I have held, is a deliberate attempt to reproduce copies of Anwar Khan Mahboob's label and strip so close as to be calculated to deceive anyone except a very close observer. In fact there is in my opinion no question here of any bona fide dispute which should be settled in a civil Court."

I have read the detailed and careful judgment of the learned Sessions Judge. So far as I see he has considered all the relevant questions very carefully. The applicant's learned counsel has contended before me that the lower Court has not decided that the trade-mark in question is the exclusive property of the opposite party. I think this contention is not well founded. The lower Court has found in effect that the trade-mark in question is the exclusive property of the firm of Anwar Khan Mahboob of Jubbulpore. The trade-mark in question is a distinctive mark which the firm has been using ever since 1919. Anwar Khan Mahboob have acquired property in that mark as indicating that all goods which bear it have been manufactured by their firm at Jubbulpore. In my opinion the lower Courts were perfectly right in holding that the charge under S. 482 is made out against the applicant. I should like to refer to the case of *Banarsi Das v. Emperor*, A. I. R. 1928 Lah. 186. In that case a manufacturer of cotton thread balls

having acquired by user (since 1917) the right to the mark "D. I." for the purpose of denoting his goods, prosecuted the accused who had lately begun to manufacture cotton thread balls and to attach the mark "D. I." and to imitate the mark and the "get up" of the complainant's label so closely that his goods were calculated to deceive purchasers into the belief that the accused's goods were those of the complainant. It was held that in India registration is not necessary in order to complete title to a trade-mark, and there is no warrant for the broad proposition that a letter or a combination of letters cannot constitute a trade-mark. It was further held that a person aggrieved by the infringement of his trade-mark has two remedies open to him: (1) he can institute criminal proceedings under the Penal Code, or (2) he can bring an action for an injunction and damages and although the criminal Court has a discretion in view of the peculiar circumstances of particular cases, e. g., if there exists a bona fide dispute as to the right to use a trade-mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a civil Court, it is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court. I take the same view. The application must therefore be rejected.

Hence I dismiss the application.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Oudh 361

WAZIR HASAN, C. J., AND RAZA, J.

Parmeshur Din—Defendant—Appellant.

v.

Bishambhar Singh and others—Plaintiffs—Respondents.

Appeal No. 1 of 1930, Decided on 12th March 1930, from decree of Pullan, J., D/- 29th November 1929.

Landlord and Tenant—Tenant acquiring agricultural holding in zamindar's village and also land for building house for residence cannot remove manure from one village to another.

Tenants, who acquire agricultural holdings in the zamindar's village and who also acquire lands on which they build their houses for residence, must be deemed to acquire those rights with all the incidents, appertaining to

such rights and one of the incidents is their disability to remove the manure from one village to another. [P 362 C 1, 2]

Hakimuddin Siddiqui and *R. B. Lal*—for Appellant.

H. Husain—for Respondents.

Judgment.—This is an appeal under S. 12 (2), Oudh Courts Act, 1925 from a judgment of our learned brother Pullan, J., dated 29th November 1929. The defendant in the suit out of which this appeal has arisen is the appellant in the appeal and he is a tenant in the village of Sheothana which belongs to the plaintiff. The defendant has also some agricultural holding in an adjoining village called Bhagwantpur. From the village of Sheothana he has carried manure to his fields in the village of Bhagwantpur. The plaintiff's case is that under a custom of the village the defendant was debarred from removing the manure from the village of Sheothana to the village of Bhagwantpur and damages are claimed for the loss of the manure caused by the act of its removal by the defendant.

Our learned brother Pullan, J., has found on the strength of oral and documentary evidence that the custom relied upon by the plaintiff does exist. The learned Judge was called upon to record the finding as to the existence of the custom for the reason that the Court of first appeal had omitted to give a definite finding on that question. This finding of the learned Judge therefore is conclusive and is not open to be challenged before us. The only argument therefore pressed at the hearing of this appeal was that the custom was unreasonable and should therefore not have been given effect to. We are of opinion that the argument has no substance. The judgment of our learned brother is so very exhaustive and lucid, if we may say so, that we do not feel that we can improve on it. Our learned brother has shown that the custom was certainly not unreasonable at its inception and it is not unreasonable now. All that we may add to the view taken by our learned brother is that it appears to us that the plaintiff's case does not rest on the existence of a custom alone, but that it can also be supported on the broad ground that tenants, who acquire agricultural holdings in the zamindar's village and who also acquire lands on

which they build their houses for residence, must be deemed to acquire those rights with all the incidents appertaining to such rights and one of the incidents is their disability to remove the manure from one village to another. In this view of the case it is wholly immaterial whether they signed the waijbularz in which the entry relating to the custom is made or not. The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 362

RAZA AND NANAVUTTY, JJ.

(*Mirza*) *Wazir Husain*—Plaintiff—Appellant.

v.

Beni Madho and *another*—Defendants—Respondents.

First Appeal No. 93 of 1929, Decided on 9th April 1930, against decree of Addl. Sub-Judge, Unao, D/- 29th June 1929.

(a) Transfer of Property Act, S. 52—Active prosecution continues in execution proceedings.

The active prosecution, i. e. pendency of the suit, is deemed to continue during the proceedings in execution since these proceedings are merely a continuation of those of the suit. Therefore the section applies to transfers made during the pendency of execution proceedings also: 26 *All.* 349; 26 *Cal.* 966 and *A. I. R.* 1927 *Oudh* 261, *Ref.* [P 363 C 2]

(b) Civil P. C., O. 21, Rr. 62 and 66—Noting encumbrance in sale proclamation and sale certificate does not make sale subject to encumbrance.

The mere fact that the encumbrances were noted in the sale proclamation for the information of the auction purchasers and were subsequently noted in the sale certificate does not establish that the property was sold subject to those encumbrances unless it is stated in the sale certificate that the property was sold subject to those encumbrances and such a notification in the sale proclamation cannot debar a purchaser from contesting the encumbrances thus notified: 15 *O. C.* 211; 2 *O. L. J.* 140; 3 *O. L. J.* 422 and *A. I. R.* 1925 *Oudh* 154, *Ref.* [P 365 C 1]

Ali Muhammad and *Saiyid Muhammad*—for Appellant.

Radha Krishna and *P. D. Rastogi*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for sale of certain properties on the basis of a mortgage dated 27th October 1924. The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows:

Nawab Ali, defendant 1, executed the mortgage in suit in favour of the plain-

tiff Wazir Husain for Rs. 4,000 bearing interest at 1 per cent per mensem (with yearly rests), in respect of zamindari shares in several villages specified in the plaint, on 27th October 1924. The mortgage was to be paid off within three years. As the mortgagor failed to pay off the mortgage within the stipulated period, the present suit was brought by the plaintiff on 12th May 1928. Several persons were impleaded as defendants in the suit; but we are concerned with the defence of defendants 5 and 6 only in disposing of this appeal. Beni Madho and Basant Rai (defendants 5 and 6) were impleaded simply on the allegation that they had purchased a portion of the mortgaged property in suit at an auction sale.

Their defence was that the mortgage in suit was executed during the pendency of the suit which they had brought on the basis of a security bond relating to a portion of the mortgaged property in suit and therefore the mortgage in suit was affected by the doctrine of *lis pendens* and was not binding on them. They pleaded further that, should the mortgage in suit be held to be binding on them, the property in dispute should be sold subject to their mortgage of 28th January 1921 on the basis of which they had obtained the final decree dated 6th December 1924 which had resulted in the sale of the property purchased by them on 20th July 1927.

The learned Subordinate Judge accepted the defence of defendants 5 and 6 and gave the plaintiff a decree for Rs. 6,044-8-2 together with future interest and costs against all the defendants except defendants 5 and 6. He ordered also that in case of default in payment of the entire money on the date fixed by the Court, the entire mortgaged property with the exception of the property, covered by the sale certificate in favour of defendants 5 and 6, should be sold to realize the money due to the plaintiff.

The plaintiff has appealed to this Court contending that defendants 5 and 6 also are liable for his claim and that the property held by the said defendants under the sale certificate dated 15th September 1927 should also be sold along with other properties in suit.

We think there is no substance in this appeal.

Nawab Ali, defendant 1 had executed a security bond in favour of defendants 5 and 6 with respect to a pronote for Rs. 600 on 28th January 1921. He had hypothecated certain property by that bond and authorized defendants 5 and 6 to realize their money by sale of the property. That very property is a portion of the property in suit. Defendants 5 and 6 filed a suit on 8th March 1923 for sale of the property on the basis of their security bond dated 28th January 1921, and a preliminary decree for sale was passed in their favour for Rs. 2,039-10-7 on 6th November 1923. The final decree was passed in their favour on 6th December 1924. They took out execution of their decree and the proclamation for sale of the property was issued for the 20th July 1927. The property was purchased by the decree-holders (defendants 5 and 6) themselves in execution of their decree dated 6th December 1924. Thus defendants 5 and 6 became the owners of the property in respect of which they had obtained the deed dated 28th January 1921 from Nawab Ali (defendant 1).

The mortgage in suit was executed by Nawab Ali in favour of the plaintiff on 27th October 1924. Defendants 5 and 6 were prior mortgagees of the property in dispute. They had brought their suit to enforce their mortgage on 8th March 1923. The property comprised in the mortgage was eventually sold in execution of their final decree dated 6th December 1924 on 20th July 1927. The preliminary decree had already been passed in their favour on 6th November 1923. The plaintiff's mortgage, that is to say, the mortgage in suit dated 27th October 1924, is thus affected by the doctrine of *lis pendens* and cannot be held to be binding on defendants 5 and 6 so far as the property in dispute is concerned: see S. 52, T. P. Act, and Ghose's Law of Mortgage, Vol. 2, Edn. 4, pp. 697 and 698. The active prosecution, i. e., pendency of the suit is deemed to continue during the proceedings in execution since these proceedings are merely a continuation of those of the suit. Therefore the section applies to transfers made during the pendency of execution proceedings also: see *Thakur Prasad v. Gaya Sahu* (1), *Har Shankar v. Shew*

(1) [1893] 26 All. 349=(1898) A. W. N. 62.

Gobind Shah (2) and *Abid Hussain v. Mt. Munno Bibi* (3). This is now made clear by the explanation which lays down that the pendency of a suit continues until complete satisfaction of the decree has been obtained : see S. 52, T.P. Act, as amended by S. 14, T. P. Amendment Act, 10 of 1929. We therefore agree with the finding of the learned Subordinate Judge on the point under consideration.

The appellant's learned counsel has contended before us that as the property in suit was sold to defendants 5 and 6 subject to their mortgage of 22nd April 1924, that mortgage must be held to be binding on defendants 5 and 6. The fact is that no such mortgage was set up by the plaintiff in his pleadings in the lower Court. It appears that the plaintiff's counsel was permitted to advance argument on this point in the course of arguments, but his arguments were not accepted by the learned Subordinate Judge. He was of opinion that that mortgage even was effected by the doctrine of *lis pendens*. In our opinion the plaintiff's counsel should not have been permitted to advance any arguments on the mortgage in question when the plaintiff had not set up the mortgage in his pleadings in the lower Court. No mention of that mortgage was made in the plaint. It was even alleged by the plaintiff in the lower Court that defendants 5 and 6 had purchased the property in dispute subject to any mortgage held by the plaintiff at any time. The mere fact that a certain mortgage of April 1924 was mentioned in the sale certificate cannot help the plaintiff in this case. We are of opinion that the plaintiff's contention has no substance even on the merits. We find that the mortgage which is mentioned in the sale certificate (Ex. 5) is the mortgage of 23rd April 1924 for Rs. 1,500 only. The mortgage was not surely the mortgage which was included in the mortgage in suit. The mortgage which was included in the mortgage in suit was the mortgage of 23rd April 1924 for Rs. 1,592 principal and interest. There is nothing to show for what amount that mortgage had been executed in plaintiff's favour and what rate of interest was provided by the mortgage.

There is no evidence on record to show that the mortgage which was included in the mortgage in suit was really the mortgage which was mentioned in the sale certificate of defendants 5 and 6. The dates of the two mortgages are different. The amounts are also different. Under these circumstances the plaintiff cannot be allowed to contend that defendants 5 and 6 had purchased the property in dispute subject to that mortgage which was included in the mortgage in suit. We have nothing to do with the mortgage of 23rd April 1924 for Rs. 1,500 in the present suit. Even granting that the mortgage mentioned in the sale certificate was that very mortgage which was included in the mortgage in suit, we are of opinion that defendants 5 and 6 can question the validity of the mortgage on the ground of *lis pendens*. We find that the property in dispute was not really sold subject to the said mortgage. The mortgage was simply noted as an encumbrance to which the property was liable. It is admitted that the plaintiff had filed no objection on the basis of the said mortgage in the execution proceedings. The executing Court therefore did not and could not decide whether the mortgage subsisted or not. No proceedings were or could therefore be held under O. 21 R. 62, Civil P. C. It should also be borne in mind that no proceedings could be held under R. 62 as the property had not been attached in fact. Rr. 53 to 63, O. 21, deal with investigation of claims with regard to property attached in execution of property and all objections to the attachment of such property. The decree which defendants 5 and 6 had obtained was a sale decree. It was passed on the basis of their mortgage of 23rd January 1921. The property directed to be sold under the mortgage decree does not require to be attached by way of execution. No attachment proceedings were or could therefore be held in respect of the property in dispute. How the mortgage of 23rd April 1924 was mentioned in the sale certificate is explained by the order of the Court dated 9th May 1927 (Ex. E 6). The order is in the following terms:

"Encumbrances under mortgage deed dated 23rd April 1921 and security bond dated 10th August 1923 as shown in the certificate of search to be declared at the time of sale."

(2) [1899] 26 Cal. 966=4 C. W. N. 317.

(3) A. I. R. 1927 Oudh 231=2 Luck 495.

It is thus clear the executing Court has simply ordered that notice of the mortgage should be given in the proclamation of sale. This was done simply to comply with the provisions of O. 21, R. 66, Civil P. C. However, the mere fact that the encumbrances were noted in the sale proclamation or the information of the auction purchasers and were subsequently noted in the sale certificate (Ex. E-5) does not establish that the property was sold subject to those encumbrances. It was not stated in the sale certificate that the property was sold subject to those encumbrances. The Civil Procedure Code clearly makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by O. 21, R. 62 and the latter by R. 66. In the former case the Court after being satisfied of the existence of the mortgage sells only the judgment-debtor's equity of redemption, that is to say the purchaser buys the property subject to the mortgage. In the latter case he buys the property with notice of the mortgage and subject to such risk as the notice might involve; the executing Court does not decide whether the mortgage subsists or not.

Such being the case, if there is in reality a subsisting mortgage the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale turns out to be invalid, the purchaser acquires the property free from liability for the mortgage. The point to be noted is that mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from questioning the validity of the mortgage. And it is also to be noted that if the mortgage specified in the proclamation turns out to be invalid, the judgment-debtor is not entitled to claim from the purchaser the amount alleged to have been due on the mortgage: see Mulla's Civil Procedure Code 8th Edn. p. 670; Notes under R. 62 and the authorities referred to therein: see also *Ram Kumar v. Dwarka Prasad* (4), *Mt. Jagdei v. Sohan Lal* (5) and *Lala Bhagwandas*

v. Ch. Ahmad Jan (6). The appellant's learned counsel has referred to the case of *Sant Bakhsh v. Nadir Mirza* (7). We think this ruling does not help the plaintiff. It rather helps the contesting defendants. The contesting defendants may rely upon the ruling in question in support of their contention that they can question the validity of the mortgage mentioned in their sale certificate even if it is held that they had purchased the property subject to that mortgage. That case follows the case of *Deputy Commissioner Manager Court of Wards, Birwa Mennon Estate v. Lal Hanwant Ram* (8), decided by a bench of the late Court of the Judicial Commissioner of Oudh. We should like to note that the following observations were made in the judgment in that case:

"In all these statements the charge in favour of the plaintiff and the mortgages in favour of Asghar Hussain are specified and there is a note in the remarks column that the auction will be held subject to the right of the mortgages and the maintenance holder. There are orders on the record, e.g. Exs. 190, 191, 195 and 196 which show that some villages belonging to Lal Achal Ram were sold in execution as far back as 1903 and 1904.

"It has been argued for the plaintiff-respondent and has been held by the Sub-Judge that the fact of the charge being notified in the sale proclamation debars the appellants from contesting the charge. We are not prepared to hold that this is the case. No doubt S. 282, Civil P. C. 1832, provides:

"If the Court is satisfied that the property is subject to a mortgage or lien in favour of some persons not in possession, and thinks fit to continue the attachment, it may do so subject to such mortgage or lien."

"And S. 283 declared that an order under S. 282 was conclusive against the party against whom it was passed unless he instituted a suit to establish his right (O. 21, R. 63 of the present Code, which corresponds to old S. 283, is somewhat differently worded)."

But what is relied on here is not an order continuing an attachment subject to a charge, but a notification in the sale proclamation and whether in the old Code or in the new there is only one provision regarding the notification of encumbrances in a sale proclamation. That provision is contained in S. 287 of the Code of 1832, and O. 21, R. 66 of the present Code. That a notification in the sale proclamation cannot bar a purchaser from

(6), [1916] 3 O. L. J. 422=36 I. C. 782.

(7) A. I. R. 192 Oudh. 151=27 O. C. 303.

(8) First Appeal No. 6 of 1918, Decided on 3rd September 1920.

(4) [1912] 15 O. C. 211=15 I. C. 5.

(5) [1915] 2 O. L. J. 140=28 I. C. 260.

contesting the encumbrances thus notified appears to be settled by the decision of the Privy Council in *Izzatunnisa Begam v. Partab Singh* (9). The principle laid down by Lord Macnaghten is that on the sale of property subject to encumbrances the vendor gets the price of it together with an indemnity against the encumbrances affecting the land. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. He cannot pick up the burden of which the land is relieved and seize it as his own property. Their Lordships were considering the position of the vendor, but their language clearly implies that if the encumbrances turn out to be invalid the purchaser gets the benefit. The result is that the plaintiff's appeal fails on all the points. In the first place the mortgage on which they based their claim on the ground that it was included in the mortgage in suit was to set up in the pleadings. It was not produced and proved as required by law. In the second place that mortgage was not mentioned in the sale certificate of the defendants 5 and 6. In the third place the property in dispute was not really sold subject to the mortgage noted first in the sale proclamation and then in the sale certificate, under the circumstances mentioned above. The mortgage on the basis of which the present suit has been brought is not of course binding on defendants 5 and 6 as it is affected by the doctrine of lis pendens. Hence we dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

(9) [1909] 31 All. 533=3 I. C. 793=36 I. A. 203 (P. C.),

A. I. R. 1930 Oudh 366

WAZIR HASAN, C. J. AND RAZA, J.

Sarabjit Singh and others — Appellants.

v.

Farahatullah Khan and others — Respondents.

Second Appeal No. 240 of 1929, Decided on 14th April 1930, against decree of Dist. Judge, Hardoi, D/- 30th April 1929.

(a) Decree — Construction — Mortgage decree—Mortgagors having defined shares in certain property auction purchaser in

execution of decree cannot get more than mortgagor's share in property mortgaged.

Where mortgagors have a specific and defined share in the mortgaged property and it is clear that they mortgaged no more than their proportionate share in the property, the auction purchaser at the sale in execution of the mortgage decree cannot be held to be entitled to retain in possession such shares in the mortgaged property as were clearly exempted from the scope of the suit and consequently from the scope of the decree on which alone their title rests, merely by reason of the fact that decree was ambiguous and the auction purchaser had entered into possession of the whole property as result of the sale: 16 Cal. 173 (P. C.), *Ref.* [P 367 C 2 P 368 C 1]

(b) Civil P. C., O. 43, R. 1 (u)—Alteration by Oudh Chief Court—Scope.

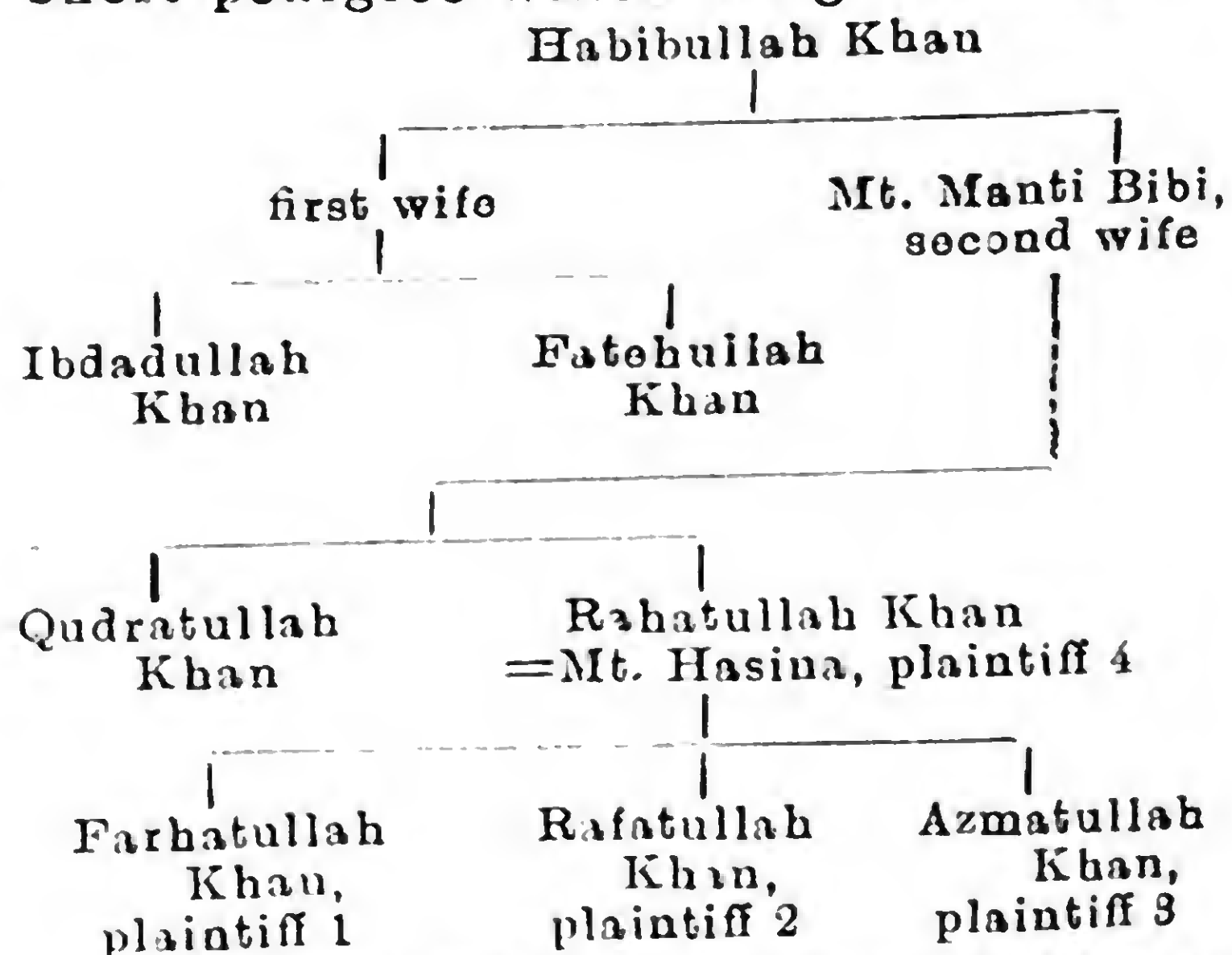
The alteration was intended to and does cover by its language such orders of remand also as are not specifically made under O. 41, R. 23, but may fall to be made by a Court in the exercise of its inherent jurisdiction *ex debito justitiae* or under the provisions of S. 151, Civil P. C.: A. I. R. 1930 All 122, *Ref.* [P 368 C 1]

A. P. Sen and S. C. Das—for Appellants.

H. Husain—for Respondents.

Judgment.—This is the appeal by defendants 2 to 11 from the decree of the District Judge of Hardoi dated 30th April 1929, reversing the decree of the Additional Subordinate Judge of Hardoi dated 12th January 1928.

This judgment should open with a short pedigree which we give below:



Habibullah Khan owned a 15 biswas 7 biswansis 17 kachwansis share in the village of Nagla Kallu, pargana Shahabad, in the district of Hardoi. He died in the year 1899 and on his death his estate devolved on his heirs indicated in the pedigree according to the Hanafi Mahomedan law. Fatehullah Khan and Rahatullah Khan are also dead. Their shares in the estate

of their father again devolved according to the same law on their heirs as shown in the pedigree. On 20th March Ibdadullah Khan, Fatehullah Khan, Rahatullah Khan and Mt. Manti Bibi transferred by way of simple mortgage for a sum of Rs. 2,000 a five biswas zamindari share in favour of Ramman Lal and of one Mangladin, husband of defendant 1, Mt. Brij Rani Koer. On the date of the mortgage Qudratullah Khan and Inayatullah Khan were minors and the transfer purported to include their interest also in the property mortgaged and was made by Fatehullah Khan and Rahatullah Khan acting in the capacity of guardians of the said minors. Having regard to the interests which the mortgagors including the minors possessed according to the Mahomedan law in the mortgaged share of 5 biswas each mortgagor had a $\frac{1}{6}$ th share. Ramman Lal and Mangladin instituted a suit in the year 1917 in the Court of the Subordinate Judge of Hardoi for the relief of sale of the mortgaged property on the foot of the mortgage mentioned above. Qudratullah Khan and Inayatullah Khan were also made defendants to that suit, but in giving his judgment dated 19th June 1918 the learned Subordinate Judge discharged the minor defendants and eventually decreed the suit. A preliminary decree of the same date was made which was made final on 25th November 1919. At this stage of the litigation Rahatullah Khan died and in the decree absolute the plaintiffs of the present suit were impleaded by way of substitution. In pursuance of the decree 4 biswas 15 biswansis share was sold and purchased by one of the mortgagees, Mangladin, for a sum of Rs. 16,000 on 26th August 1922. The result was the dispossession of the mortgagors from the 4 biswas 15 biswansis share purchased by Mangladin. On 17th March 1925 Mangladin sold the share mentioned just now to some of the defendants of the present suit. Thereafter some of the other defendants brought a suit for pre-emption in respect of a portion of the share sold by Mangladin.

On the facts stated above, the case of the plaintiffs is that the defendants are in unlawful possession of their share which amounts to 15 biswansis 14 kachwansis $1\frac{1}{4}$ nanwansis in the property purchased by Mangladin under the

decree for sale. The lower appellate Court has granted a decree to the plaintiffs for possession of 15 biswansis 14 kachwansis and $1\frac{1}{4}$ nanwansis share on payment of Rs. 2,199-0-8 to defendants 2 to 8. The main defence which the Court below has rejected was that a 4 biswas 15 biswansis share was sold under the decree for sale mentioned before, to which decree the plaintiffs were a party, and therefore they are bound by it. If this defence is rejected it seems to us that there is no bar to the success of the plaintiffs' claim. The other obstacles set up on behalf of the defendants are that the adult mortgagors were liable to make good the entire mortgaged share of 5 biswas out of their interest in the village and that the purchasers from Mangladin were bona fide purchasers protected by the provisions of S. 41, T. P. Act, 1882.

As just now indicated, we are of opinion that neither of these pleas has any substance. Each mortgagor, including the minors, had a specific and defined share in the mortgaged property as they had in the entire inheritance of Habibullah Khan and the mortgagors together mortgaged no more than their proportionate interest in the entire mortgaged property. The provisions of S. 41, T. P. Act, are also wholly inapplicable.

We now proceed to determine the effect of the decree for sale. If the decree can be interpreted to mean that a 4 biswas 15 biswansis share was ordered by the Court to be sold, then there is an end of the plaintiffs' case. We think that the question involved in the case is the question of the interpretation of the decree. On its terms it exempted from sale a 5 biswansis share, but there is no description in the decree of the defendants whose shares were the subject-matter of the exemption. The decree is therefore in our opinion ambiguous. In the circumstances and in order to see whose and what interest was intended by the Court to be exempted from the sale the judgment must be looked at. The decree as prepared is wholly insufficient for that purpose: *Kali Krishna Tagore v. Secretary of State* (1). The judgment however is perfectly clear. The minor mortgagors were discharged at the instance of the

(1) [1888] 16 Cal. 173=15 L. A. 186=5 Sar. 237 (P.C.).

plaintiffs of that suit. The extent of their shares was determined under a specific issue and those shares were excluded from the scope of the suit altogether. It is not disputed that the share of the plaintiffs amounted in extent to the share for which the Court below has now granted a decree to them. It follows that the defendants cannot be held to be entitled to retain in possession such shares in the mortgaged property as were clearly exempted from the scope of the suit and consequently from the scope of the decree on which alone their title rests. At the hearing of this appeal the learned counsel for the plaintiffs-respondents raised a preliminary objection on the ground that the appeal was barred by reason of the defendants' failure to prefer an appeal from the order of the learned District Judge of Hardoi passed on 9th January 1929 remanding the case under O. 41, R. 25, Sch. I, Civil P. C., to the Court of first instance for the determination of certain issues. The argument is based on the recent alteration made by this Court and also the High Court at Allahabad in the language of Cl (u), R. 1, O. 43, Civil P. C. Originally Cl. (u) read as follows :

"An order under R. 23, O. 41, remanding a case where an appeal would lie from the decree of the appellate Court."

As altered the clause reads as follows:

"Any order remanding a case, where an appeal would lie from the decree of the appellate Court."

It is contended that the effect of the alteration is that an appeal is permitted even from an order of remand under R. 25, O. 41, Civil P. C.

We are unable to accept this contention. We think that the alteration was intended to and does cover by its language such orders of remand also as are not specifically made under R. 23, but may fall to be made by a Court in the exercise of its inherent jurisdiction *ex debito justitiæ* or under the provisions of S. 151, Civil P. C. We had expressed this view at the hearing of the appeal and we now find that it is in consonance with a recent decision of a Bench of the High Court at Allahabad in *Moti Lal v. Nandan* (2).

The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 368

RAZA AND PULLAN, JJ.

S. Afzal Husain — Plaintiff — Applicant.

v.

Mt. Shafiqunissa and others—Defendants—Respondents.

Civil Revn. Appln. No. 11 of 1930, Decided on 11th April 1930, against order of Sub-Judge, Bara Banki, D/- 10th February 1930.

Court-fees Act, S. 7 (5)—When relief for possession is consequential relief and principal relief is declaration court-fee is to be paid on valuation of plaint.

If the principal relief claimed is one for possession and the plaintiff's right to possession is merely ancillary to it, in that case it is enough to pay the court-fee on the relief for possession. On the other hand if the principal relief is for declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the court-fee would be payable according to the amount at which the relief is valued in the plaint : *A. I. R. 1930 Oudh 104, Foll. ; A. I. R. 1929 Oudh 419, Dist* [F 369 C 1]

Naimullah—for Applicant.

Khaliquzzaman—for Opposite Party.

Judgment. — This is a revision filed against an order of the Subordinate Judge of Bara Banki on a question of court-fees. The plaintiff brought a suit in which he claimed that he was the owner of a certain property and the reliefs which he asked were, first, that he should be given a decree for possession of the said property; and, secondly, that he should be granted a declaratory decree to the effect that a deed of gift (in virtue of which possession had been obtained by the opposite party) was ineffectual owing to the plaintiff's minority and fraud and undue influence on the part of the defendants. He valued the claim for the purposes of jurisdiction at Rs. 8,000 and he paid a court-fee of Rs. 91-12-0 made up as follows : Rs. 10 for cancellation of the deed of gift ; Rs. 51-12-0 for possession based on five times the amount of the land revenue ; and Rs. 30 on the sum due as mesne profits.

The suit was entered in the Subordinate Judge's Court as a suit for possession and no objection was made by the office to the stamp. The opposite party, however, objected that an *ad valorem* duty should have been paid as this was a suit for cancellation of a document,

and possession was a consequential relief. The Subordinate Judge accepted the objection and this application in revision has been filed against his order. A similar case was decided by a Bench of this Court of which one of us was a member : *Avadhraj Singh v. Dharamraji Kuar* (1). The principle laid down in that case was that where the plaintiff sues for possession of certain zamindari shares questioning the validity of a certain compromise and a decree passed on the basis of the compromise the suit is not one for a declaration with consequential relief and the court-fee calculated on five times the Government revenue is sufficient. A decision of the Allahabad High Court was before that Bench and not disapproved. In that case *Ganga Dei v. Sukhdeo Prasad* (2), the plaintiff, was the wife of a man who had been adjudged a lunatic and she sued first for a declaration that a deed of gift executed by her husband before he was declared to be a lunatic was invalid and void and the donee had thereby acquired no right in the property ; and secondly, for possession of the land conveyed by the deed. It was held of this case that the suit was a suit for a declaration with consequential relief but it was distinguished from the case before the Judges of this Court which was a suit for possession of zamindari shares by setting aside the compromise and decree. The same question came before another Bench of this Court in the case of *Deoraj v. Kunj Behari* (3). In this case the principle was stated to be as follows :

"If the principal relief claimed is one for possession and the plaintiff's right to possession is merely ancillary to it in that case it is enough to pay the court-fee on the relief for possession. On the other hand if the principal relief is for declaration and the plaintiff's right to possession depends upon his being entitled to the declaration, then the relief for possession must be regarded as a consequential relief and the court-fee would be payable according to the amount at which the relief is valued in the plaint."

Thus in order to decide the question before us we have to consider what is the principal relief claimed. We cannot decide the matter simply by seeing the order in which the plaintiff has stated the relief sought by him, but we must consider the substance of those reliefs.

(1) A.I.R. 1929 Oudh 419.

(2) A.I.R. 1924 All. 612=47 All. 78.

(3) A.I.R. 1930 Oudh 104.

In the present case it is clear that what the plaintiff seeks is possession. The Judges who decided the case last cited (6 O. W. N. 1105) found that in the case before them the plaintiff could not become entitled to a decree for possession unless he got a declaration that certain former decrees were not binding upon him. The Judges were therefore of opinion that his primary relief was the declaration, and possession was only a consequential relief. If we apply their principle to the present case we cannot say that it is clear that the plaintiff "could not ignore" the deed of gift in the same way, as in the case cited it was clear that the plaintiff could not ignore the decrees for foreclosure and sale. We can merely see the plaint and from that deduce the points in issue between the parties and if, as the plaintiff says, the deed of gift was executed by him in his minority and was therefore ab initio void we cannot say that it is necessary for him to get a declaration about that deed of gift before he could become entitled to a decree for possession. Looking as we must to the frame of the suit and judging as best we can the substance of the reliefs claimed we can only conclude that the principal relief sought by the plaintiff was possession and that the relief by cancellation of the deed of gift was in a sense ancillary to it. In our opinion therefore the law stated in the case of *Avadhraj Singh v. Dharamraji Kuer* (1) applies to the suit before us. The decision of the Court below is incorrect and the suit was correctly stamped. We therefore allow this appeal with costs, set aside the order of the Court below and order that the plaint be admitted on the existing stamp and the Court proceed according to law.

v.B./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 369

SRIVASTAVA, J.

Faqir Bux—Appellant.

v.

Bileshar and others—Respondents.

Second Appeal No. 88 of 1930, Decided on 25th April 1930.

Limitation Act, S. 12 (2)—"Requisite time," meaning of.

Time which need not have elapsed if the appellant had taken reasonable and proper steps

to obtain a copy of the decree or order cannot be regarded as "requisite" time within the meaning of S. 12 (2). *A. I. R. 1928 P. C. 103* and *A. I. R. 1922 P. C. 352, Rel. on.: 12 All. 79, Diss. from: A. I. R. 1925 Oudh 600, Ref. [P 370 C 2]*

Ali Muhammad—for Appellant.

Judgment.—These are two appeals against a decision of the Additional Subordinate Judge pronounced by the judgment which has given rise to these appeals on 17th December 1929. In accordance with O. 20, R. 7, Civil P. C., the decree prepared in the lower appellate Court bears the same date on which the judgment was pronounced. But it appears that as a matter of fact the decree was signed by the Additional Subordinate Judge on 2nd January 1930. Applications for copies of the judgment and decree were made by the appellants on 7th January 1930. The copies were ready on the 11th January and were delivered to the applicants on the 13th January. The present appeals were filed on 5th April 1930. It has been reported by the office that the appeals are beyond time by 14 days.

The contention urged on behalf of the appellants is that the period intervening between the date of the judgment and the date of the signing of the decree should be regarded as "time requisite for obtaining a copy of the decree" within the meaning of S. 12, Cl. 2, Lim. Act (9 of 1908). It has been frankly conceded by the learned counsel for the appellants that the practice which has hitherto prevailed in Oudh is against his contention. In *Mohammad Mehdi Ali Khan v. Lal Bahadur Singh* (1), Dalal, J. C. (now Sir Barjor Dalal) held that in computing the period of limitation under S. 12 (2), Lim. Act, there was no such practice prevailing in Oudh or in the sister province of Allahabad as would exclude the time between the date of the judgment and preparation of the decree. The learned Judge distinguished the decision of the Calcutta High Court in *Beni Madhub Mitter v. Matungini Dassi* (2) on the ground that the practice prevailing in the Calcutta High Court appeared to be different. Reliance was placed before me upon the following observations of Sir John Edge, C. J., in *Parbati v. Bhola* (3) at p. 81:

(1) *A. I. R. 1925 Oudh 600.*

(2) [1886] 13 Cal. 104.

(3) [1890] 12 All. 79=(1890) A. W. N. 25.

"In my opinion, applying S. 12, Lim. Act, to such a case, allowance should be made for the time between the date when a judgment was pronounced and the date when the decree was signed if the delay in signing the decree delayed the applicant in obtaining a copy of the decree, and not otherwise. In such a case as that it would clearly be, within the meaning of S. 12, time which was requisite for obtaining a copy of the decree because a copy of the decree could not be obtained until the decree was signed by the Judge."

With all respect to the learned Judge, I feel very doubtful whether any time preceding the making of an application for a copy can be regarded as "time requisite for obtaining a copy of the decree" even though the decree may not have been signed by the Judge. In *Pramatha Nath Roy v. Lee* (4) it was held by their Lordships of the Judicial Committee that time which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order could not be regarded as 'requisite' time within sub-S. 2, S. 12, Lim. Act. In *J. M. Surty v. T. S. Chettyar* (5), Lord Phillimore delivering the judgment of their Lordships of the Judicial Committee observed as follows:

"The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default."

In the present case, as pointed out before, no application for copies was made until 7th January 1930. There is nothing to suggest that the applicants were prevented from making their application earlier by reason of the decree not having been signed. If they had made the application earlier there is no doubt that the time subsequent to the date of the application would have been treated as "time requisite for obtaining a copy" within the meaning of S. 12, but in the absence of any such application, it seems to me that we would be straining too much the language of the section if we hold the period intervening between the pronouncing of the judgment and signing of the decree as period requisite for obtaining a copy of the decree. I can therefore see no reason to make a departure in this case

(4) *A. I. R. 1922 P. C. 352=49 Cal. 999=49 I. A. 307 (P. C.).*

(5) *A. I. R. 1928 P. C. 103=109 I. C. 1=55 I. A. 161=6 Rang. 302 (P. C.).*

from the practice which has prevailed so long in this province and must overrule the appellant's contention.

The learned counsel for the appellant also suggested that he might be allowed extension of time under S. 5, Lim. Act. It is enough to say that the applicants actually obtained the copies on 13th January 1930. They did not file their appeals until about three months later on 5th April 1930. There is no explanation forthcoming why they waited so long before filing their appeals. I must therefore reject this contention also.

The result therefore is that these appeals must be held to be barred by time. They are dismissed accordingly.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1930 Oudh 371

SRIVASTAVA, J.

Mt. Dhanpati Kuer—Appellant.

v.

Kandhaiya Bakhsh Singh and others—Respondents.

Second Appeal No. 27 of 1930, Decided on 1st April 1930.

(a) Interpretation of Statutes—Jurisdiction conferred on tribunal of limited authority—Conditions and qualifications annexed to grant must be strictly construed.

Where the statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with. [P 372 C 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 110—Objection brought after expiry of period—No action taken under S. 113—Court can consider it if sufficient reason is shown for delay.

Under S. 110, provided sufficient reason is shown for delay a Court of revenue is not precluded from dealing with an objection brought before it merely by reason of such objection not having been filed within the time limited by the Court for filing objections, the Court not having up to that time taken any action under S. 113 of the said Act: 18 All. 210; A. I. R. 1926 Oudh 309 and A. I. R. 1929 Oudh 67, Foll.: 17 O. C. 224, not Appr. [P 373 C 1]

(c) U. P. Land Revenue Act (3 of 1901), S. 111 (b)—Period of three months is period prescribed by statute and by S. 29, Lim. Act, provisions of S. 4 apply to suit under it.

If the partition Court decides to take action under Cl. (b), S. 111, then according to the provisions of that clause it must require the party concerned to institute, within three months, a suit in the civil Court for the determination of such question. This period of three months is clearly a period of limitation prescribed by statute within the meaning of S. 2, Lim. Act. [P 374 C 1]

H. K. Ghosh—for Appellant.

Ghulam Imam for Pratap Singh—for Respondents.

Judgment.—This is a second appeal by Mt. Dhanpati Kuer defendant 1, against the judgment and decree dated 21st October 1929 passed by the Subordinate Judge of Sultanpur affirming the decision, dated 16th October 1928, passed by the Munsif, Sultanpur. It arises out of a suit instituted by Kandhaiya Bakhsh, plaintiff for a declaration that he was the exclusive owner of the plots in suit. The facts which led up to this litigation are that one Kali Din Tewari, defendant 6, made an application for partition of mahal Rajbans Singh, village Deoara in the Sultanpur District. A proclamation was issued under S. 110, U. P. Land Revenue Act (3 of 1901), calling upon the recorded cosharers in the mahal, who had not joined in the application, to file their objections, if any, against the partition on or before the 5th July 1926. It is in evidence that this proclamation was served on the plaintiff personally on 9th June 1926 and that the plaintiff appeared on the date fixed but did not file any objection that day. However, on 6th January 1927, he made an application to the partition officer saying that he was the exclusive owner of the plots in suit under a sale deed dated 14th February 1916 executed by one Jagwant in his favour and had obtained an order for mutation on the basis thereof, but that he has now discovered that as a matter of fact his name is not recorded in respect of the entire area of the plots in suit and that the name of Mt. Dhanpati Kuer, defendant 1, has been entered as against a portion of the said plots. He further alleged that he was in possession of the entire land ever since the sale deed was executed. He prayed that the partition proceedings be stayed and he may be allowed time to get an order from a competent Court on the basis of the sale deed in his favour and to have his name entered accordingly. Thereupon the partition officer, on 15th February 1927, granted Kandhaiya Bakhsh three months time within which he should "secure a decision." The suit which has given rise to this appeal was instituted in pursuance of this order, on 16th May 1927.

The plaintiff based his title upon a sale deed executed by Jagwant in his favour in the year 1916. As regards

the title of Jagwant it was alleged that he was the owner of a one-fourth share in the plots in suit in his own right and that as regards the remaining three-fourth share he had acquired title to it under an agreement dated 4th September 1897 executed in his favour by his three cousins Har Prasad, Har Nath and Har Dayal. It was further pleaded that the title of Jagwant in respect of the entire plots in suit had been recognized by Mt. Dhanpati Kuer, defendant 1, under a compromise dated the 29th March 1921 arrived at in a suit instituted against her by Jagwant.

The suit was contested by Mt. Dhanpati Kuar on numerous grounds. The defences material for the purpose of this appeal were that she denied the validity of the agreement dated 4th September 1897 and claimed title through her father-in-law Har Dayal who was alleged to have been the last survivor amongst the three brothers Har Prasad, Har Nath and Har Dayal. It was further pleaded that the suit was not cognizable by the civil Court and was barred by limitation, and S. 42, Specific Relief Act. The learned Munsif held the plaintiff's title through Jagwant established and rejected the defences raised on behalf of Mt. Dhanpati Kuar. As a result of his findings he decreed the plaintiff's claim. The learned Subordinate Judge has agreed with the trial Court in its conclusions as regards all the points above referred to and has upheld the decision of the learned Munsif.

The learned counsel for Mt. Dhanpati Kuar, defendant-appellant has challenged the correctness of the decision of the lower appellate Court as regards jurisdiction, limitation, bar of S. 42, Specific Relief Act, and with regard to the plaintiff's title. The main contention urged on the question of jurisdiction is that the objection raised by the plaintiff by his application, dated 6th January 1927 (Ex. 15) was not made within time and therefore the civil Courts had no jurisdiction to entertain the suit. It has been argued that the jurisdiction of the civil Court to entertain the suit is based upon the provisions of S. 3, Land Revenue Act 111, and that the conditions laid down in that section must be strictly complied with as a condition precedent to the civil Court being invested with jurisdiction to entertain the suit. It is

further pointed out that the section lays down that the objections should be made "on or before the day fixed" and as admittedly the objection in the present case was made after the date fixed in the proclamation, therefore, the order passed by the revenue Court was manifestly contrary to the provisions of that section and the civil Court could not assume jurisdiction in respect of the suit. Reliance has been placed upon a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Mukhtar Ahmad v. Barati Lal* (1). In this case it was held that when the jurisdiction of civil Courts is invoked in such cases they must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied with. It was further observed that

"it must be made clear in the first place that the question of title which they are invited to decide has been raised by an objection filed in the revenue Court within the time provided by S. 110 of the Act."

At another place it was observed that "jurisdiction is conferred by the statute and not by the Court's order and it is for the civil Courts to see that the conditions precedent which are laid down by the Act have been strictly fulfilled before they assume jurisdiction."

Ultimately it was held that the order of the Assistant Collector directing the plaintiff to file a civil suit within three months was without jurisdiction for the reasons, amongst others, that it was made long after the period limited by the proclamation had expired. This decision no doubt supports the appellant's contention. It is quite true that where the statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with. But with all respect to the learned Judges who decided the case I feel that they have taken a much too rigid view of the provision requiring the objection to be filed on or before the date fixed in the proclamation. S. 110 allows the partition Court latitude to fix a date for filing objections which should not be "less than thirty days or more than sixty days from the date of the issue thereof." Board Circulars, Vol. 1, 21-11, R. 9, prescribes as follows :

(1) [1914] 17 O. C. 224=25 I. C. 916=1 O. L. J. 335.

"No objection raising a question of title shall be entertained except for special reasons, to be recorded in writing, at any period subsequent to the date fixed in the proclamation for the lodging of objections."

The rule clearly authorizes the partition Court to entertain such objections in special cases even subsequent to the date fixed in the proclamation. The attention of the learned Judges who decided the case of *Mukhtar Ahmad v. Barati Lal* (1) does not appear to have been drawn to this rule. In a case decided by another Bench of the same Court, namely, *Sheo Ratan Singh v. Rohan Singh* (2), it was held with reference to this provision contained in S. 110, Land Revenue Act, that the Collector is at liberty after the expiration of the date fixed in the proclamation to entertain an objection and do justice between the parties if sufficient reason is shown for the delay. This decision was based upon a decision of the Allahabad High Court in *Tulsi Prasad v. Matru Mul* (3) in which it was held by Knox, J., that under S. 110, provided sufficient reason is shown for delay a Court of revenue was not precluded from dealing with an objection brought before it merely by reason of such objection not having been filed within the time limited by the Court for filing objections, the Court not having up to that time taken any action under S. 113 of the said Act. This view has also been adopted in this Court by my brother Raza, J., in *Rudan Singh v. Kalka Singh* (4) and by the late Misra, J., in *Ram Sumran v. Sarjoo Pershad* (5). In the present case it is admitted that no proceedings under S. 113, Land Revenue Act, had been taken until the making of the application dated 6th January 1927 by the plaintiff. It is also clear from the application, Ex. 15, and the order passed by the partition officer, Ex. 16, that the plaintiff had alleged special reasons for his not filing the objection earlier, and the learned Assistant Collector while observing that the objection had been filed beyond the date fixed, held that as no proceedings had been started in the case he was justified in entertaining it. I must therefore hold that it is not, in these circumstances, open to the civil

Court to question the correctness of the order passed under S. 111, Land Revenue Act. It was also argued that the application, Ex. 16, did not ask for permission to institute a suit in the civil Court for the determination of the question of title, but simply asked for a postponement of the partition case to enable the plaintiff to get his name entered as owner and that the order passed by the Assistant Collector did not require the plaintiff to institute a suit in the civil Court within three months but granted him three months' time within which he should secure a decision. I agree with the Courts below that though the application and the order are worded rather loosely, yet they must be regarded as substantially complying with the provisions of S. 111, Land Revenue Act. Reading the application, Ex. 15, as a whole, I have no doubt that the prayer made by the applicant was intended to mean that he should be allowed time to have the question of title raised by him in the application determined by the civil Court. Similarly I am of opinion that the order of the Assistant Collector which is clearly one under S. 111, Land Revenue Act, was intended to grant three months' time in accordance with the provisions of Cl. (b) of that section. I must therefore overrule this contention also. I therefore agree with the Courts below that the suit which has given rise to this appeal was instituted in pursuance of the order passed by the Revenue Court under S. 111, Land Revenue Act, and that the civil Court had jurisdiction to entertain it.

Next it was argued that the period of three months allowed by the Assistant Collector in his order, Ex. 16, expired on 15th May 1927 and therefore the present suit was instituted one day too late. The lower appellate Court has pointed out that 15th May 1927 was a Sunday and has held that under S. 4, Lim. Act, the present suit instituted on 16th May 1927 was within time. The learned counsel for the appellant has argued that S. 4 has no application to the case on the ground that the period of three months in question is not a period of limitation prescribed by any law, but is a period fixed under an order of the partition officer. In my opinion the contention is without substance. S. 29, Lim. Act, prescribes that:

(2) [1919] 22 O. C. 139=54 I. C. 258.

(3) [1896] 18 All. 210=(1896) A. W. N. 30.

(4) A. I. R. 1926 Oudh 309.

(5) A. I. R. 1929 Oudh 67=4 Luck 270.

"for the purpose of determining any period of limitation prescribed for any suit, appeal or application, by any special or local law, the provisions contained in S. 4 . . . shall apply only in so far as and to the extent to which they are not expressly excluded by any such special or local law."

If the partition Court decides to take action under Cl. (b), S. 111 then according to the provisions of that clause it must require the party concerned to institute, within three months, a suit in the civil Court for the determination of such question. This period of three months is clearly a period of limitation prescribed by statute within the meaning of S. 29, Lim. Act. I am not aware and have not been referred to any provision of the Land Revenue Act expressly excluding the application of S. 4 to such cases. I, therefore, hold that the suit was within limitation.

The next contention urged on behalf of the appellants was that the plaintiff's suit was barred by the provisions of S. 42, Specific Relief Act. It was contended that the plaintiff was not in possession of the entire plots in suit and that the suit for a mere declaration was not therefore maintainable. This matter is concluded by the finding of fact of the two Courts below in support of the plaintiff's possession. On behalf of the appellant reference is made to copies of village papers showing that the name of Mt. Dhanpati Kuar was recorded as against a portion of the plots in suit. The Courts below have rejected this evidence and believed the statement of the plaintiff in support of his exclusive possession. It is not open to him in second appeal to question the correctness of this finding. I must therefore overrule this contention.

Lastly it was contended that the plaintiff has failed to prove his title in respect of the plots in suit. It was argued in the first place that the Courts below were wrong in relying upon the copy of the deed of agreement dated 4th September 1897, Ex. 2, when the plaintiff had failed to produce the original deed. The Courts below have held that the plaintiff has sufficiently accounted for the non-production of the original. This being so they were justified in making a presumption in favour of the genuineness of the original: see *Brij Kishore v. Beni Pershad* (6).

(6) A. I. R. 1929 Oudh 483.

It was also argued that the deed of agreement, Ex. 2, was invalid as it was executed by Har Prasad, Har Nath and Har Dayal without sufficient consideration and had not been acted upon. It is conceded by the learned counsel for the appellant that he is unable to contend that the deed was altogether without consideration. This being so the deed cannot be invalidated on the ground of the alleged inadequacy of the consideration. It is further clear from the proceedings which resulted in the compromise dated 29th March 1921 that the deed of agreement in question was sufficiently acted upon and a decree for possession was passed in favour of Jagwant in terms of the aforesaid deed. These were the only contentions urged impugning the plaintiff's title. As I have shown above none of them is of any force.

The result therefore is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 374

SRIVASTAVA, J.

Sohan Lal—Plaintiff—Appellant.

v.

Shaikh Mohammad Husain and another—Defendants—Respondents.

Second Appeal No. 318 of 1929, Decided on 10th December 1929.

(a) **Landlord and Tenant**—"Town".

Mere inclusion in municipality is no test as to whether an area is or is not a town: *A. I. R. 1929 Oudh 301, Foll.* [P 375 C 2]

(b) **Adverse Possession**—Non-owner's possession.

Possession by a person who has no title is confined to the land actually occupied by him: 12 O. C. 58 and 8 O. L. J. 495, *Foll.* [P 376 C 1]

(c) **Possessory Title**—Decree for possession can be given on the basis of possessory title but not against rightful owner.

A plaintiff can be given a decree for possession on the basis of his possessory title even in cases other than those under S. 9, Specific Relief Act, but such a decree can be granted only against a person who is not the rightful owner. [P 376 C 2]

Ali Zaheer and Raj Bahadur—for Appellant.

Hyder Husain and B. K. Mathur—for Respondents.

Judgment.—This is the plaintiff's appeal against the decree dated 17th August 1929 passed by the Subordinate Judge of Malihabad, Lucknow, reversing the decision dated 12th July 1928 passed by the Munsif, North Lucknow.

It arises out of a suit for possession of certain plots of land and for mesne profits.

The plaintiff's case was that the land in suit originally belonged to one Hira Lal who sold it to Mohammad Ekram, defendant 5, by a sale-deed, dated 12th March 1918, that the latter sold it to Bhagwan Din, defendant 6, on 22nd September 1926, and that the latter in his turn sold it to the plaintiff by a sale deed dated 14th October 1927. The plaintiff averred that on 5th December 1925 defendants 1 and 2 obtained a decree for arrears of rent under S. 127, Oudh Rent Act, against Kalka, defendant 3, who was alleged to be a tenant of the plaintiff. This was alleged to constitute plaintiff's dispossession from the land in suit and was set up as the cause of action for the suit which has given rise to the present appeal. The suit was contested by defendants 1 and 2 who denied the title of the plaintiff and of his predecessors-in-title and claimed that the property in suit belonged to one Nawab Umrao Mahal, one of the wives of Nawab Wajib Ali Shah, and that it had been granted to her by the British Government as part of Farah Bagh in the year 1858. The contesting defendants claimed title through the said Umrao Mahal. The plaintiff in his plaint did not specify the khasra numbers of the land in suit but had described the land with reference to its boundaries. The trial Court appointed a commissioner who went to the place and made measurements and fixed the khasra numbers of the land in suit. Those numbers have been detailed in the judgment of the learned Munsif, according to the report of the commissioner.

The learned Munsif held the plaintiff's title established and decreed his claim. On appeal the learned Subordinate Judge has disagreed with the findings of the trial Court and has come to the conclusion that the plaintiff has failed to prove his title. He has on the other hand found the defendant's title established. On these findings he has dismissed the plaintiff's suit. The learned counsel for the plaintiff-appellant has, in support of this appeal, assailed the finding of the lower appellate Court in favour of the defendant's title and has contended that the plaintiff has established his title to two out of the twenty-four numbers in dispute

through Puran, the father of Hira Lal, and in respect of the remaining twenty-two numbers by adverse possession. He has in the course of his arguments conceded that if the finding of the lower appellate Court regarding the defendants' title is upheld, then it is not possible for him to substantiate his claim in respect of any of the lands in suit. The ground of attack set up as regards the finding in respect of the defendants' title is that the lands in suit are situate in Suppa which is not a village but a part of the city of Lucknow and that on the authority of *Barati v. Secy. of State* (1) the persons whose names are recorded in the khasras as in possession of houses at the time of the first Regular Settlement should be considered to be the owners of the houses together with the lands on which they stand and that the title of Umrao Mahal must be limited to the particular plots which were recorded in her name during the aforesaid settlement. In my opinion the contentions are without force. Reference has been made to the description of Suppa as a mohalla of the city of Lucknow in the settlement khasras Exs. 7 and 8, and in one of the sale-deeds executed by Umrao Mahal. It was held in *Fasahat Hussain v. Mohammad Zamin*, A. I. R. 1929 Oudh 301, that mere inclusion in municipality is no test as to whether an area is or is not a town. The learned Subordinate Judge on a consideration of the entire evidence came to the conclusion that the plaintiff had failed to prove that Suppa was a part of the city. This is a finding of fact based upon evidence and is not vitiated by any error of law. It cannot therefore be questioned in second appeal.

Next the learned Subordinate Judge has found by a reference to Ex. A-4, the statement of Umrao Mahal's mukhtar, dated 3rd June 1858, Ex. A-5, the rubkar dated 1st July 1858 and Ex. A-27, the agreement executed by Umrao Mahal dated 7th July 1858, that the whole of Farah Bagh and Talab Suppa was released by the Government in favour of Nawab Umrao Mahal and an agreement was taken from her. I am sorry to note that the finding of the learned Subordinate Judge as

(1) A. I. R. 1921 Oudh 65=61 I. C. 721=24 O. C. 33.

regards the whole of the area in suit being included in the lands which were released in favour of Nawab Umrao Mahal is not as clear and definite as one should have wished it to be. But after a careful examination of the judgment and by a reference to the report of Babu Fateh Bahadur, Ex. D. W. 2/2, and the naqsha prepared by him, I am satisfied that the entire area in suit is included within the lands forming part of Farah Bagh, which had been granted to Nawab Umrao Mahal. I must therefore uphold the finding of the learned Subordinate Judge about the defendants having successfully established the title of Nawab Umrao Mahal in respect of the property in suit. This, on the admission of the learned counsel for the plaintiffs appellants, is sufficient to put him out of Court.

But apart from the above finding the plaintiffs' claim must also fail because, as found by the lower appellate Court, he has failed to establish the title of Hira Lal in respect of the plots in suit. The suit which has given rise to this appeal was a suit in ejectment and whether the defendant had any title or not the plaintiff must establish his title before he can be entitled to a decree for possession. The only title set up before me in respect of the plots in suit, Ex. Nos. 111 and 112 is a title based upon adverse possession. It is well settled that possession by a person who has no title is confined to the land actually occupied by him. As held in *Ma-heshwar Baksh Singh v. Pratap Bahadur Singh* (2) and *Durga v. Ram Padarth* (3), constructive possession can only be presumed where there is a claim based upon titles. In this case the lower appellate Court has found that at best the plaintiff was in possession from 1908 to 1915, but there was a gap in his possession from 1915 when, during the heavy rains that took place in that year, the house fell down, until about the year 1918 and that during this period the land remained vacant. This finding of the learned Subordinate Judge is supported by the statement of plaintiff's own witness, P. W. 5, who stated that Hira Lal did not have possession over the land in suit during these two years. On the principle just stated there can

be no presumption about Hira Lal having continued in possession over this vacant land, and even if there were any room for presumption the matter is concluded by the finding of the lower appellate Court supported by the statement of P. W. 5. The plaintiff's claim, therefore, based on adverse possession must fail.

Next as regards the two plots 111 and 112 the position is this. These two numbers are recorded in the khasra, Ex. 7, in the name of Puran, the father of Hira Lal. I was at first inclined to uphold the title of the plaintiff in respect of these two plots inasmuch as his title was supported by the khasra entry, but on further consideration I think that in view of the finding of the lower appellate Court which I have accepted above, namely, that the defendants have established the title of Umrao Mahal in respect of the whole of the lands in suit, the possession of Puran and Hira Lal must be considered to be only as riyaya, as found by the learned Subordinate Judge. The name of Puran finds place in two columns of the khasra. Ex. 7, one of the columns being headed "*nam malik baruai kabza*" and the other as "*nam sakin eh kashtikar*." The first entry does not necessarily prove title as owner and when it has been found that the title as owner rested in Umrao Mahal by virtue of the grant made in her favour some ten years before the preparation of this khasra, the proper construction to place upon the entry is that Puran held it only as a riyaya.

Lastly it was alleged that in any case the plaintiff should be given a decree on the basis of his possessory title. It is no doubt true that a plaintiff can be given a decree for possession on the basis of his possessory title even in cases other than those under S. 9, Specific Relief Act, but such a decree can be granted only against a person who is not the rightful owner. In this case it has been found that Umrao Mahal, through whom the defendants claim, was the owner of the land in suit. This being so the plaintiff cannot claim any decree on the basis of their alleged possessory title. The appeal therefore fails and is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(2) [1909] 12 O. C. 58=2 I. C. 63.

(3) [1921] 8 O. L. J. 495=65 I. C. 749.

* * A. I. R. 1930 Oudh 377

Full Bench

WAZIR HASAN, C. J., RAZA AND SRIVASTAVA, JJ.

Shyam Behari—Applicant — Appellant.

v.

Mt. Mohandei—Opposite Party—Respondent.

Second Appeal No. 348 of 1929, Decided on 8th May 1930, from decree of Dist. Judge, Gonda, D/- 7th September 1929.

* * Civil P. C., O. 34, R. 6—Provisions of O. 34, R. 6, cannot be invoked unless it is established that mortgaged property had been sold as contemplated by O. 34, R. 5 (2).

The expression "any such sale" in O. 34, R. 6, has reference to O. 34, R. 5 (2). An application for a personal decree under O. 34, R. 6, is not maintainable unless a sale in pursuance of O. 34, R. 5 (2) has as a matter of fact taken place: 42 All. 519 and A. I. R. 1924 Cal. 209, *Foll*; A. I. R. 1918 P. C. 159, *Expl*.

[P 378 C 1]

K. P. Misra for L. S. Misra—for Appellant.

H. D. Chandra—for Respondent.

Report.—The question referred to the Full Bench for decision is:

Is the application of 23rd April 1928 maintainable in the circumstances of this case?

Now the circumstances are as follows:

The appellant obtained a decree for sale of immovable property on 25th September 1922 on the foot of a mortgage of 4th March 1916. The decree was made final on 8th September 1923 before the appellant could proceed to bring the mortgaged property to sale. The property was sold in the year 1927 in pursuance of another decree for sale in favour of a mortgagee prior to the appellant. The appellant was a party to the decree of the prior mortgage. On 23rd April 1928 the appellant made the application, to which the question refers, for a personal decree against the mortgagor under O. 34, R. 6, Civil P. C., for the amount of the mortgage-money. In the first instance the application was rejected on the ground that it was barred by limitation but on appeal this order was set aside and now both the lower Courts have dismissed the application on the ground that it was not maintainable because there had been no sale under the appellant's mortgage decree and consequently

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the requirements of R. 6, O. 34, of the Code are not fulfilled.

The question therefore which is covered by the reference and which we have to decide, is as to whether the view taken by the Courts below is correct or not. We have heard arguments at great length in this case and have also taken time to consider our judgment. On behalf of the appellant the following cases were cited:

Jeuna Bahu v. Parmeswar Narayan Mahtha (1); *Sheo Din v. Bhawani Bakhsh* (2), *Ram Raghbir v. Imami Begam* (3); *Brij Behari Lal v. Indarpal Singh* (4); *Syed Wasi Ali v. Jang Bahadur Singh* (5); and *Adhar Chandra Naskar v. Sarnwamoyi Dasi* (6).

Before proceeding to give our answer to the question under reference we want to make it perfectly clear that we do not wish to express our opinion on any question other than the question as to whether the application which purports to have been made under O. 34, R. 6, Civil P. C., is or is not maintainable having regard to the sole fact that no sale of the mortgaged property in pursuance of the decree passed in favour of the appellant on 8th September 1923 had taken place. The reason for making this observation is that it was argued on behalf of the appellant that the relief for a personal decree could be granted to the appellant independently of the provisions of R. 6, O. 34, Civil P. C., and in support of the argument reliance was placed on a recent decision of a Bench of the High Court at Allahabad in the case of *Bisheshar Nath v. Chandu Lal* (7).

The decision of their Lordships of the Judicial Committee in the case of *Jeuna Bahu v. Parmeswar Narayan* (1) does not in our opinion support the view that a personal decree in pursuance of the provisions of R. 6, O. 34 of the Code can be made even where no sale under the final decree has as a matter of fact taken place. All that was decided in that case was that a

(1) A. I. R. 1918 P. C. 159=49 I. C. 620=46 I. A. 294=47 Cal. 370 (P.C.).

(2) [1911] 14 O. C. 62=9 I. C. 752.

(3) [1911] 14 O. C. 217=9 I. C. 403.

(4) [1920] 23 O. C. 145=57 I. C. 967.

(5) [1915] 34 I. C. 48.

(6) A. I. R. 1929 Cal. 121=117 I. C. 530.

(7) A. I. R. 1928 All. 71=103 I. C. 459=50 All. 821.

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decree of the nature contemplated by R. 6 could be made in anticipation of sale directed to take place by the terms of the preliminary decree; and as a matter of fact, before action was taken under S. 90, T. P. Act, then in force, a sale had taken place. As regards the other cases cited by the learned counsel for the appellant it must be admitted that they support the argument that a decree under R. 6, O. 34 could be made where the mortgaged property is not available for sale for some reason or another and thus no sale as a matter of fact takes place. This view is supported in the judgments of those cases on some equitable principle, and analogy is taken generally from the principle that a mortgagee has a right to abandon his security in part or in whole and proceed to realize the debt either from the person or from other properties of his debtor. We think, however, that in a case of the nature which we have before us we have only to interpret the provisions of R. 6, O. 34, Civil P. C., and to give effect to those provisions. That the appellant may have a right in law or in equity to the relief of a personal decree outside the provisions of that rule is a question which, as we have already said, we are not called upon to decide. With great respect to the learned Judges who decide the cases mentioned above it seems to us that they felt themselves free to disregard the requirements of R. 6 as stated therein and not to interpret it. We are of opinion that we are not free to do so.

As a pure question of interpretation there can be no doubt that an application for a personal decree under O. 34, R. 6, Civil P. C., is not maintainable unless a sale in pursuance of the preceding rule has as a matter of fact taken place. This is the view which has recently been taken by a Bench of the High Court at Allahabad in *Darbari Lal v. Mula Singh* (8). In the case of *Chand Mall v. Ban Behari Bose* (9), Mookerjee and Rankin, JJ. (now Sir George Rankin, C. J.), after quoting R. 6, O. 34, Civil P. C., said:

"It is plain that the expression 'any such sale' has reference to R. 5, sub-R. (2), which ordains that if payment is not made as directed

by the preliminary decree, the Court shall on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in R. 4. Consequently, before the plaintiff can invoke the aid of the provisions of R. 6, he must establish that the mortgaged properties have been sold as contemplated by sub-R. (2), R. 5."

We think that the quotation given above well expresses, if we may respectfully say so, the view which we take on the question of the interpretation of R. 6. We are not concerned with the actual decision in that case nor with the actual decision which may be given in the present case by the Courts below or by the Bench from which this reference has come on any ground other than the interpretation of R. 6, O. 34, Civil P. C. Accordingly we answer the question in the negative.

R.M./R.K.

Order accordingly.

* * A. I. R. 1930 Oudh 378 Full Bench

WAZIR HASAN, C. J., AND
SRIVASTAVA, RAZA, PULLAN AND
NANAVUTTY, JJ.

Ram Nath and another—Plaintiffs—Appellants.

v.

Nageshur Singh and another—Defendants—Respondents.

First Appeal No. 92 of 1929, Decided on 8th May 1930, from decree of Addl. Sub-Judge, Gonda, D/- 8th August 1929.

* * Civil P. C., O. 34, R. 6—Per Full Bench) Plaintiff praying in plaint recovery personally in case sale proceeds are insufficient to meet amount due to him—Preliminary decree passed in accordance with the prayer—If defendant does not appeal against preliminary decree, he cannot resist subsequent application under O. 34, R. 6 (Srivastava, J dissenting).

Per Full Bench—Where the plaint contains a prayer that if the money due to the plaintiff could not be obtained from the sale proceeds of the mortgaged property, the balance should be recoverable from the defendant personally and a preliminary decree is passed for sale in form 4, App. 9, Civil P. C., enacting that if the sale proceeds are insufficient the plaintiffs are at liberty to apply for a personal decree for the amount of the balance, this amounts to an adjudication between the parties that the plaintiff decree-holder has an actual right to such a personal decree and as the existence of that right is detrimental to the defendant judgment-debtor the latter must appeal against the preliminary decree and if he does not do so he cannot resist a subsequent application made under R. 6, O. 34 on the ground that the

(8) [1920] 42 All. 519=56 I. O. 139.

(9) A. I. R. 1924 Cal. 209=74 I. O. 1021=50 Cal. 718.

plaintiff decree-holder is not entitled to a personal decree against him: *A.I.R. 1930 Oudh 10; 124 I.C. 669, Affirmed. (Srivastava, J., dissenting).*

Per *Srivastava, J.*—The Court in granting the plaintiff's prayer to reserve to himself the liberty of making an application under O. 34, R. 6, does not judicially determine or adjudicate upon any question in controversy between the parties. It does not, in granting such a request, apply its mind to any of the legal rights of the parties, but merely as a matter of form passes an order which in its nature might well be regarded as more administrative than judicial. The fact of a plaintiff having been given liberty to apply for a personal decree does not constitute an adjudication in his favour of his right to get a personal decree, and a defendant by reason of it is not precluded from disputing the plaintiff's right to a personal decree when an application is made for the purpose. [P 384 C 2]

Per *Wazir Hasan, C. J.*—A decree that if the net proceeds of the sale are insufficient the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance can certainly be passed by the Court in anticipation of the sale and in anticipation of the proceeds of the sale being found insufficient. Where a decree reserves to a party liberty to do a certain act in future on the doing of which the fruition of the right decreed depends his opponent is debarred from questioning the right when the act contemplated by the decree is being done. Once the right or the liberty to do a certain act is established and declared by a decree of Court in favour of a party his adversary cannot be permitted to thwart and nullify that right by raising objections which he might and ought to have raised or which if raised have been negatived by the Court during the progress of the litigation in which the decree was made: 26 *I.C. 294, Foll.* [P 380 C 2; P 381 C 2]

Per *Pullan, J.*—Where the plaint does not contain a prayer for a personal decree, but the Court prepares the decree in the ordinary form, giving the plaintiff liberty to apply in case the sale proceeds of the mortgaged property are found insufficient, the defendant would not be debarred from challenging the plaintiff's right to obtain a personal decree under R. 6, O. 34, merely because these words appear in the preliminary decree.

It makes no difference whether the plaintiff asked "that liberty should be reserved to him to apply" or that "the balance should be recoverable personally." The meaning in each case is the same. The plaintiff was taking the earliest opportunity of expressing his intention of applying under R. 6, O. 34, if he was unable to satisfy his decree by the sale of the mortgaged property, and if the defendant had any objection which he could raise at that time to the passing of a personal decree in the event of the sale proceeds of the property being found insufficient he should and could have done so then. It is immaterial whether he raised his objection or failed to do so; for once the plaintiff had put the matter in issue the decree of the Court granting the plaintiff's prayer amounts to an adjudication of the right claimed by the plaintiff.

Al-ilRaza for *H. Husein*--for Appellants.

Radha Krishna—for Respondents.

Wazir Hasan, C. J.—This is a reference by a Division Bench to a Full Bench with the object of obtaining an answer to the following question:

"Is the view laid down in *Lala v. Amir Haider Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) correct?"

Nothing in particular need be said with reference to the second of the two decisions mentioned in the question because it follows the decision in the first case, and if I hold that the first case was rightly decided I must further hold that the second case was also so decided.

What was decided in the first case can well be stated by quoting the head-note of the report of the decision as given in 6 *O. W. N.*, 969. The head-note is as follows:

"Order 34, R. 6, Civil P. C., reproduces the effective portion of the old S. 90, T. P. Act, and the words used in Decree Form No. 4 are intended to give effect to O. 34, R. 6. The preliminary decree contemplated by that order means that if the sale proceeds are insufficient the plaintiffs then can take out a personal decree against the defendants for the balance, which provision gives the plaintiffs an actual right, the existence of which is detrimental to the defendant. The defendant is thus aggrieved by that portion of the preliminary decree and if he takes exception to that portion of the decree, he has to appeal against the preliminary decree within the period of limitation, and if he does not do so, he is subsequently precluded under the provisions of S. 97, Civil P. C., from disputing the correctness of the preliminary decree upon that point."

After taking time for considering my judgment I have come to the conclusion that that case was rightly decided. In support of the view taken by the learned Judges who decided it they have given ample reasons and I think that they are unanswerable. In that case the plaintiff had brought a suit to enforce a charge on immovable property in the hands of the defendant. The relief of sale of the property for the purpose of satisfying the charge was prayed for. In the plaint a further prayer was made that if the amount due to the plaintiff could not be obtained from the sale proceeds of the property the balance should be recoverable personally from the defendant. The Court passed a decree granting the plaintiff certain reliefs and also the relief:

(1) *A.I.R. 1930 Oudh 10=123 I.C. 215.*

(2) [1930] 124 *I.C. 669.*

"that if the net proceeds of the sale were insufficient to pay such amount and such subsequent interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance."

That being the character of the plaint filed by the plaintiff and this being the character of the decree passed by the Court, it will be seen that the former was subsequently in accordance with the form laid down in Form No. 45 of Appendix A and the latter with Form No. 4 of Appendix D, Civil P.C. Para. 6 (2) of Form No. 45 is as follows:

"In case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff to apply for a decree for the balance."

Form No. 4 is described as a "preliminary decree for sale:" O. 34, R. 4. Para. 3 of the form of the decree is almost literally the same as para. 6 (2) of Form No. 45 of the plaint.

From what has been stated above three facts indisputably emerge:

(1) That a prayer for the relief of a personal decree to cover the deficiency in the sale proceeds was made; (2) that the said prayer was granted by the Court; and (3) that the decision of the Court was incorporated in the preliminary decree prepared in pursuance of the decision.

The acceptance of the prayer now under consideration by the Court is as much a part of the decree as the acceptance of the other prayer relating to the defendant's obligation to pay to the plaintiff the amount of money declared due to the plaintiff on or before a specified day and that if such payment is not made on or before the said day the mortgaged property or a sufficient part thereof shall be sold and that the balance, if any, be paid to the defendant. This decree was a preliminary decree as stated before and not having been appealed from became final by virtue of the provisions of S. 97, Civil P. C. I am unable to see how that portion of the decree which says that if the net proceeds of the sale are insufficient the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance is in its legal characteristics anything other than a decree of the Court or of less decretal effect than other portions of the decree.

A decree of the nature which I have described above can certainly be passed by the Court in anticipation of the sale

and in anticipation of the proceeds of the sale being found insufficient. This was decided by their Lordships of the Judicial Committee in the case of *Jeuna Bahu v. Parmeshwar Narayan Mahtha* (3). This decision is relied upon in support of the view which the learned Judges took in the case of *Lala v. Amir Haider Khan* (1). As observed by their Lordships of the Judicial Committee in the case of *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji* (4):

"The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both; neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders."

The argument of the learned advocate for the respondents really comes to this that this part of the preliminary decree amounts to an advice, and I may add gratuitous on the part of the Court to the plaintiff to apply and to obtain a personal decree under O. 34, R. 6, Civil P. C., and to strengthen this argument stress is laid on the words "shall be at liberty to apply." To my mind these words have not the effect of converting the decree of the Court into an advice of the Court. They are merely indicative of the plaintiff's choice to apply or not for a personal decree. But the right to such a decree, if applied for, is to my mind clearly decreed. Any other construction leads to the result that the prayer for such a relief made in the plaint was a superfluity to which was added the further superfluity by the act of the Court of accepting the prayer and incorporating it in its decree because an application for a personal decree could certainly be made and such a decree if not barred by any rule of law be made by the Court even in the absence of such a prayer and of such a preliminary decree.

It was argued that the words "if the balance is legally recoverable" in R. 6, O. 34, Civil P. C., leave open the door for inquiry by the Court as to the merits of the application made under that rule and therefore that inquiry must be made. To my mind the argument is wholly unsound. The inquiry into the merits of the application and

(3) A. I. R. 1918 P. C. 159=49 I. C. 620=46 I. A. 294=47 Cal. 370 (P.C.).

(4) A. I. R. 1915 P. C. 116=28 I. C. 710=42 I. A. 91=42 Cal. 914 (P.C.).

of the plaintiff's right to obtain the decree for which the application is made will certainly be made in all cases where there is no bar arising out of a preliminary decree previously passed between the same parties by a Court of competent jurisdiction. But if such a bar does not exist as it existed in the decision under consideration, the door to enquiry is closed. Further the words "legally recoverable" will be amply satisfied by showing that the preliminary decree has already declared the plaintiff's right for a personal decree under O. 34, R. 6, Civil P. C.

A preliminary decree for sale is both in form and substance incomplete and depends for its complete effectiveness on being supplemented by a final decree, the making of which again depends on the happening of the contingency provided for in the preliminary decree, that is, the default in payment of the sum decreed on the date specified in the decree. This however does not in the least derogate from the right of the plaintiff declared by the preliminary decree to obtain a final decree and to bring about the sale of the mortgaged property in pursuance of the latter. It seems to me that a preliminary decree in all cases in which the Code contemplates the passing of such a decree is incomplete in its nature and requires for the purposes of its effectiveness and execution a further decree which may be regarded as a supplementary decree. The fact that the need for a supplementary decree exists and that it is necessary to obtain it for the purposes just mentioned does not in my opinion entitle the defendant to question the plaintiff's right to the relief for a supplementary decree which right has been secured to him finally by the preliminary decree. My opinion therefore is that when a relief of this nature is prayed for by a plaintiff and that prayer is granted and incorporated by the Court in its preliminary decree and such a decree becomes final, all this has the effect of establishing the plaintiff's right to obtain a further or a supplementary decree, if he so chooses and if the contingencies contemplated by the preliminary decree have occurred, under O. 34, R. 6, Civil P. C.

In my opinion, in all cases where such a preliminary decree exists as it existed

in the case decided by the Bench the provisions of R. 6, O. 34, Civil P. C., must be construed as provisions for enabling the making of a supplementary decree. It is so in the very nature of things because the rule comes into operation in such cases only on the happening of certain events, the happening of which was anticipated in the preliminary decree. There may also be cases where the Court may pass a decree complete in itself even in the first instance, which would obviate the necessity of obtaining a supplementary decree under R. 6, O. 34 of the Code. To this class of cases belongs the case decided by their Lordships of the Judicial Committee in *Jeena Bahu v. Parmeshwar Narayan Mahta* (3) already referred to.

That the passing of a supplementary decree in view of the exigencies of a case is within the competence of a Court is well established by the decision of their Lordships of the Judicial Committee in the case of *Ashfaq Husain v. Gauri Sahai* (5). Indeed it seems to me that with a view to do complete justice and with a view to obviate the contingency of a preliminary decree becoming abortive and futile, the Court may well pass successive decrees so as to give full effect to the rights determined by the preliminary decree. At least one thing is clear that there is nothing in the Code of Civil Procedure to debar a Court from so acting.

One word more and I have done. It appears to me that it is wholly correct to say that where a decree reserves to a party liberty to do a certain act in future, on the doing of which the fruition of the right decreed depends, his opponent is debarred from questioning the right when the act contemplated by the decree is being done. Once the right or the liberty to do a certain act is established and declared by a decree of Court in favour of a party his adversary cannot be permitted to thwart and stultify that right by raising objections which he might and ought to have raised or which if raised have been negatived by the Court during the progress of the litigation in which the decree was made. I cite for instance the recent decision of the House of Lords in

(5) [1911] 33 All. 264=9 I. C. 975=33 I. A. 27.

Manchester Corporation v. Farnworth (6). In that case the plaintiff Farnworth was given a decree for damages and for an injunction arising out of nuisance caused by the defendant Manchester Corporation. Their Lordships declared that immediately after the injunction there should be inserted the following clause :

"With liberty reserved to the defendants to apply to a Judge of the King's Bench Division to dissolve the said injunction: (a) on their establishing, if it be not admitted by the plaintiff, that they exhausted all reasonable modes of preventing mischief to the plaintiff, and (b)"

Can it be contended that the defendants were not decreed the right to obtain the dissolution of the injunction by applying to the Judge and on proof of the fact that they have exhausted all reasonable modes of preventing mischief to the plaintiff? I think not. Similarly it could not be successfully contended in the case of *Lala v. Amir Haider Khan* (1) decided by the Bench that the plaintiff was not entitled to a personal decree on an application being made for that decree and on proof of the fact that the net proceeds of the sale were insufficient to pay the decretal amount.

My answer therefore to the question is in the affirmative.

Raza, J.—The question referred to the Full Bench for decision is as follows :

"Is the view laid down in *Lala v. Amir Haider Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) correct?"

The Hon'ble Chief Judge (Sir Louis Stuart) and I were parties to both the decisions. It was held in *Lala's* case that O. 34, R. 6, Civil P. C., reproduces the effective portion of old S. 90, T. P. Act and the words used in Decree Form No. 4 are intended to give effect to O. 34, R. 6. The preliminary decree contemplated by that order means that if the sale proceeds are insufficient the plaintiffs then can take out a personal decree against the defendants for the balance, which provision gives the plaintiffs an actual right, the existence of which is detrimental to the defendant. The defendant is thus aggrieved by that portion of the preliminary decree, and if he takes exception to that portion of the decree he has to appeal against the preliminary decree within

the period of limitation, and if he does not do so he is subsequently precluded under the provisions of S. 97, Civil P. C., from disputing the correctness of the preliminary decree upon that point. We had relied on the case of *Jeuna Bahu v. Parmeshar Narain Matha* (3) in deciding the case before us. *Lala's* case was followed in the case of *Suraj Bakhsh v. Munno Bibi* (2). I have again considered very carefully the decision in *Lala's* case (1). I still adhere to the opinion expressed in that decision. I have nothing to add to the reasons given in the judgment in *Lala's* case (1) for the decision in question. I have to say nothing about the facts of this particular case which has been referred to the Full Bench for decision. Order 34, R. 6 and Form No. 4, Appendix D Act 5, 1908 has since been amended. I need not and should not say how the recent amendments would have affected our decision in *Lala's* case mentioned above. I am still of opinion that the view laid down in *Lala's* case is correct. I answer the question in the affirmative.

Srivastava, J.—The question which has been referred to the Full Bench for decision is whether the view laid down in *Lala v. Amir Haider Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) is correct. An examination of these two cases shows that the following three propositions have been laid down therein :

(1) That a preliminary decree for sale passed exactly in the form of decree laid down in No. 4, Appendix D of Act 5 of 1908 declaring that :

"if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance,"

constitutes an adjudication which must be regarded as awarding the plaintiff a personal decree in the event of the proceeds of the sale being insufficient but merely leaving it open to him to apply for a personal decree in such event.

(2) That if a party aggrieved by a preliminary decree does not appeal from it he is under S. 97 precluded from disputing its correctness afterwards.

(3) That if a Court passes a composite decree combining a decree for sale and a personal decree, the decree is valid and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place

and fails to satisfy the mortgage debt :
vide *Jeuna Bahu v. Parmeshwar Narayan Mahta* (4).

I have no hesitation in accepting the correctness of the last two propositions. It is only the first proposition, which necessitated this reference to the Full Bench and which requires careful consideration. It seems clear from the order of reference that this question has to be decided as a dry question of construction of a decree prepared in the form laid down in No. 4 of Appendix D quite irrespective of the facts of the case which have given rise to this reference or the facts of the case reported in *Lala v. Amir Haider Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2). To put the matter in a nutshell the crucial question is as regards the meaning of the words, namely :

"the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance."

These are simple words and should be construed in their ordinary sense. The effect of the decisions of the Division Bench under consideration is to treat these words as tantamount to saying that "the plaintiff shall be entitled to apply for a personal decree for the amount of the balance."

On the plain meaning of the words used I am unable to regard the words "shall be at liberty," etc., as equivalent to a present determination of the right in favour of the party to whom the liberty has been so reserved. The matter seems hardly to need an elaborate discussion. If I resort to an argument by analogy I might refer to O. 23, R. 1, Civil P. C., which authorizes a Court to "grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or part of a claim."

It seems obvious that an order granting the plaintiff permission to withdraw a suit with liberty to institute a fresh suit cannot be regarded as any determination in the plaintiff's favour in respect of the right which forms the subject-matter of the suit. It should be equally obvious in case of a decree granting the plaintiff liberty to apply for a personal decree.

The learned counsel for the plaintiffs-appellants laid great emphasis upon the fact that if this provision in the decree was not intended as an adjudication of right in the plaintiff's favour, then the

inevitable conclusion must be that these words are quite useless. He stressed the fact that the legislature could not be supposed to have incorporated in the form of the decree a useless provision. In my opinion this provision in the form of the decree should be read with the prescribed form of the plaint in such suits, namely form No. 45 of Appendix A, Civil P. C. The last clause of the paragraph for relief is as follows :

"(Where O. 34, R. 6 applies). 2. In case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff to apply for a decree for the balance."

It is important to note that in the whole of O. 34 which deal with suits relating to mortgages there is no substantive provision requiring determination of the right of the plaintiff to get a personal decree at the time of the institution of the suit for sale. O. 34, R. 4, which deals with a preliminary decree in a suit for sale, also contains nothing which could show that a personal decree was intended to be passed simultaneously with the decree for sale. On the contrary the use of the words :

"if the balance is legally recoverable from the defendant otherwise than out of the property sold,"

in O. 34, R. 6, Civil P. C., seem definitely to imply that this question has to be determined when the stage for the application of R. 6 is reached, namely, where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff. This view is further strengthened by the form prescribed for a decree under O. 34, R. 6, which is Form No. 11 of Appendix D, Civil P. C. It says :

"And whereas it appears to this Court that the defendant is personally liable for the said balance it is hereby decreed as follows :"

These words also point to the conclusion that the personal liability has to be determined in the course of proceedings under O. 34, R. 6. If the clause under consideration in the form of the preliminary decree for sale constituted an adjudication of the right to the personal decree, then the words just quoted which I have underlined (*italicized*) would be quite out of place and it would have been enough simply to say that "It is hereby decreed as follows, etc." This being the position, the plain object of introducing the clause quoted above in the relief paragraph of the plaint

seems to be to exclude the plea of the splitting of the cause of action or of res judicata being raised when proceedings are taken for a decree over, under O. 34, R. 6. Looking at the matter from the point of view of the person drafting the plaint he might well apprehend that if he does not make any such reservation then, when he makes the application later for a decree over, he might be confronted with the plea that the relief claimed by him was barred by O. 2, R. 2, or that it was barred by S. 11, Civil P. C. The provision in the decree under consideration does nothing more than correspond with the prayer in the plaint. The plaintiffs ask that liberty be reserved to them to apply for a personal decree, and the decree says that they shall have such liberty. In this sense it cannot be said that the provision is altogether useless. But whether useless or not I find it impossible under the circumstances to construe it as an adjudication of the right to get a personal decree.

The learned counsel for the appellants also relied strongly upon certain observations of their Lordships of the Judicial Committee in *Musaji Saleji v. Hashim Ebrahim Saleji* (4) at p. 95 (of 42 I. A.) This was an action to have partnership accounts taken. The trial Judge "declared" that the partnership was dissolved as from a certain date and "ordered and decreed" that the Assistant Referee of the Court should take accounts and make inquiries according to the directions given in the decree. It was contended that the adjudication declaring that the partnership was dissolved as from a certain date was not a decree but an order. Lord Sumner delivering the judgment of their Lordships of the Judicial Committee observed as follows:

"The declaration, when so made, was what the Court's adjudication and indeed the appellant's own case call it, a decree. The Code makes no provision for something which is neither a decree nor an order nor for anything which is both; neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. This was in substance a decree; it did not cease to be such because a subordinate part of it, if correctly made, might have been made separately as an order. It conclusively determined the rights of the parties in regard to certain, and these essential, matters involved in the suit, and the expression 'matters in controversy' in S. 2, sub-S. 2 (the

definition of "decree"), cannot, in their Lordships' opinion, be pressed so as to exclude the matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen, and were the foundation of the whole determination."

The facts of the case were quite different. In this case there was a clear adjudication and determination of the rights of the parties and the adjudication about the partnership being dissolved was clearly a decree both in substance and in form. But the position in the present case is quite different. The Court in granting the plaintiff's prayer to reserve to himself the liberty of making an application under O. 34, R. 6, does not judicially determine or adjudicate upon any question in controversy between the parties. It does not in granting such a request apply its mind to any of the legal rights of the parties, but merely as a matter of form passes an order which in its nature might well be regarded as more administrative than judicial. It could very well be possible for the plaintiff to make a request like that contained in sub-Cl. (2) of the relief prayer in the draft plaint No. 45 of Appx. A, by means of an application, and equally so it could be possible for the Court to pass an order thereon granting them the liberty asked for. The mere fact that it finds place in the decree does not necessarily mean that it must be regarded as an adjudication. It is not difficult to think of decrees containing directions which are really not in the nature of any adjudication of rights, but even supposing that because the direction finds place in the decree it must therefore be regarded as such, what does it come to? There can be no justification for extending the decree beyond the terms of it. At best it can mean nothing more than that there is a decree in the plaintiff's favour which gives him the liberty to apply for a personal decree. This does not mean that the Court has made any determination of his right to get such personal decree when he chooses to apply for it. The fact that he has been decreed the liberty to apply cannot mean that when he makes the application the defendant is debarred from pleading that he is not entitled to a personal decree for one reason or another. Suppose he wants to plead that

the terms of the mortgage deed on their proper construction do not entitle the mortgagee to any personal relief or that such relief was barred by limitation. Can he not say that he was not called upon to raise any of these defences in answer to the suit brought for a decree for sale as the question as regards the personal decree was quite premature at that stage inasmuch as the cause of action for the personal decree arises only when the sale proceeds are found to be insufficient. Further it can be said that the plaintiff as a matter of fact did not ask for any adjudication of these rights, but merely asked for permission to reserve to himself the liberty to set up that right at a later stage and that it was not therefore necessary for the defendant to raise any such pleas then. It seems to me preposterous to penalise a defendant for not raising defences in respect of a matter which is premature and which the plaintiff expressly asks should be reserved for consideration at a subsequent time. I am therefore of opinion that even treating this provision as a decree in the strict sense of it, it cannot be regarded as any adjudication in favour of the plaintiff of his right to a personal decree.

The argument which I have just considered was also repeated in another form. It was urged that the decree under consideration is a preliminary decree for sale under O. 34, R. 4, Civil P. C., that the clause in question is a part of this decree and it should therefore be regarded as something in the nature of a preliminary personal decree, and the subsequent application contemplated by O. 34, R. 6 should be regarded as in the nature of a final personal decree, the object of it being to fix the exact amount payable by the defendant personally to the plaintiff, which amount was not and could not be determined at the time when the decree under O. 34, R. 4 was passed. In my opinion the contention is not sound. We find that the legislature in O. 34 has made distinct provisions for a preliminary and a final decree for sale, for a preliminary and a final decree for foreclosure and for a preliminary and a final decree for redemption: O. 34, Rr. 4 and 5, 2 and 3, and 7 and 8, Civil P. C. If the legislature had any such inten-

tion I fail to see any reason why they should not have made a similar provision for a preliminary and final decree. I cannot persuade myself to hold that although the legislature has made no substantive provision for a preliminary and a final personal decree in O. 34 yet the same result is achieved in this surreptitious manner by means of the provisions continued in the forms prescribed in the appendices.

Reference was also made to *Jeuna Bahu v. Parmeshwar Narain Mahta* (3). This was a case governed by the provisions of the Transfer of Property Act (4 of 1882). "In addition to granting the necessary relief under the mortgage" the decree passed in the case :

"further provided that, if the proceeds of the sale were not sufficient to cover the amount secured by the mortgage with interest till the date of realization, the defendant should pay the balance of the amount from the estate of the deceased and if the assets were not admitted to be sufficient, the estate should be kept under the management of the Court."

Their Lordships held that the words of S. 90, T.P. Act, were satisfied in cases where the Court passes a decree that on the happening of the event when the net proceeds of the sale are found to be insufficient the balance should be paid. The order, though made at the time of the decree for the sale of the mortgaged property, operates at a future date, and is made in such terms that it can only operate when the sale has failed to satisfy the debt, and this is the event specified and defined in the section as the event when the decree can be made.

Thus their Lordships treated the decree before them as a composite decree and held that in so far as it gave a personal decree it was to operate at a future date. This case is quite distinguishable and does not in any way help the plaintiffs. The terms of the decree which I have quoted above show that there was a definite order that "the defendant should pay the balance of the amount." This is very different from saying merely that the plaintiff shall be at liberty to apply for a personal decree.

I might also make reference to the provisions of Act 21 of 1929 and the amendments made by it in the terms of O. 34, R. 6, and in the forms of the preliminary decree for sale and of the decree under O. 34, R. 6, Civil P. C.

The only change introduced in O. 34, R. 6, is that the words "on application by him" have been added. This does not in any way affect the question under consideration. The form prescribed for the decree for sale as amended by this Act stands as follows:

".....the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance."

In my opinion this alteration in the form does not introduce any change in the law, but only makes it clear beyond all doubt that this provision in the decree does not constitute any adjudication in favour of the plaintiff as regards his right to the personal decree. Similarly in the form prescribed for a personal decree in O. 34, R. 6, the relevant portion as amended stands as follows:

"And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor personally."

This again seems to strengthen my opinion that whether the amount legally recoverable from the mortgagor personally or not is a matter which has to be determined at the time of the passing of the decree for sale.

Lastly it was argued on behalf of the appellants that we should uphold the decisions in *Bala v. Amir Haidar Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) as correct unless we had strong reasons to take a contrary view. Speaking for myself I feel clear, with the utmost respect to the learned Judges who decided those cases, that the construction which they have placed upon a decree in the form prescribed in No. 4, Appendix D, is not correct. Both these decisions were passed less than a year ago and no question of any application of the principle of stare decisis arises.

The answer therefore which I would return to the reference made by the Division Bench is that the interpretation placed upon a decree in the form laid down in No. 4, Appendix D, in *Lala v. Amir Haidar Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) is not correct. The fact of a plaintiff having been given liberty to apply for a personal decree does not constitute an adjudication in his favour of his right

to get a personal decree and a defendant by reason of it is not precluded from disputing the plaintiff's right to a personal decree when an application is made for the purpose.

Pullan, J.—The following question has been referred to this Full Bench for decision:

"Is the view laid down in *Lala v. Amir Haidar Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) correct,"

Of the latter of these two rulings it is sufficient to say that on the question of law it merely follows the former ruling and it was further decided on its merits against the judgment-debtor. The head-note of the former ruling lays down the view of the law which this Full Bench is asked to consider, and put briefly it is this: Where a preliminary decree has been passed for sale in Form 4, Appendix D, Civil P. C. enacting that if the sale proceeds are insufficient the plaintiffs are at liberty to apply for a personal decree for the amount of the balance, this amounts to an adjudication between the parties that the plaintiff decree-holder has an actual right to such a personal decree and as the existence of that right is detrimental to the defendant judgment-debtor the latter must appeal against the preliminary decree, and if he does not do so he cannot resist a subsequent application made under R. 6, O. 34 on the ground that the plaintiff decree-holder is not entitled to a personal decree against him. Although it appears from the head-note that the learned Judges were considering only the interpretation of the preliminary decree passed in Form No. 4, Appendix D, a perusal of the judgment shows that this is not so. They were considering a case in which the plaintiff asked in his plaint that if the money due to him could not be obtained from the sale proceeds of the property "the balance should be recoverable personally from the defendant:" p. 970. In my opinion the judgment of the Bench was based on the fact that such a prayer was made in the plaint and that effect was given to it in the decree. This Form No. 4 is the only form prescribed for a preliminary decree for sale, and presumably the clause relating to the plaintiff's right to apply for a personal decree should be deleted if the plaintiff

made no such application in his plaint. But it may very well be that in some cases a preliminary decree is prepared in the ordinary form whether the plaintiff has or has not made any such prayer, and I would certainly not be prepared to say in such a case that the judgment-debtor would be debarred from challenging the plaintiff's right to obtain a personal decree under R. 6 O. 34, merely because these words appear in the preliminary decree. It is not possible to make this a universal rule. In the new Form 5 which has been substituted in Act 21 of 1929 for the old Form No. 4 many words have been added which cannot be considered to be operative as a decree, for instance the clause which we have to consider now contains an observation that the parties are at liberty to apply to the Court

"from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit."

Although these words purport to form part of the decree they appear rather to be a statement of the legal rights of the parties and a note as to the powers of the Court. Strictly speaking they should not form part of the decree at all. Thus I would not lay too great stress on the mere form of a decree unless it can be clearly shown that it represents an adjudication between the parties on some question, which had already been raised in the proceedings. In the judgments which we are considering the question had been raised. The plaintiff had asked that if the amount due to him could not be obtained from the sale proceeds of the property the balance should be recoverable personally from the defendant. Thus at the outset the defendant knew that if a decree for sale was passed against him and the property was not sufficient to satisfy the decree the plaintiff would seek to recover the money from him personally. It does not appear from the judgment whether the plaintiff's plaint was drafted in accordance with the model plaint No. 45, Appx. A, Civil P. C. If it were so he must have prayed "that liberty be reserved to the plaintiff to apply for a decree for the balance," thus using the same words which are repeated in the decree in Form No. 4; but

in my opinion it makes no difference whether the plaintiff asked "that liberty should be reserved to him to apply" or that "the balance should be recoverable personally." The meaning in each case is the same. The plaintiff was taking the earliest opportunity of expressing his intention of applying under R. 6, O. 34, if he was unable to satisfy his decree by the sale of the mortgaged property, and if the defendant had any objection which he could raise at that time to the passing of a personal decree in the event of the sale proceeds of the property being found insufficient he should and could have done so then.

It is immaterial whether he raised his objection or failed to do so, for once the plaintiff had put the matter in issue the decree of the Court granting the plaintiff's prayer amounts to an adjudication of the right claimed by the plaintiff. The law permits an appeal against that decree, and if the defendant omitted to appeal within time he cannot at a later stage raise the same objections that he could have raised then. In my opinion it is improper to lay too great stress on the words "liberty to apply." It is true that these words may suggest that there has been no adjudication of any kind, but in that case they mean nothing. I would rather consider that the words were used because it was impossible at the time of the passing of a preliminary decree to give definitely a personal decree. That personal decree can only be passed when the property has been put to sale and the proceeds have been found to be insufficient to satisfy the decree. Moreover it is impossible to say how much will then be due, and the application for the personal decree may be defective in some other material point. In my opinion these words were used both in the model plaint and in the proposed form of the decree to imply that up till that time the plaintiff's right to a personal decree was, as far as could be foreseen, a good right, and that there was no bar to his subsequently applying for a personal decree under R. 6 if and when the occasion for making such application arose. The use of the words therefore is not inconsistent with the view taken in the judgments which we are considering, that when the Court passed a preliminary decree it had disposed of the

preliminary objection which could have been raised by the defendant to the ultimate passing of a personal decree, namely, that in the circumstances of the case no personal decree could be claimed by the plaintiff.

I consider therefore that, though the head-note of the judgment of the Bench in *Lala v. Amir Haider Khan* (1) should have made it clear that the preliminary decree had been passed in accordance with a prayer made by the plaintiff that if the amount due to him could not be obtained from the sale proceeds of the property the balance should be recoverable personally, the decision of the Bench, which is based upon the fact that such a prayer was made, is correct. It does not appear from the judgment in the second case under our consideration: *Suraj Bakhsh v. Munno Bibi* (2), whether there was any such prayer by the plaintiff or not in that case; but as this is merely a brief judgment following the former one it must I think be assumed that in that case also there was a prayer by the plaintiff to the same effect. I would therefore reply to the reference that the view of the law taken in both these judgments is correct.

Nanavutty, J.—The question that has been referred to the Full Bench for decision runs as follows:

"Is the view laid down in *Lala v. Amir Haider Khan* (1) and in *Suraj Bakhsh v. Munno Bibi* (2) correct?"

I have carefully examined these rulings in the light of the arguments of the learned counsel of both parties, and I have had the inestimable advantage of perusing the considered opinions of the Hon'ble the Chief Judge and of my learned brothers Mr. Justice Raza and Mr. Justice Bisheshar Nath.

It seems to me upon a careful consideration of the arguments of both sides that the very fact of incorporation in the preliminary decree for sale, prepared in accordance with Form No. 4, Appendix D, Act No. 5 of 1908 of a clause to the effect that:

"the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance,"

necessarily amounts to an adjudication binding on the parties to the decree, of the plaintiff's right to such a personal decree for the balance, leaving it to him (the plaintiff) the option of exercising

that right if and when the conditions antecedent to the exercise of such a right had come into existence. To hold otherwise would be in my opinion to render that portion of the preliminary decree which conferred upon the plaintiffs the right of "liberty to apply for a personal decree for the amount of the balance" mere verbiage, or at best a gratuitous piece of advice to the plaintiff by the Court granting him the preliminary decree.

I find myself in entire agreement with the reasoning of the learned Chief Judge, and for the weighty reasons given by him, if I may respectfully say so, I too would answer the question referred to the Full Bench in the affirmative.

By Court.—In accordance with the opinion of the majority the answer to reference to the Full Bench is in the affirmative.

Wazir Hasan, C. J.—In this appeal we made a reference to a Full Bench for decision of the question as to whether the view laid down in *Lala v. Amir Haider Khan* (1) and *Suraj Bakhsh v. Munno Bibi* (2) was correct. The reference has come back to us with the answer in the affirmative by the majority of the Court constituting the Full Bench.

A few particular features of the case before us may now be mentioned. The appeal arises out of an application made by the appellants for a personal decree under O. 34, R. 6, Civil P. C. On a plea being taken by the opposite party the Court found that the relief to the decree prayed for was barred by limitation and dismissed the application. From that order the present appeal was preferred.

The substance of the argument raised at the first hearing of the appeal was that the plea as to limitation and its adjudication against the respondents was barred, having regard to the prayer made in respect of a personal decree in the plaint of the suit on the mortgage and the same plea having been then raised by the opposite party, and finally having regard to the fact that the preliminary decree prepared by the Court in the suit gave the relief to the plaintiffs that they were entitled to a personal decree in the event of deficiency in the sale proceeds. In support of this argument reliance was placed upon the two decisions mentioned above.

We have before us the plaint of the mortgage suit. Para. 7 of the plaint relates to the reliefs for which the suit was brought. Sub-paragraph (b) is as follows:

"If any sum be left unsatisfied out of the proceeds of the sale of the mortgaged property, then a simple money decree for that sum be passed in the plaintiffs' favour."

We have also before us the written statement filed by the opposite party in that suit. In the written statement, para. 7 was denied in toto and in para. 11 of the written statement the following plea was taken:

"The claim for a simple money decree is time barred."

We have also before us the judgment of the Court in that suit. From that judgment it appears that the plea as to the bar of limitation was put into a separate issue which was as follows:

"Is the suit barred by the three years limitation?"

In deciding that issue the Court expressed its opinion in the following terms:

"Nothing has been shown me how the three years rule applies to the suit for sale. The suit is brought under the express terms of a registered deed and even the sum paid can be recovered within six years. I find the issue in the negative."

In my opinion this is a clear adjudication of the issue as to the bar of limitation made in favour of the applicants who were the plaintiffs in that suit.

Finally as stated before in the decree which followed the judgment, the following clause was incorporated:

"That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiffs shall be at liberty to apply for a personal decree for the amount of the balance."

Strictly speaking this clause appears in the form of the decree prescribed by the Code of Civil Procedure (see the decree form No. 4, Appendix D, Civil P. C.); and in the decree prepared in this particular case, that clause was retained. Apart therefore from the answer which the Full Bench has returned to us I should have been prepared to hold in this particular case that the plaintiffs' right to obtain a personal decree in the event of the sale proceeds proving insufficient to cover the mortgage decree was adjudicated upon and decided in favour of the plaintiffs, and that therefore the plea as to the bar of limitation now raised by the opposite party is barred by the rule of *res judicata*.

I would therefore allow this appeal having regard both to the opinion of the majority of the Full Bench and to my personal view of the matter in controversy. As to the costs in this Court I should allow to the appellants half of such costs because the pure question of law which they raised in this Court and which has now been decided in their favour was not raised either in the Court of first instance or in the memorandum of appeal to this Court. The other costs I would direct to abide the result and as the point on which the order of the Court below was based is a preliminary point and that order we are hereby reversing, the case must go back to the lower Court for determination on merits, under O. 41, R. 23, Civil P. C.

Srivastava, J. — I agree. In view of the answer returned by the Full Bench, the appeal must succeed.

K.N./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 389

NANAVUTTY, J.

Bhoj Nath—Appellant.

v.

Shiva Nandan and others — Respondents.

Second Appeal No. 302 of 1929, Decided on 8th March 1930, against decree of Addl. Sub-Judge, Lucknow, D/- 29th July 1929.

(a) Civil P. C., S. 11—X mortgaging with possession property to Y and then to Z directing Z to pay off Y and to obtain possession—Z not paying Y—X suing Y for redemption and having deposited mortgage debt recovering possession from Court—Y not taking money thus deposited alleging to have received it from Z—Z executing sale of mortgagee rights to P, Y's son—Disputes that arose referred to arbitration—Agreement to refer, referring to sale by Z and arbitrators, considering that question finding it fictitious and passed award—P sued X to recover possession under sale-deed—His suit was barred by arbitrators' award.

X mortgaged his property with possession to Y and then to Z directing Z to pay off Y's debt and obtain possession from him. Z, however, did not pay Y's debt. X then sued Y for redemption, deposited mortgage money in Court and obtained possession from Court. Y instead of taking away money deposited in Court alleged that he had received it from Z and on the same day Z executed a sale deed of his mortgagee rights in favour of Y's son P. Disputes then arose between the parties which were referred to arbitration. The agreement to refer to arbitration distinctly referred to the sale of mortgagee rights in favour of P and the arbitrators also considered the question of sale, decided that it was fictitious and passed award

accordingly. *P* then sued *X* to recover possession on the basis of the sale deed executed in his favour.

Held: that it would be wrong to say that the question of the sale of mortgagee rights was not referred to arbitration. [P 391 C 1]

Hence *P*'s suit against *X* was barred by the award of the arbitrators. [P 392 C 1]

(b) **Civil P. C., S. 100—New plea.**

A new plea materially altering nature of the suit cannot be allowed to be put forward in second appeal. [P 391 C 2]

(c) **Arbitration—Validity of award.**

Where the agreement to refer leaves the matter to be decided by the majority of the arbitrators, the fact that only three of five arbitrators signed the award, cannot render the award invalid if none of the arbitrators have refused to act: 7 *All.* 523, *Dist.*

[P 392 C 1, 2]

Hargolind Dayal—for Appellant.

Harish Chandra and *Rameshwari Dayal*—for Respondents.

Judgment.—This is an appeal from an appellate judgment and decree of the learned Additional Subordinate Judge of Lucknow reversing the judgment and decree of the Munsif of Lucknow, who had dismissed the plaintiff's suit. Defendant 1 Bhoj Nath has filed this second appeal.

The facts out of which this second appeal arises are as follows. Bhoj Nath: defendant 1, who is the appellant before me, owned a one pie share in village Sarawan in the district of Lucknow. He mortgaged this zamindari share for a period of five years on 10th August 1914 for Rs. 240 to Din Dayal, father of Sheo Nandan, the plaintiff in the present suit. Subsequently on 23rd June 1915 Bhoj Nath mortgaged with possession 1 bigha 8 biswas of land in village Bargadi for Rs. 50 also to Din Dayal. On 11th May 1916 Bhoj Nath executed another mortgage of his one pie share for a period of 20 years to Kalka Singh and Indarjit Singh. Actual possession was not delivered to Kalka and Indarjit, but they were directed to pay Rs. 290 to Din Dayal and obtain possession from him. Kalka Singh and Indarjit Singh, however, did not pay off the prior mortgagee Din Dayal and so did not obtain possession from him. In 1925 Bhoj Nath deposited Rs. 50 in Court under S. 83, T. P. Act. Din Dayal, however, refused to take this money unless the first mortgage of Rs. 240 in his favour was also redeemed. In 1926 Bhoj Nath filed a suit against Din Dayal but not against Kalka and Indarjit. This suit was compromised on 8th July 1926: see

Exs. 8, A-1 and A-2. By this compromise Rs. 50 deposited in Court were to be taken by Din Dayal and within one year Bhoj Nath was to pay off Rs. 240 due on the first mortgage and to redeem the property and obtain possession of his one pie zamindari share. On 21st March 1927 Bhoj Nath deposited Rs. 240 in Court: vide Ex. A-6. Din Dayal, however, did not take this money from the Court and instead of taking away the sums of Rs. 240 and Rs. 50 deposited in Court in his favour by Bhoj Nath, Din Dayal alleged that he had received Rs. 290 from Kalka and Indarjit on 30th March 1927 and on the same day Kalka Singh and Indarjit Singh purported to execute a sale deed of their mortgagee rights for Rs. 315 in favour of Sheo Nandan, the son of Din Dayal. On 10th May 1927 on the application of Bhoj Nath the Munsif ordered that possession should be delivered to Bhoj Nath and on 13th May 1927 delivery of possession was made to Bhoj Nath. The refusal of Din Dayal to take the money deposited in Court under S. 83, T. P. Act, and the sale deed of the mortgagee rights of Kalka and Indarjit in favour of his son Sheo Nandan led to disputes between the mortgagor Bhoj Nath on the one side and Din Dayal and his son Sheo Nandan on the other. All these disputes were referred by Bhoj Nath, Din Dayal and Sheo Nandan to five arbitrators by a deed of reference dated 26th July 1927 (Ex. A-7), and on 12th September 1927 the arbitrators delivered their award which is Ex. A-9 D. W. 1. Mutation was made in favour of Bhoj Nath on 29th November 1927.

The award of the arbitrators was against Sheo Nandan as the arbitrators held that the sale deed of mortgagee rights in favour of Sheo Nandan was fictitious, and that Sheo Nandan did not acquire the mortgagee rights of Kalka Singh and Indarjit Singh by the terms of that fictitious sale deed, and that this sale deed was executed in order to nullify the compromise of 1926 entered into by Din Dayal (the father of Sheo Nandan) and Bhoj Nath. On 1st March 1928 Sheo Nandan filed the present suit for recovery of possession as a mortgagee on the basis of the sale deed of mortgagee rights executed in his favour by Kalka Singh and Indarjit Singh. Indarjit Singh and Kalka Singh did not

contest the suit of Sheo Nandan and admitted that they had no rights left in the property in suit. Bhoj Nath, defendant 1, disputed the plaintiff's claim and averred that the award of the arbitrators dated 12th September 1927 barred the present suit. The contention of Bhoj Nath was upheld by the trial Court and the plaintiff's suit was dismissed. In first appeal the learned Subordinate Judge reversed the finding of the trial Court on the ground that as no cause of action had accrued to Sheo Nandan at the time of reference to arbitration and as the dispute regarding mortgagee possession was not referred by the parties to the arbitration of the arbitrators, so the plaintiff's suit was maintainable.

In second appeal it has been strenuously argued before me that the cause of action in respect of the present suit had accrued to the plaintiff Sheo Nandan at the time of reference to the arbitration to which the plaintiff was a party. The sale-deed of mortgagee rights in favour of the plaintiff Sheo Nandan was executed by Kalka and Indrajit on 30th March 1927 whereas the agreement to refer the disputes of the parties to arbitration is dated 26th July 1927. It is also clear from the narrative of events which I have set forth above that Bhoj Nath obtained possession over the mortgaged plots on 13th May 1927 when delivery of possession was made to him through the Court so that, in my opinion, the learned Subordinate Judge was not correct in saying that the cause of action did not accrue to Sheo Nandan on 26th July 1927 against Bhoj Nath who had obtained delivery of possession of the mortgaged plots two months before the disputes were referred to arbitration.

The second contention which was strenuously argued before me by the learned counsel for the defendant-appellant Bhoj Nath was that the agreement to refer the disputes to arbitration fully covered the subject-matter of the plaintiff's claim in the present suit. The learned Munsif has quoted practically in full the terms of Ex. A-7, the agreement to refer the disputes to arbitration, and it is, therefore, not necessary for me to reproduce it in this judgment. This agreement to refer the dispute to arbitration distinctly refers

to the sale of mortgagee rights executed by Kalka Singh and Indarjit Singh in favour of Sheo Nandan, the son of Din Dayal, and states that all the disputes between Bhoj Nath on the one side and Din Dayal and his son Sheo Nandan on the other, which cannot be decided by the parties themselves, have been referred to the arbitration of the arbitrators. The terms of this agreement (Ex. A-7) in my opinion clearly postulate that the question of the sale of mortgagee rights in favour of Sheo Nandan was referred to the arbitrators, and I find myself unable to accept the view of the learned Subordinate Judge that this question of the sale of mortgagee rights was not referred to the arbitration of the panches. If the view taken by the lower appellate Court be accepted as correct, then there was no point in Sheo Nandan joining in this arbitration. The arbitrators after a most elaborate enquiry came to the conclusion that the sale deed of mortgagee rights executed by Kalka and Indarjit in favour of Sheo Nandan, the son of the prior mortgagee Din Dayal, was fictitious and that the mortgagee rights of Kalka Singh and Indarjit Singh could not be transferred by this fictitious sale deed to Sheo Nandan.

The learned counsel for the plaintiff-respondent argued that even if the sale of mortgagee rights in favour of the plaintiff be deemed to be fictitious as found by the arbitrators in their award, still the plaintiff could bring the present suit as a benamidar of the mortgagee rights of Kalka Singh and Indarjit Singh. This plea was never taken in the first two Courts and I cannot allow it to be put forward at this late stage, as it materially alters the nature of the plaintiff's suit. As would appear from the proceedings, the arbitrators considered that they were authorized by the terms of Ex. A-7 to enter into the question as to whether Sheo Nandan by virtue of the sale deed acquired the mortgagee rights of Kalka Singh and Indrajit Singh. The evidence of the plaintiff's witness Parag Narain (P. W. 2) who was one of the arbitrators shows clearly that the sarpanch asked this arbitrator, whose opinion was adverse to Bhoj Nath and in favour of Sheo Nandan, as to how he would decide the question of the sale of

mortgagee rights of Kalka and Indrajit, and Parag Narain has deposed that he told the sarpanch that Bhoj Nath should pay Rs. 25 to Sheo Nandan in respect of the sale of mortgagee-rights. It was because the sarpanch and two other panches did not accept this view of Parag Narain that the latter refused to put his signature on the award. There is, therefore, no doubt in my mind that not only the parties to the arbitration but also the arbitrators considered that the question of the sale of mortgagee rights of Kalka Singh and Indarjit Singh to Sheo Nandan was to be decided by the arbitrators. I consider that the award is fatal to the contention of the plaintiff. In my opinion the lower appellate Court was wrong in saying that the question of the sale of mortgagee rights was not referred to the arbitration of the panches and that no cause of action accrued to Sheo Nandan against Bhoj Nath at the time when the agreement Ex. A-7 was executed.

The learned counsel for the plaintiff-respondent further argued that the award filed by the arbitrators was invalid as it was signed by three members of the panch only and not by the other two, and that the presence of all the arbitrators was essential at all the hearings. In support of this contention the learned counsel for the plaintiff-respondent relies upon a ruling of the Allahabad High Court reported in *Nand Ram v. Fakir Chand* (1). The facts of that case were very different from those of the present suit. In the case quoted above, one of the arbitrators refused to act and withdrew from the arbitration. In the present case no arbitrator refused to act as such. Even Parag Narain (P. W. 2) has nowhere stated in his deposition that he refused to act as an arbitrator. On the contrary he has deposed that the sarpanch used to take the opinion of all the arbitrators on every question and that the sarpanch used to draw up the proceedings and the other panches used to sign them. On the one occasion that this panch absented himself, the proceedings were adjourned to another date to enable him to attend. The fact that only three arbitrators out of five signed the award will not invalidate it in view of the terms

of Ex. A-7 which left the matter to be decided by the opinion of the majority of the arbitrators. The opinions, however, of all the arbitrators have been recorded by the sarpanch but the award only gives effect to the opinions of the majority. In these circumstances, I consider that the award is a valid award and is binding on the plaintiff-respondent.

The learned counsel for Indarjit Singh and Kalka Singh, respondents 2 and 3, has argued that the application of his clients dated 22nd July 1929 filed in the lower appellate Court should be granted by this Court even if Sheo Nandan's suit is dismissed on the ground that it is barred by the award, and that these respondents should be made plaintiffs in the present suit and be permitted to proceed with the case. The lower appellate Court saw no reason to grant this application and rejected it. I too see no reason for granting this application, for it will really be setting up a new case in place of the claim of Sheo Nandan which will stand dismissed as being barred by the award. It is open to these defendants-respondents, if so advised, to file a separate suit in respect of their mortgagee rights, but their request to be made plaintiffs in the present suit is not a reasonable one and I reject it. For the reasons given above I allow this appeal, set aside the judgment and decree of the lower appellate Court, restore the judgment of the trial Court and dismiss the plaintiff's suit with costs in all three Courts.

S.N./R.K.

Decree set aside.

A. I. R. 1930 Oudh 392

PULLAN, J.

Nem Das and others—Defendants—Applicants.

v.

Kunj Behari Lal and others—Plaintiff and Defendants—Respondents.

Civil Revn. Appln. No. 5 of 1930. Decided on 23rd April 1930, from order of Chief Justice, and Pullan, J., D/- 28th January 1930.

(a) Civil P. C., O. 47, R. 1 — Deliberate order of Bench for benefit of parties, in order to meet circumstances of particular case is not analogous to discovery of fresh evidence or manifest mistake and no review lies.

The words "for any other sufficient reason" in O. 47, R. 1, mean a reason sufficient on grounds at least analogous to those specified immediately previous to discovery of new and

(1) [1885] 7 All. 523=(1885) A. W. N. 139.

important matter or mistake or error apparent on the face of the record.

A deliberate order passed by a Bench of the High Court with a view to obtain a just decision of the dispute between the parties does not constitute a reason for review analogous to discovery of fresh evidence or a manifest mistake on the record. A review cannot, therefore, be granted against an order deliberately passed by a Bench for the benefit of the parties in order to meet the circumstances of a particular case: 1922 P. C. 112, *Rel. on.* [P 394 C 1]

(b) Civil P. C., O. 47, R. 1—No review can be granted simply because different conclusion of law should have been arrived at.

A Court hearing application for review of decree on appeal has no jurisdiction to order a review because it is of opinion that different conclusion of law should have been arrived at: A. I. R. 1922 P. C. 112, *Rel. on.* [P 394 C 1]

M. Wasim and Radha Krishna—for Applicants.

Zahur Ahmad and Muhammad Ha-feez—for Opposite Party.

Judgment.—This is an application for review of a judgment delivered by a Bench composed of the late Chief Judge and myself. As the late Chief Judge has left the Court I must under the existing law hear this application singly. The appeal before the Bench arose out of a case for partition. It was the plaintiff's appeal against a judgment and decree of the Subordinate Judge of Bara Banki. The Judge had decided that the plaintiff's claim should be decreed for partition of the partnership property subject to certain conditions, and those conditions were that certain outstanding questions, which were for the most part merely matters of accounting between the parties, should be decided by an advocate of his Court whom he appointed as commissioner. This Bench upheld the order of the Judge but we made some further modifications. We excluded from the scope of the inquiry before the commissioner several matters and in particular we objected to any inquiry as to an alleged infringement of patent by the plaintiff. The business was concerned with the distribution of certain patent sugar-pressing machines and the defendants had alleged that the plaintiff had in contravention of the terms of their partnership agreement constructed and put on the market other machines of a similar nature and by so doing had committed infringement of patent and also subjected the company to a serious financial loss. In our judgment the following passage occurs:

"It is neither feasible nor desirable that a commissioner in a case of this kind should function as a Judge to work out whether one of the partners has or has not committed torts, to assess damages on those torts if any, and to deduct such damages from his share. He should work out on actuals without going into any of these matters. If the plaintiff has committed acts of the nature of torts it will still be open to the members of the firm to bring a suit against him for damages, but that matter should be kept completely out of the present case."

It is on this portion of our judgment that the present application for review is based. It is argued that if the plaintiff committed any breach of the agreement of partnership any loss in which he might thereby involve the firm was a matter which should be taken into account in the partition proceedings, and I have been asked to hold that the last words of our judgment which I have quoted are on the face of them wrong. It is said that the plaintiff himself never asked that the consideration of these transactions should be kept out of the case, but only that they should be removed from the list of questions submitted to the commissioner for inquiry, and that, therefore, by ordering that the matter should be kept completely out of the present case we were making a "mistake or error apparent on the face of the record," and if it could not be said that the words of the judgment amount to a mistake or error apparent on the face of the record, they at least provide "another sufficient reason" for an application in review under O. 47, R. 1, Civil P. C. It is admitted by the applicant that the preceding words of the sentence quoted by me have already been acted upon, and that the defendants in the suit have themselves filed a suit against the plaintiff for the infringement of the patent and damages in connexion with the construction, distribution and use of these very sugar pressing machines. But this fact would not of itself prevent the present applicants from filing an application for review if such an application were otherwise entertainable. I am in a position to say definitely that the opinion taken by us that the matter should be kept completely out of the present case was a deliberate opinion. It was not a mistake or error. It is not a general observation implying that no matters of this kind should be taken

into account in partnership proceedings. It was a rule passed in the circumstances of the case before us in order that the matters in suit between the parties might be decided as efficiently and expeditiously as possible. We considered and I still consider that it was neither feasible nor desirable for the commissioner to go into this matter which involved a long and difficult inquiry and possibly the consideration of a mass of evidence, and we believe that the commissioner would not come to a satisfactory decision on this question. We were also of opinion, rightly or wrongly, that the Court would find great difficulty in deciding the matter in the present proceedings, and we deliberately passed our order in order to exclude the consideration of this alleged infringement of patent from the partnership proceeding.

In the case of *Chhajju Ram v. Neki* (1), their Lordships of the Judicial Committee considered the meaning of the words "for any other sufficient reason" in O. 47, R. 1, Civil P. C., and the conclusion at which they arrived was that the words mean a reason sufficient on grounds at least analogous to those specified immediately previously. The grounds specified immediately previously are the discovery of new and important matter which could not be produced at the time that the decree was passed or a mistake or error apparent on the face of the record. I cannot consider that an order passed by a Bench of this Court with a view to obtain a just decision of the dispute between the parties can constitute a reason for a review analogous to the discovery of fresh evidence or a manifest mistake on the record. In the same judgment their Lordships of the Judicial Committee held that a Court hearing an application for review of a decree on appeal has no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. Supposing therefore that our decision should be held to be a conclusion of law and supposing further that I am now prepared to dissent from it this would not be a sufficient ground for review. Still less do I consider that a review can properly be granted against

an order deliberately passed by a Bench for the benefit of the parties in order to meet the circumstances of a particular case. The learned counsel for the applicants has stated that the order has imposed some hardship on his clients, but he has not satisfied me that even this is the case. Had he proved to me that the order has worked some gross injustice I might then on general grounds have been prepared to amend it in some manner, but failing any such proof I am of opinion that the order of the Bench cannot be challenged in review and I dismiss this application with costs.

R.M./R.K. *Application dismissed.*

A. I. R. 1930 Oudh 394

PULLAN, J.

Lala and others—Accused -- Appellants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 15 of 1930, Decided on 24th April 1930, made by Second Addl. Sess. Judge, Lucknow.

Public Gambling Act (18 of 1867), S. 13 — "Public place" — Meaning explained.

A public place is one which is in full view of the public and one to which the public has access: *White v. Cabitt*, 1 K. B. 443, *Ref.*; A. I. R. 1922 Oudh 275; 51 I. C. 971 and A. I. R. 1922 Oudh 196, *Dist.* [P 395 C 1]

Jagannath Prasad Kapur — for Appellants.

H. K. Ghose—for the Crown.

Judgment.—This is a reference by the Second Additional Sessions Judge of Lucknow at Unao in a case of gambling under S. 13, Public Gambling Act 18 of 1867. The first objection made to the trial was that one of the accused was only 13 years of age. The Magistrate pointed out that he himself recorded his age as 17, and he was therefore quite entitled to proceed with the case as no plea was raised that the accused was a minor. The second point raised by the learned Additional Sessions Judge is that the place where the gambling took place was not a public place. He describes it as a verandah of a shop and he does not controvert the statement of the Magistrate that it is on a public road. A public place for the purposes of the Gambling Act is a place to which the public have a right of access and the question of ownership is immaterial. The same is the view

(1) A. I. R. 1922 P. C. 112=72 I. C. 566=49 I. A. 144=3 Lab. 127 (P. C.).

taken by the Courts in England in interpreting various special acts and I have before me a very recent decision of the King's Bench, *White v. Cabitt* (1) in which reference is made to the standard case of *Queen v. Wellard* (2) which shows that the view taken in England still is that a plot of ground privately owned to which the public have no right of access but are allowed to pass over may be a public place.

The learned Additional Sessions Judge refers me to two cases: one reported in *Emperor v. Bashir* (3) and another reported in an unauthorized report of the Lahore High Court *Badraduddin v. Emperor* (4) in which cases it was held that certain places, namely, land forming an angle between two roads in the one case and lands situated near a temple in the premises of the railway station in the other case were not public places. I have been referred on the part of the Crown to another ruling of the Judicial Commissioner's Court reported in *Emperor v. Lalji* (5), in which it was held that a footpath running from a public way through a private grove and used by the public as of right is a public place. None of these cases is exactly parallel to that before me. In my opinion a public place is one which is in full view of the public and one to which the public has access. But in this case there is no evidence that the public had a right of access to the verandah. For all I know the owner of the shop may have refused to allow the public to go on his verandah. If the public had no right of access even though the shop is in a public situation it is not a public place within the meaning of the Gambling Act. I accept the reference, set aside the order of conviction, but in the circumstances it is not necessary to return the 184 kowris and two annas which were confiscated. The fine if paid will be returned.

V.B./R.K. Conviction set aside.

(1) [1930] 1 K. B. 443.

(2) [1885] 14 Q. B. D. 63=54 L. J. M. C. 14=49 J. P. 296=15 Cox. C. C. 559=23 W. R. 156=51 L. T. 604.

(3) A. I. R. 1922 Oudh 275=68 I. C. 613=23 Cr. L. J. 531=26 O. C. 41.

(4) [1920] 57 I. C. 931.

(5) A. I. R. 1922 Oudh 196=68 I. C. 611=23 Cr. L. J. 579=25 O. C. 114.

A. I. R. 1930 Oudh 395

PULLAN AND SRIVASTAVA, JJ.

Chaturgun—Defendant—Appellant.

v.

Shahzady—Plaintiff—Respondent.

Second Appeal No. 356 of 1929, Decided on 15th April 1930, from decree of Addl. Sub-Judge, Unao, D/- 1st September 1929.

(a) Limitation Act, Art. 145—"Deposit" does not cover transaction of nature of "loan."

The word "deposit" does not cover a transaction of the nature of a loan.

Where A lent some ornaments to B used by the latter in a religious procession,

Held: that the transaction was a loan and not a deposit and Art. 145 did not apply: 37 Mad. 175 and A. I. R. 1923 Mad. 578, Ref.

[P 396 C 2]

(b) Limitation Act, Arts. 49, 115 and 120—A lent to B ornaments to be used in religious procession—B lost them and A sued for recovery of ornaments—Art. 115 held to be applicable and not Arts. 49 and 120.—Transaction was bailment.

A handed over to B certain ornaments to be used in religious procession in 1924. The ornaments were stolen. B admitted the liability in 1924, but denied it later on and A filed a suit in 1928 for recovery of the ornaments.

Held: that Art. 115 applied to the case and not Art. 49 or Art. 120; that the ornaments had been taken on loan and the transaction was of the nature of the bailment as defined in S. 148, Contract Act; that the ornaments were to be returned within reasonable time according to S. 46, Contract Act, i.e., when the owner demanded them after the ceremony was complete. Time therefore ran from the date when B should have returned the articles to A and suit by A brought three years after that date was barred by time.

[P 396 C 2]

(c) Limitation Act, Arts. 115 and 120—Art. 115 is residuary article for action ex contractu—Art. 120 should not be invoked if any other article has application—Limitation Act, Art. 120.

Article 115 is a residuary article for actions ex contractu and can only be applied when no other article of the Limitation Act Schedule is appropriate.

As long as there is a contract between the parties which is not in writing and which can be covered by Art. 115, Art. 120 cannot be applied. Art. 120 should not be invoked if there is any other article in the schedule, which upon reasonable interpretation of the language seems to cover the particular suit with which the Court is dealing.

[P 397 C 1]

Radha Krishna—for Appellant.

Ram Bharosey Lal—for Respondent.

Pullan, J.—The facts of this case as decided by the findings of the Court below, which are not now in appeal, are as follows: On 24th October 1924 the plaintiff handed over to the defendant four gold ornaments for use in the Ram

Lila procession which was to be celebrated that day. The ornaments were stolen from the keeping of the defendant owing to the latter's negligence. The defendant did not at first deny liability and it appears that he made some attempts to recover the stolen articles. However, on 27th February 1928, the defendant made a statement in which he denied liability for the return of the ornaments, and the plaintiff filed the present suit on 5th May 1928. In this second appeal we have only to consider whether the suit is or is not within limitation. In order to determine this question we have to decide the nature of the transaction. The lower Court has found that it was a deposit and that Art. 145, Sch. 1, Lim. Act, applies to the case. Art. 145 deals with a suit against a depository or pawnee to recover moveable property deposited or pawned, and the period of limitation is thirty years from the date of the deposit or pawn. The word "deposit" as pointed out by the Madras High Court in *V. Balakrishnudu v. Narayanaswamy Chetty* (1), is derived from the Latin depositum, a technical word used in the Roman law of bailment for a bailment of a specific thing to be kept for the bailor and returned when wanted, as opposed to commodatum where a specific thing is lent to the bailee to be used by him and returned. In popular language commodatum is translated by the word "loan" and the distinction between deposit and loan is this: that a deposit is to be kept by the depositee for the depositor and the loan is to be kept by the borrower for himself. Thus I deposit my hat in the cloak room. My hat is not to be used by the depositee, but is to be kept for me and returned to me on my demand; but I lend my money to a friend and he can do what he likes with it as long as he returns it to me either on demand or at some specified time. It may be, as observed by Sir Walter Schwabe when Chief Justice of the Madras High Court, in *Kishtappa Chetty v. Lakshmi Ammal* (2), that Art. 145 covers more than the depositum of Roman law, and his Lordship observed that the framers of the Indian Limitation Act "meant to use simple and plain language," but I take this to mean that

the word "deposit" is used in the ordinary sense of the word in the English language, and as far as I am aware the word "deposit" does not cover a transaction of the nature of a loan. The transaction that we have to consider is a loan. The plaintiff lent the defendant these ornaments to be used by the latter in a religious procession. There was no question of trust or quasi trust. It was a mere loan for the benefit of the borrower and in my opinion Art. 145 has no application.

I am equally certain that Art. 49 need not be considered. This article provides for a case where the property has been wrongfully taken or injured or wrongfully detained. The property was not wrongfully taken, it was not injured nor was it detained by the defendant, because it was stolen from his possession before he had an opportunity of returning it. This article, though pleaded in the first Court, was given up in the Court below. The only other article which appears to be applicable is Art. 115. This prescribes the period of three years limitation in a suit for compensation for the breach of any contract express or implied and the limitation runs from the time when the contract is broken. It is not and cannot be contended that the defendant when he took these articles of jewellery on loan was bound to return them, and as he took them for a special purpose namely for use in the Ram Lila procession, he should not have retained the articles after the purpose had been accomplished.

In fact the transaction is a bailment as defined in S. 148, Contract Act, and a bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned. Thus, although no time was stipulated for the return of the articles there was in my opinion an implied contract that they should be returned when the purpose for which they were borrowed was accomplished. S. 46, Contract Act, lays down that where no time for performance of a contract is specified the engagement must be performed within a reasonable time, and the question "what is a reasonable time" is in each particular case a question of fact. It is clearly unreasonable for a person who has borrowed ornaments for use in a

(1) [1914] 37 Mad. 175=24 I. C. 852.

(2) A. I. R. 1923 Mad. 578=72 I. C. 842.

ceremony to detain them after the ceremony has been completed and the owner has demanded their return.

As I stated above this is not a case of detention, but if I were required to find what was a reasonable time for these articles to be returned, supposing that they had not been lost and that the defendant was in a position to return them, I should say that that reasonable time was when the lender asked for the articles after the purpose for which they had been lent had been accomplished. The defendant reported to the police the theft of the articles on 27th October 1924, and this may be taken for the purposes of limitation as the date when the defendant should under his implied contract have returned the articles to the plaintiff. In my opinion the plaintiff had a period of three years from that date to bring a suit either for the return of the articles or for compensation. He cannot rely on the fact that the defendant did not deny his liability during that period for obtaining an extension of the period of limitation. Art. 115 is a residuary article for actions *ex contractu* and can only be applied when no other article of the Limitation Act Schedule is appropriate. It would not in my opinion be proper to go beyond this and take refuge in the omnibus Art. 120.

As long as there is a contract between the parties which is not in writing and which can be covered by Art. 115, Art. 120 cannot be applied. Indeed it should never be invoked if there is any other article in the schedule which upon reasonable interpretation of its language seems to cover the particular suit with which the Court is dealing. In my opinion the transaction between the parties can be covered by a reasonable interpretation of the language of Art. 115, and as the suit has been brought more than three years after the breach of the contract it is barred by time and I would therefore allow this appeal with costs.

Srivastava, J.—I agree. Art. 145 governs suits to recover moveable property deposited or pawned." In the present case the relief claimed by the plaintiff and decreed in his favour is a decree for money representing the value of the ornaments. The article has, in my opinion, no application to a suit for

such a money decree. Art. 49 also is inapplicable. Though the suit is for compensation, yet on the facts found it is impossible to say that the defendant has wrongfully taken or injured, or that he is wrongfully detaining the ornaments which have been stolen.

Thus in the absence of any specific article, Art. 115 which is a residuary article would seem to apply. When the defendant borrowed the ornaments he must be deemed to have made an implied contract for the return of the goods to the plaintiff. Under S. 160, Contract Act, it is the duty of the bailee to return the goods bailed without demand as soon as the time for which they were bailed has expired or the purpose for which they were bailed has been accomplished. Admittedly the ornaments were borrowed for the purpose of the Ram Lila and the Ram Lila was over on 24th October 1924. There was therefore a breach of the contract when the ornaments were not returned after the completion of the Ram Lila and the suit is barred by Art. 115.

By Court.—The appeal is allowed, the decree passed by the lower Court is set aside and the plaintiff's suit is dismissed with costs in all the Courts.

R.M./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 397

SRIVASTAVA AND PULLAN, JJ.

Dwarka—Defendant—Appellant.

v.

Ali Muhammad Khan and others—Plaintiff and Defendants—Respondents.

First Appeal No. 104 of 1929, Decided on 17th April 1930, from decree of Sub-Judge, Rae Bareilly, D/- 26th August 1929.

Transfer of Property Act, S. 74 — Mortgage by A to B—Sale of same property to C who paid B's mortgage out of consideration —Property already attached under previous claim by D and purchased by him in execution—Suit by C for refund of amount paid to B—C held to have been subrogated to rights of B, his remedy being to enforce payment against property covered by mortgage — Mortgage being consideration for payment, held there was no failure of consideration and no suit for refund would lie as C had suffered no loss.

A executed a mortgage deed in respect of certain property in favour of B. Later on A executed a sale deed in respect of the property (including the property mortgaged) in favour of C, certain sum out of the consideration being left with C to be paid to B. C paid the money, satisfying the mortgage in favour

of B. But D already held a decree against A and had attached the property (which C had purchased) in execution of that decree. The sale to C was held void and D purchased the property in the execution sale. C thereupon brought a suit claiming for refund of the amount paid in cash by him to B from B in the first instance and failing him from A.

Held: that the rule of subrogation applied to the case and C had stepped into the shoes of B to the extent of payment made by him to B. Payment by C to B was to be regarded as a purchase pro tanto of his rights and C's remedy in respect of the amount paid by him was to enforce payment of it against the property covered by the mortgage. [P 399 C 2]

Held further: that C was not entitled to refund on the ground that the consideration had failed as the consideration for the payment was not the sale deed in favour of C but the mortgage held by B and C had only acquired the rights of B. [P 400 C 1]

Held further: that although there was a clause in the sale-deed that A would be responsible for loss and damage suffered by C, there was hardly any loss or damage if C had been subrogated to the rights of B and had acquired a charge on the property: *A. I. R. 1924 P. C. 35* and *A. I. R. 1926 P. C. 68* and *A. I. R. 1926 P. C. 103, Rel. on.* [P 400 C 2]

Ram Bharose Lal—for Appellant.

M. Wasim—for Respondent 1.

Radha Krishna—for Respondent 2.

Judgment.—This is a first appeal against the judgment and decree dated 26th August 1929 passed by the Subordinate Judge, Rae Bareilly.

The facts, so far as they are material for the purpose of this appeal, are that Muhammad Asad Khan, defendant 1, Mt. Kaniz Abbas defendant 2 and Mt. Zinat Bibi defendant 3 are the son, widow and daughter respectively of one Mumtaz Ali Khan. On 21st January 1924 Muhammad Asad Khan defendant 1 executed a mortgage-deed (Ex. D-1) in favour of Sankata, father of Dwarka and Ramautar, defendants 4 and 5 in respect of certain property in village Chak Akhtiyarpur. Muhammad Asad Khan also executed a deed of further charge (Ex. D-2) on 18th March 1924. Defendants 1, 2 and 3 executed a sale deed in favour of the plaintiff on 9th November 1928 in respect of their shares in Chak Akhtiyarpur which included the share covered by the deeds of mortgage and further charge (Exs. D-1 and D-2) above referred to. This sale deed was for Rs. 20,000 out of which Rs. 4,000 were left with the plaintiff for payment to Sankata. The plaintiff on 2nd February 1929 paid Dwarka and Ramautar, defendants 4 and 5, Rs. 2,000 in cash and executed a

pro-note in their favour for the remaining Rs. 2,000 and the mukhtar of defendants 4 and 5 entered satisfaction of the two deeds on their back. Muhammad Shakir Khan and Mt. Karam Bibi defendants 6 and 7 held a decree for dower against defendants 1 to 3. They had in execution of their decree attached the property conveyed by the sale deed dated 9th November 1928 before the execution of that deed. In pursuance of this attachment they put the property to sale. The plaintiff objected to the sale on the basis of the sale deed dated 9th November 1928 but the execution Court by its order dated the 16th February (Ex. 4) held that the sale having been made after attachment was legally void. The property was accordingly sold and was purchased by defendants 6 and 7 themselves on 20th February 1929. The sale was confirmed on 23rd March 1929. The plaintiff instituted the suit which has given rise to this appeal for refund of the consideration paid by him to defendants 1 to 3 including the amount paid by him to defendants 4 and 5. He also claimed certain mesne profits. During the course of the trial the plaintiff made a compromise with defendants 1 to 3 and also with defendants 4 and 5 as regards several items of the claim. The only item which remained in controversy was the item of Rs. 2,000 paid to defendants 4 and 5. In respect of this the plaintiff claims a decree in the first instance against defendants 4 and 5 and failing them, a decree against defendants 1 to 3.

The learned Subordinate Judge has held that the plaintiff is entitled to get back this amount of Rs. 2,000 from defendants 4 and 5 to whom it was paid by him and has accordingly decreed the plaintiff's claim in respect of this sum against them. It might be mentioned that defendants 6 and 7 though originally impleaded in the suit, were subsequently discharged by the plaintiff.

Dwarka defendant 4 has come here in appeal. There has been a triangular contest before us between the defendant-appellant, the plaintiff and defendants 1 to 3. Each party has sought to throw the responsibility on one or other of the remaining two. On the one hand the appellant contends that he cannot

be made liable to refund the amount of Rs. 2,000 received by him in part payment of his mortgage and that the plaintiff has, by making the payment, been subrogated pro tanto to the rights possessed by him under the mortgages Exs. D-1 and D-2 and must enforce his rights as such against defendants 6 and 7 who have purchased the property subject to the prior encumbrances, or should seek to recover the money from defendants 1 to 3 who directed him to redeem the mortgage. The learned counsel for the plaintiff-respondent on the other hand maintains that the learned Subordinate Judge was right in giving him a decree against defendants 4 and 5. In the alternative he contends that, failing them, the plaintiff should be given a decree against defendants 1 to 3, but he repels the contention that he has been subrogated to the rights of defendants 4 and 5. The learned counsel for defendants 1 to 3 joins hands with the plaintiff in supporting the decree passed by the lower Court and also supports the defendant-appellant as regards the plea about subrogation. We are of opinion that the rule of subrogation applies to the case and that the plaintiff has stepped into the shoes of defendants 4 and 5 to the extent of the payment made by him to the said defendants. The appeal must therefore succeed on this ground.

In *Malireddi Ayyareddi v. Gopalakrishnayya* (1) land was subject to three simple mortgages of which the second only was on the crops as well as the land. A purchaser from the mortgagor, and the respondents, assignees of his interest, paid to the second mortgagee money to save the crops from sale under a decree which he had obtained upon his mortgage. It was held by their Lordships of the Privy Council that there being no covenant by the mortgagor to pay the third mortgagee, the payments made to the second mortgagee were to be regarded as purchases pro tanto of the second mortgage, not as a discharge of it, the fact that the third mortgage did not include the crops not being material; and that accordingly the respondents were entitled in respect of the payments to priority over the third mortgagee. In *Ram Charan*

Lonia v. Bhagwan Das Maheshri (2), which was a case of a joint Hindu family, it was held by their Lordships of the Judicial Committee that where the purchaser of certain joint family property under a contract made by the karta discharges the debt due under an earlier mortgage out of the sale price and on a suit by the karta's sons the contract of sale is set aside, the purchaser stands in the shoes of the mortgagee and the possession of the property by him, although unwarranted as a purchaser, should be treated as possession under a usufructuary mortgage. Similarly in *Nasiruddin v. Ahmad Husain* (3) it was held by their Lordships of the Judicial Committee that where a subsequent sale of property is declared invalid owing to a prior contract of sale in favour of another person, and the subsequent purchaser, in virtue of his claim to be a purchaser, discharges mortgages upon the property, he is in respect of any money paid by way of such discharge, entitled to stand in the shoes of the mortgagees whom he has paid off and to a charge upon the property for any sums so paid by him which might have been rightfully due under the mortgages.

The principle underlying these decisions seems to us to be fully applicable to the present case. The plaintiff was a purchaser, free from encumbrances, of the property mortgaged with defendants 4 and 5. In virtue of his claim as such purchase he paid Rs. 2,000 in respect of the said mortgages. Subsequently the sale in his favour was declared invalid as against defendants 6 and 7 and the property was put to sale at the instance of the latter. Under the circumstances there is no reason why the payment made by the plaintiff to defendants 4 and 5 should not be regarded as a purchase pro tanto of their rights. We are, therefore, of opinion that the plaintiff's remedy in respect of this sum of Rs. 2,000 is to enforce payment of it against the property covered by the mortgages, Exs. D-1 and D-2.

It was also contended on behalf of the plaintiff-respondent that even if it is held that he had been subrogated to the rights of defendants 4 and 5, still

(1) A. I. R. 1924 P. C. 36 = 79 I. C. 592=51 I. A. 140=47 Mad. 190.

(2) A. I. R. 1926 P. C. 63 = 95 I. C. 898=53 I. A. 142=48 All. 443.

(3) A. I. R. 1926 P. C. 109=37 I. C. 543.

that should not stand in the way of his getting a personal decree against defendants 4 and 5 or failing that against defendants 1 to 3 if he succeeds in establishing his claim for such relief against them. His argument was that he is entitled to such a decree against defendants 4 and 5 on the ground that he had paid the Rs. 2,000 in question to them upon an existing consideration which has afterwards failed, and against defendants 1 to 3 upon the basis of the covenant contained in the sale-deed dated 9th November 1928. With reference to the claim against defendants 4 and 5 reliance was placed upon the observations of Lord Mansfield quoted in *Jugdeo Narain Singh v. Raja Singh* (4), which are to the following effect :

"This kind of equitable action to receive back money which ought not in justice to be kept is very beneficial and, therefore, much encouraged; it lies only for money which *ex aquo et bono* the defendant ought to refund; it does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him in any course of law, as on payment of a debt barred by the statutes of limitation, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake or upon a consideration which happens to fail, or for money got through imposition (express or implied) or extortion or oppression or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under these circumstances."

It was conceded that no case based upon mistake was set up in the pleadings but it was said that as the sale-deed obtained by the plaintiff has been held to be invalid he is entitled to get back the money on the ground of the failure of consideration. We cannot see our way to accede to this argument. The consideration for the payment of Rs. 2,000 to defendants 4 and 5 was not the sale deed obtained by the plaintiff in his favour but the mortgage-deed held by defendants 4 and 5. We have already held that the plaintiff by making that payment has acquired the rights of the mortgagees to that extent. It cannot therefore be said that the payment was made upon

any consideration which has afterwards failed.

Next as regards defendants 1 to 3, the sale deed Ex. 1 no doubt contains a clause which provides that the vendors would be liable for any loss and damage suffered by the vendee. If the plaintiff has been subrogated to the rights of defendants 4 and 5, and if he has acquired a charge on the property in respect of the amount of Rs. 2,000 paid by him, it is hardly possible to say that there has been any such loss or damage as would attract the application of the clause relied upon in the sale deed. If for any reason the plaintiff is unable to enforce payment of the sum of Rs. 2,000 in dispute against the property it may be possible for him then to say that he has suffered a loss and damage which entitles him to a personal decree against the vendors on the basis of the covenant contained in the sale deed. Unfortunately the whole controversy has arisen on account of the plaintiff's own conduct in discharging defendants 6 and 7 from the suit. If the aforesaid defendants had been parties before us, we could very well have made a final adjustment of the rights of the parties in this suit. Under the circumstances we must disallow the plaintiff's claim against defendants 1 to 3 also.

The result therefore is that we allow the appeal and set aside the decree of the lower Court in respect of Rupees 2,000 passed against defendants 4 and 5. The decree of the lower Court will be modified accordingly. In all other respects the decree will stand. The appellant will be allowed the costs of this appeal against the plaintiff and defendants 1 to 3.

R.M./R.K.

Order accordingly.

A. I. R. 1930 Oudh 401

PULLAN, J.

Shah Naim Ata—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. 46 of 1930,
Decided on 7th May 1930, from order
of Sess. Judge, Lucknow, D/- 31st July
1929.

(a) Limitation Act, Art. 181—Art. 181, Lim.
Act, does not apply to application in revision
—No time limit is placed on High Court's
power of revision—Criminal P. C., S. 439—
Civil P. C., S. 115.

Article 181 has no application to an appli-
cation made to High Court in revision of an
order of a criminal Court of inferior jurisdic-
tion. It does not appear that the legislature
ever intended that there should be a time
limit placed upon the power of the High Court
to interfere by way of revision in a criminal
case. There is no reason also why the same
principle should not be applied to civil revi-
sions. These powers are exercised by High
Court quite irrespective of any right on the
part of the aggrieved party to move the Court.
43 Cal. 1029, Ref. [P 401 C 2]

(b) Criminal P. C., S. 439—Admission or
non-admission of application is in discretion
of Court — Applications must be made
within reasonable time.

- The admission or non-admission of applica-
tions for revision is entirely discretionary and
it is not necessary for the Court to prescribe
any hard and fast rule, but the Court should
not as matter of practice admit applications
for revision unless it is satisfied that they are
made within a reasonable time, and the reason-
able time would appear to be the time granted
by statute for admitting appeals. When an
application for revision has been made after
the expiry of the period allowed for an appeal
it is proper that the Court should ask the
applicant to give reasons for the delay and
if those reasons are not sufficient to dismiss
the application : 8 All. 514 ; 27 All. 468 and
A. I. R. 1923 Oudh. 272, Ref. [P 402 C 1, 2]

(c) Penal Code, S. 405—S. 405 covers
any person who is in any manner entrusted
with any property.

Section 405 does not limit the offence to
the case of persons who are entitled to be
called trustees in the technical sense. The
section is couched in broad terms and covers
any person who is in any manner entrusted
with any property. Where a person manages
a large property under a definite agreement
that he should get 3/5ths for his own use and
spend 2/5ths on certain religious and educa-
tional objects, if it can be proved that he has
converted to his own use some portion of the
2/5ths share of the profits which he should
devote to these objects, he may be properly
convicted of an offence of breach of trust: A. I.
R. 1927 Oudh 118, Dist. [P 403 C 1]

St. George Jackson—for Applicant.

H. K. Ghosh—for the Crown.

Judgment.—This is an application
in revision of an order passed on appeal

1930 O/51 & 52

by the learned Sessions Judge of
Lucknow on 31st July 1929. When
the application was admitted the
office reported according to the practice
of this Court that it was within time
up to 31st July 1932, but an objection
has now been raised by the learned
Assistant Government Advocate that
this application should be held to have
been made too late and that in accor-
dance with the practice of this Court
it should not be entertained. The prac-
tice of the office is based on the belief
that Art. 181, Lim. Act, applies to
applications for revision. It is true
that that article is provided for appli-
cations

"for which no period of limitation is provided
elsewhere in this schedule or by S. 48, Civil
P. C., 1908."

and the time from which the period
begins to run is "when the right to
apply accrues." In my opinion this
article has no application to an appli-
cation made to this Court in revision
of an order of a criminal Court of in-
ferior jurisdiction. It does not appear
that the legislature ever intended that
there should be a time limit placed
upon the power of a High Court to in-
terfere by way of revision in a criminal
case. I say "a criminal case" because
the case before me is a criminal case,
but I know of no reason why the same
principle should not be applied to
civil revisions also. These powers are
exercised by a High Court quite ir-
respective of any right on the part of
aggrieved persons to move the Court.
As a matter of fact no one has any
right to move the Court in revision.
All that can be done by the aggrieved
person is to ask the Court to exercise
the power conferred upon it by S. 435,
Criminal P. C. I therefore find a fur-
ther reason for my view that Art. 181,
Lim. Act, has no application to this case
in the fact that no "right to apply" has
accrued to the person making it. A
similar case came before a Bench of
the Calcutta High Court in the matter
of *Khetra Mohan Giri v. Darpa Nara-
yan Giri* (1). In rejecting the appli-
cation the learned Chief Justice ob-
served :

"This is not a question of limitation but a
rule of the practice of the Court to the effect

(1) [1916] 43 Cal. 1029=17 Cr. L. J. 419=35
I. O. 979.

that an application for revision must be made within a reasonable time."

Moreover justice demands that there should be no limitation for righting a miscarriage of justice for such a miscarriage may be discovered many years after it has been committed, and in many cases it can only be put right by moving the High Court in revision.

On the other hand it has never been the practice of this Court, or, as far as I know, any High Court, to admit applications for revision if in the opinion of the Court they have been made after unreasonable delay. The Calcutta High Court has laid down in the case to which I have referred that their practice is to admit no applications after a period of 60 days together with such period as may have been necessary for obtaining copies; but they observe that this is not an inflexible rule and in exceptional circumstances might be departed from. I have been referred to two cases decided by the Allahabad High Court : *Queen-Empress v. Ram Narain* (2) and *Emperor v. Jagan Nath* (3) in which applications for revision were rejected on the ground that they were made too late. The first was made nine months after the order of which revision was sought and the second was made 5 months and 23 days after the order. In Oudh there is no reported case on the criminal side though I am informed that the practice of the Court has always been to reject applications made more than 90 days after the order complained against unless special reason was shown for the delay. In a reported case on the civil side the Judicial Commissioner rejected an application for revision on the ground that it was filed after an inordinate delay, that is to say, a year after the order complained of : *Binda Prasad v. Banarsi Das* (4). In my opinion the admission or non-admission of such applications is entirely discretionary and it is not necessary for the Court to prescribe any hard and fast rule, but the Court should not as a matter of practice admit applications for revision unless it is satisfied that they are made within a reasonable time, and the reasonable time would

appear to be the time granted by statute for admitting appeals. When an application for revision has been made after the expiry of the period allowed for an appeal it appears to me proper that the Court should ask the applicant to give reasons for the delay, and if those reasons are not sufficient to dismiss the application.

In the present case the judgment was dated 31st July 1929. The applicant applied for a copy of the judgment on 21st October 1929 and obtained it on 22nd October, and he did not file any application in revision until the 12th April 1930. The learned counsel who appears for the applicant has given no reasons for the delay and in my opinion I should be fully justified in the circumstances in rejecting the application. As however the application was admitted by a learned Judge of this Court owing to what I consider to be an incorrect office report on the point of limitation I think it right to decide the case also on the merits. The applicant was found guilty of the offence of breach of trust under S. 406, I. P. C., and sentenced to one day's simple imprisonment and to pay a fine of Rs. 1,000. He is a hereditary Sajjadaashin of a Mahomedan religious institution in the Rae Bareilly District.

"The property was made wakf in the time of the Kings of Oudh and after the annexation the British Government restored to the sajjadaashin the same tenure which he was in possession of prior to confiscation."

These words are quoted from a judgment of this Court in an appeal in a civil suit in which the present applicant was the defendant *Shah Mohammad Naim Ata v. Mohammad Shamsuddin* (5). I have been asked to hold that in view of that judgment the applicant is not a trustee and cannot be guilty of the offence of breach of trust. Apart from the fact that this judgment was delivered on 20th December 1926 long before the offence, if any was committed for which the applicant has been convicted, I can find nothing in the judgment to show that the applicant holds a position in which it is impossible for him to commit a breach of trust. On the contrary it appears that he manages a large property under a definite agreement that

(2) [1886] 8 All. 514=(1886) A. W. N. 177.

(3) [1905] 27 All. 468=(1905) A. W. N. 65.

(4) A. I. R. 1923 Oudh 272=77 I. C. 115.

(5) A. I. R. 1927 Oudh 113=100 I. C. 241=2 Luck 109.

he should get 3/5ths for his own use and spend 2/5ths on certain religious and educational objects. If it can be proved that he has converted to his own use some portion of the 2/5ths share of the profits which he should devote to these objects it appears to me that he may be properly convicted of an offence of breach of trust. S. 405, I. P. C., does not limit the offence which is there defined to the case of persons who are entitled to be called trustees in the technical sense. The section is couched in broad terms and covers any person who is in any manner entrusted with any property. A perusal of the judgments of the Courts below show that they have found the applicant guilty of converting to his own use a portion of the funds which he was legally bound to spend on the objects on trust. I can find no reason to doubt the correctness, legality or propriety of the finding, sentence or order of the lower Court. I therefore see no reason to interfere in revision on the merits of the case. The application is accordingly dismissed.

P.N./R.K. *Application dismissed.*

*** A. I. R. 1930 Oudh 403**

PULLAN, J.

Lachhman and others—Accused—Applicants.

v.

Emperor—Complainant—Opposite Party.

Criminal Ref. No. 22 of 1930, Decided on 19th May 1930, reported by Sess. Judge, Unao.

*** (a) Public Gambling Act, Ss. 3 and 4—Dewali gambling is not an offence unless it is in contravention of Gambling Act.**

Gambling in Dewali should not be considered to be an offence; but the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act.

Where the only evidence that anything was done in contravention of the Gambling Act was that the owner of the house had in front of him a small pot containing As. 15 and there was no reason to suppose that the sum represented his profits or that it was what is known as "nal" and the sums staked were quite trifling.

Held: that it was only a case of Dewali gambling in private house and no offence was committed under the Gambling Act: 20 O. C. 4 and A. I. R. 1922 Oudh 224, *Rel. on.*

[P 403 C 2]

*** (b) Public Gambling Act, S. 5—To issue gambling warrant to raid houses where goes on in Dewali is undesirable.**

To issue warrant to raid houses where gam-

bling goes on at the time of Dewali is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward.

[P 414 C 1]

J. N. Prasad Kapur—for Applicants.

H. K. Ghose—for the Crown.

Judgment.—These references were made by the learned Sessions Judge of Unao. They arise out of the same case. The Kotwal of Unao obtained a warrant from the Superintendent of Police in order to raid a house where gambling was going on at the time of Dewali. He found a number of people gambling with cowries. The total amount of money found on the premises was Rs. 24-12-9 and the number of persons playing was twenty-eight. The Magistrate fined all except two whom he held to be minors and whom he discharged with an admonition. The total amount of fines realized was Rs. 29. In his judgment the Magistrate observed:

"The festival of Dewali does not give a free permit to persons to gamble in contravention of the provisions of the Gambling Act."

The last words are important. The festival of Dewali is recognized by all Hindus as a time when gambling is not only permissible but praiseworthy, and the law has never yet interfered with this practice as such. It is, however, true to say that the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act. If, therefore, this gambling took place in a public place, or if the owner of the premises was making a profit out of the gamblers, the conviction might not be illegal although the raid and the prosecution would still in my opinion be deplorable. The only evidence in this case that anything was being done in contravention of the Gambling Act is that the owner of the house had in front of him a small pot containing As. 15. There is no reason whatever for supposing that this represented his profits or that it was what is known as "nal." It may very well have been the small sum which he had won or which he proposed to stake. In my opinion this was an ordinary case of Dewali gambling in a private house. The sums staked were trifling and in my opinion no offence was committed under the Gambling Act. On previous occasions the Judicial Commissioners of Oudh have had occasion to point out that Dewali gambling was

not to be considered an offence. I refer to *Ram Shanker v. Emperor* (1) and *Emperor v. Shankar Dayal* (2). In his explanation the learned Magistrate has attempted to differentiate both cases but he has not succeeded. I regret to say that I have recently seen several cases in which warrants have been issued to the police in order that they may interfere with persons engaged in Dewali gambling. In my opinion to issue such warrants is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward. As I have already shown in this case no less than Rs. 290 have been collected from 26 persons and the Magistrate has expressed his intention of giving a reward to the police. I can only hope that no reward has been given. I accordingly accept this reference, set aside the convictions and direct that all the fines shall be returned. It is not, in these circumstances, necessary to consider the minor law point raised as to the applicability of S. 562 (1-A) to cases under the Gambling Act.

R.M./R.K. *Reference accepted.*

- (1) [1917] 20 O. C. 4=18 Cr. L. J. 494=39 I. C. 334.
 (2) A. I. R. 1922 Oudh 224=71 I. C. 62=24 Cr. L. J. 14=25 O. C. 111.

A. I. R. 1930 Oudh 404

PULLAN, J.

Shankar Sahai—Accused—Appellant.
 v.

Emperor—Opposite Party.

Criminal Appeal No. 191 of 1930, Decided on 29th April 1930, from order of Sess. Judge, Hardoi, D/- 6th March 1930.

(a) Criminal P. C., Ss. 476 and 476-B—Proceedings.

Proceedings under S. 476 should not be undertaken on the application of private persons unless the prosecution is clearly in the interests of the State and is reasonably certain to result in conviction. [P 404 C 2]

(b) Criminal P. C., S. 476—Proceedings under S. 476 cannot be taken against person not party to proceeding.

Court cannot take proceedings under S. 476 against a person who is not a party to a proceeding in any Court. [P 405 C 2]

(c) Criminal P. C., S. 476—Officer making complaint under S. 476 should state evidence on which he relies.

When complaints under S. 476 are made, the officer making them; must state the evidence on which he relies otherwise the Magis-

trate to whom the case is referred for decision has no means of ascertaining what the evidence is on which the prosecution case is based. [P 405 C 2; P 406 C 1]

R. F. Bahadurji and *Moti Lal Sak-sena*—for Appellant.

B. K. Dhaon and *H. K. Ghose*—for the Crown.

Judgment.—This is an appeal under S. 476-B, Criminal P. C., against an order of the Sessions Judge of Hardoi in which he makes a complaint to the District Magistrate under S. 476, Criminal P. C., requiring one B. Shankar Sahai, who is a practising lawyer in the Hardoi District, to be prosecuted under Ss. 193 and 465, I. P. C. The case which gave rise to the proceedings was a criminal case brought by one Shambhu Nath against Tula and others which resulted in the conviction of the accused for offences under Ss. 147, 323 and 324, I. P. C., and the conviction and sentences were upheld on appeal by the learned Sessions Judge. Neither he nor the Magistrate elected to prosecute B. Shankar Sahai at that time and the present order has been passed on the application of Shambhu Nath. It cannot be too strongly impressed upon the Courts that such proceedings should not be undertaken on the application of private persons unless the prosecution is clearly in the interest of the State and is reasonably certain to result in a conviction. I have been very carefully through the facts of this case. The Judge was under the impression that the assault took place in a certain field which is No. 440 and that it arose out of a dispute as to tenancy rights in that field between Tula on the one side and Shambhu Nath on the other. I find on the contrary that in the report made by Shambhu Nath no particular field is mentioned. It is only stated that Shambhu Nath heard that his jundhri crop had been cut, that he went to verify the fact and that he was waylaid by Tula and others, but the scene of the occurrence is not placed on this field. Tula made a counter complaint and he also stated that he was attacked when on his way back from his field. The evidence was recorded in Court on 8th November. The complainant examined himself and six other witnesses; none of them mentioned the number of the field and it is very clear from the evidence that the matter in dispute was

the assault not the field. On 25th November Shambhu Nath was cross-examined by B. Shankar Sahai who was counsel for the accused. He was tied down in cross-examination to a description of the field which could be verified, but even on that day no number was assigned to the field. On the following day, 26th November, the village patwari was examined. He located the field from Shambhu Nath's description as No. 440, and he stated that this field was partly cultivated by B. Shankar Sahai, who is the lambardar of the village, and was partly fallow. He did not bear out Shambhu Nath's assertion that he (Shambhu Nath) had obtained this field by relinquishment from a former tenant Badlay. It is at this stage of the proceedings that B. Shankar Sahai, who had withdrawn from the case on the previous day, was examined as a witness, and he said that Badlay's field No. 440 had been relinquished in his own favour and he had himself given it on lease to Tula accused on 25th June 1929, and he verified the lease which was produced. The view taken by the learned Sessions Judge is that B. Shankar Sahai got this lease prepared during the trial of the case in order to establish the defence of Tula and it is on this belief that he has instituted proceedings against him. From the facts which I have stated it is evident that the field was not the matter of dispute until the 25th November. Shambhu Nath had up till then made vague statements only about the cutting of his crops and it was not until he was forced to give the boundaries and description of the field which he alleged to have been cut that the other side had any opportunity to prove their possession over that field. Thus the production of the lease was not an after thought as stated in his judgment in appeal by the learned Sessions Judge. It could not have been produced any earlier and his reason for supposing that the lease is antedated falls to the ground. I cannot myself see any other reason for supposing the lease to be antedated.

When proceedings were taken under S. 476 Babu Shankar Sahai asked to produce witnesses to prove the lease, but he was not allowed to do so. He had also offered in Court to produce the deed of relinquishment said to have been executed in his own favour by

Badlay, but the deed of relinquishment produced by Shambhu Nath was produced and not that said to have been executed in favour of Shankar Sahai. It is therefore a matter still open to question whether this field was relinquished by Badlay in favour of B. Shankar Sahai who is the lambardar or Shambhu Nath who had purchased some land in the village and is apparently disliked by the former zamindars. In my opinion there is no presumption that the lease produced by B. Shankar Sahai was a forgery and there is certainly no evidence to prove that it was not executed as stated on 25th June 1929. Thus in my opinion the prosecution for forgery was bound to fail. There is nothing on which the Court could base a conviction. Apart from that the learned Sessions Judge acted without jurisdiction. Under S. 476, Criminal P. C., he could take action by way of complaint where in his opinion an offence referred to in S. 195, sub-S. (1), Cl. (b), or (c)

"appears to have been committed in relation to a proceeding in that Court."

But S. 196 (c), which is the relevant clause, forbids any Court from inquiring into an offence described in S. 463, where such an offence is alleged to have been committed "by a party to a proceeding in any Court," except on the complaint in writing of the Court. I find no clause under which the Court can take proceedings against a person who is not a party, and B. Shankar Sahai was not a party to the proceedings in the Court of the Magistrate on which action has been taken by the Sessions Judge. No doubt the learned Judge was empowered to take proceedings in respect of an alleged offence under S. 193, but the only statement which he considers to constitute perjury was the following:

"*Main ne No. 440 ka patta 25th June 1929 ko Tula Ram mulzim ko dia.*"

The Judge himself describes the perjury charge as a mere corollary to the charge of forgery. In my opinion the complaint of the offence of forgery was without jurisdiction and neither a charge of forgery nor a charge of perjury can possibly be made out on the materials given by the learned Sessions Judge. When such complaints are made under S. 476 the officer making

them must state the evidence on which he relies, otherwise the Magistrate to whom the case is referred for decision has no means of ascertaining what the evidence is on which the prosecution case is based. As far as I can see the Magistrate, who is required to act on the complaint in the present case, would start and end with the opinion of the Sessions Judge that this lease was antedated and that B. Shankar Sahai had made a false statement about it. I am at a loss to see how either opinion of the learned Sessions Judge was to be established by legal evidence. I consider that the whole order was misconceived. There was no justification for the prosecution of Babu Shankar Sahai either under S. 193 or S. 465; I. P. C; and under S. 476-B, Criminal P. C., I direct the withdrawal of the complaint.

R.M./R.K.

Order accordingly.

* A. I. R. 1930 Oudh 406

RAZA AND PULLAN, JJ.

Manni—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 244 of 1930, Decided on 10th July 1930, from order of Addl. Sess-Judge, Bahraich, D/- 8th May 1930.

* (a) Evidence Act, S. 118—Evidence by child should be accepted with caution.

There is no more dangerous witness than young children. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate. The evidence of a child should therefore be accepted with great caution. [P 407 C 1]

(b) Criminal P. C., S. 164—Statement made under S. 164 behind back of accused cannot be used against him, its only object being to get hold over witness.

A statement made under S. 164 behind the back of the accused cannot be properly used as evidence against him. The only object in recording such statement is to obtain a hold over the witness: 17 O. C. 333, *Foll.*

[P 407 C 2]

B. B. Chandra—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—Manni Ahir a man of thirty years of age has been convicted of the murder of his wife and sentenced

to death. The sentence is before us for confirmation and Manni has appealed against his conviction.

The girl Jugra who died was stated by her mother to be about fourteen years of age. It is in evidence that she had been married for about a year, that she was not on good terms with her husband and that she had run away from him more than once. Her body was found in the river Khurpehwa on the afternoon of 16th October by Mr. Surja. The chaukidar Sarju was told about the recovery of the body and he went to the place and found the body of Jugra lying naked on the bank of the river tied by a rope to a short bamboo stick. He found her mother Mt. Surja with it. The chaukidar went to the police station and made a report. Admittedly this report is based on the statement made by Mt. Surja. In that report he gave the gist of the evidence which has subsequently been produced in Court. He said that on his inquiry Khemai's wife (Surja) said:

"that she (the corpse) was her daughter named Jugra who was married to Manni Ahir of Gurgurwa, that she used to live little at the place of her husband and used to run away to her parents' house, that therefore she had been killed by her husband, that the girl was at the place of her husband, that her granddaughter, the daughter of Baldi, had gone along with her to her husband's place, that she returned in the evening on the day previous saying that her aunt had been killed by her uncle, that she and her people began to search for her from early morning that day and that they found the dead body in the river at that time."

This fixes the time of the alleged murder on the night of 14th and 15th October and naturally the most important evidence in the case is that of the granddaughter, the daughter of Baldi, whose name is Shukhrania, and who is said to have given the first information to her grandmother Surja of the commission of the crime. Sukhrania has been believed by the learned Sessions Judge. This child is six years of age. Her statement in Court is that she and her grandmother Surja went to the house of the accused and that she (Sukhrania) was sleeping with Jugra and woke up on receiving a kick from her. She states that she saw the accused throttling his wife. He was sitting on her chest, and when the child began to cry he told her to go to sleep. She says that she went to sleep. When she

woke up in the morning she did not find Mt. Jugra. She found another woman who had been sleeping in the same house behind a partition of cornbins and she asked her what had happened. This woman told her that Jugra had been beaten and had run away, and this is the story which she told to her grandmother on the same evening. She said nothing about the throttling, and although the learned Judge thinks it not unnatural that a child should describe throttling by the word beating we are not of that opinion. We do not believe that anybody would describe the incident which the child now says she saw as a beating. The learned Judge is clearly impressed by the child's statement. He says she did not give him the impression of having been tutored and there is no reason why anyone should tutor her. Now Surja in her statement in Court admitted that she suspected the accused from the first because there was no one else possible. She obviously believes in his guilt and her whole conduct throughout shows that she wishes that he should be convicted. The child is completely under her influence and could very easily be taught by her what she was to say in Court. The Judge was impressed by the fact that Sukhrania caught her own throat with her hands and set her teeth to illustrate what she saw the accused doing. We are not impressed by this piece of acting which had previously been performed in the Court of the Committing Magistrate. It does not appear to us to have been spontaneous, but rather to have been tutored along with the rest of her statement. There is no more dangerous witness than a young child. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well-taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate.

We find in this case that there is no evidence to corroborate the statement made by the child. There is no evidence that the woman was throttled.

The cause of her death is entirely unknown. There is no evidence that her husband was present on the night on which she died, and it is uncertain that she died on the night which is stated to have been the date of her death. The Civil Surgeon who conducted the post-mortem examination on the morning of 18th October found that the woman had been dead for five or six days, that is to say, according to his opinion she died on the night of 12th and 13th October and not on the night of 14th and 15th. Doctors are frequently wrong on the difficult question of post-mortem appearances, but as this body was in water, it would be expected that decomposition would be delayed and not accelerated, and it is surprising that if the woman really died on the night of 14th and 15th October, the doctor should have placed her death some 48 hours earlier.

We have been asked to consider a statement made under S. 164, Criminal P. C., by another woman Mt. Sarjudei who is said to have been actually present in the house on the night in question. This statement was excluded by the learned Sessions Judge and in our opinion he was right in so doing. A statement made under S. 164 behind the back of the accused cannot be properly used as evidence against him. The only object in recording such statement is to obtain a hold over the witness. This was the view expressed by Lindsay, J. C., in the case of *Puttu v. Emperor* (1) and we believe it to be a correct statement of law.

Another point used by the learned Judge against the accused is that he ran away and remained in hiding for over two months. We should be most reluctant to use this fact in any way against the accused. The man is an ignorant villager, and according to his own statement he returned to his village from a short absence of seven days to hear that his wife had been drowned, that members of the family were shut up in the thana, and that a report was made against him. If this statement is true, and there is no evidence to rebut it as the man was not seen anywhere either on the day when his wife is said to have been killed or later until he was

(1) [1914] 17 O. C. 363=27 I. C. 196=16
Cr. L. J. 132.

arrested, we can only say that his conduct can easily be explained on the ground of fear, and fear is not necessarily caused by a guilty conscience.

The last point which we need consider is the alleged identification of danda or stick which was found tied to the body. Certainly three witnesses say that the danda belonged to the accused. It has no particular marks of identification and in our opinion it is very difficult for anyone to say that this is the accused's danda. But even if it were so, it does not provide important evidence against its owner. Nor can we say how the danda was used. We cannot accept the explanation given by the learned Judge that it was fixed in the sand in the bed of the river in order to prevent the body from being washed away because we cannot imagine anyone doing anything so foolish. A short stick like this could not retain its hold in a river bed even for a few minutes let alone for three or four days. Moreover all that we know from the chaukidar who may be considered to be an impartial witness is that when the body was lying on the bank it was tied by the rope to the stick. We are far from certain that when the body was in the water it was tied to the stick and we cannot understand the object with which any murderer could have so tied the body. It is at least probable that the stick and the rope were merely used to bring the body to the shore.

Viewing the case as a whole we are of opinion that there is no sufficient evidence to justify the conviction of the appellant of the offence of murder. We are not even certain that the woman was murdered. We, therefore, allow this appeal, set aside the conviction and sentence and declare the accused Manni to be acquitted.

R.M./R.K. *Conviction set aside.*

A. I. R. 1930 Oudh 408

RAZA AND NANAVUTTY, JJ.

Mahabir and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 298 of 1930, Decided on 21st July 1930, from order of Sess. Judge, Fyzabad, D/- 6th June 1930.

Penal Code, Ss. 99, 103, 302 and 304—Right of killing offender found committing burglary given by S. 103 is subject to provisions of S. 99—Deceased beaten to death by lathi blow while found coming out of hole in wall after committing burglary—Accused held guilty of offence under S. 304—S. 300, Excep. (2) held applicable but accused held to have exceeded right of private defence of property.

The right in exercise of right of private defence of property of killing of offender who is found committing burglary given by S. 103 is subject to the provisions of S. 99.

Where the deceased was found committing housebreaking and was set upon by the owner of the house and his son when he was coming out of the hole and was beaten to death with lathi blows.

Held: that the accused were guilty of an offence under S. 304. The Exception (2) to S. 300 applied to their case: The accused had no intention of committing more harm than was necessary for the purpose of their defence of private defence of property, but without premeditation they in fact exceeded their right of private defence of property as the deceased was at their mercy while coming out of the hole and he could have been easily overpowered and secured. It was not necessary to beat him to death with lathi blows.

But as the accused were villagers who hardly realized that in killing a thief caught flagrante delicto they were committing any serious offence, severe punishment was not called for: A. I. R. 1925 Oudh 425; A. I. R. 1926 Lah. 28 and A. I. R. 1923 All. 194, Dist. [P 411 C 1, 2; P 412 C 1]

J. Jackson and S. N. Tankha—for Appellants.

H. K. Ghose—for the Crown.

Judgment.—Mahabir Tewari, aged 70, and Tarpat, his son aged 24 of Pura Beni Ram, a hamlet of village Ghatauli, police station Milkipur, in the district of Fyzabad, have been both convicted of an offence under S. 302, I. P. C., and sentenced to death by the Sessions Judge of Fyzabad. They have appealed against their conviction and sentence. The reference in confirmation of the sentence of death is also before us.

The facts out of which this charge of murder arises are briefly as follows:

On 1st February 1930 at 6-30 a. m. Mahabir, appellant, accompanied by the village chaukidar made a report at Thana Milkipur that on the previous night at about midnight four thieves entered his house by making a hole in the back wall of his house, that three of them ran away when a cry of "thief, thief" was raised but that the fourth one as he was coming out of the hole in the wall of the house was attacked

by Mahabir and his son Narpatt with their lathis, that this thief who was coming out of the hole in the wall was Mulhar Singh a resident of Narsara and that he died shortly afterwards as a result of the injuries inflicted on him by Mahabir and Narpatt, that having seated Sital Brahman and Narpatt to keep watch over the dead body of the thief Mulhar Singh, Mahabir along with the village chaukidar hurried to the thana to make his report. His report was entered in a cheque receipt or first information report and the offence of burglary was registered at the Milkipur police station as Crime No. 19.

Upon this very same report of Mahabir there and then, without any further enquiry, a case of culpable homicide under S. 304, I. P. C., was registered against this unfortunate Mahabir and his son Narpatt by the Station Officer of Thana Milkipur and Mahabir who had come to make a report concerning the burglary at his own house found himself all of a sudden a prisoner in police custody. Subsequently the charge under S. 304, I. P. C., became magnified into one of wilful murder under S. 302, I. P. C. The original case under S. 457, I. P. C., was dropped by the police as an empty worthless husk. and a very laboured, halting and lame story was set up on behalf of the prosecution to explain the manner in which the deceased Mulhar Singh met with his death. It is said that Mulhar Singh who was a notorious house-breaker and thief and who was bound over under S. 110, Criminal P. C., in August 1926 came with Karia Bhat to the house of Aharwadin (P. W. 19) of Deora Kotra. Aharwadin is a history-sheeter and with him was seated his associate Raghubans Rai (P. W. 9). This meeting of bad characters took place after night fall, and then Mulhar Singh asked his friends Aharwadin and Raghubans Rai to accompany him through the jungle as he was afraid of the people of Pura Beni Ram and apprehended danger at their hands. Thereupon Aharwadin and Raghubans Rai accompanied Mulhar Singh through the jungle and when they were about $2\frac{1}{2}$ furlongs from the hamlet of Puta Beni Ram they turned home leaving Mulhar Singh to go his way alone. When they had gone about 165 paces

towards their own village Deora Katra they heard a cry of Mulhar Singh, and they turned back and saw 15 or 16 men beating Mulhar Singh with lathis. How these men, amongst whom presumably were the two appellants, came to be there is a matter upon which the prosecution witnesses do not throw any light. There is also no evidence adduced by the prosecution to explain how Mulhar Singh came to be found at the house of Mahabir, appellant, and as to who carried Mulhar Singh from the imaginary spot where the 15 or 16 men are said to have beaten him to the house of Mahabir. A story so truncated and formless and so absolutely devoid of the sap of reason and of common sense it is hard to imagine, and it is therefore a matter of surprise, to us that it found such ready credence with the learned trial Judge. The learned Sessions Judge himself characterizes the evidence of Ram Bakhsh (P. W. 13), Bhawani Pher (P. W. 16) Ribai Pasi (P. W. 17) Bhabhute (P. W. 18) and Ram Nath (P. W. 20) unreliable and unworthy of belief. We entirely agree with the learned Sessions Judge in his estimate of the evidence of these witnesses and we, therefore, will not discuss their testimony. The only witnesses upon whose evidence the learned Sessions Judge convicts the appellants are Aharwadin P. W. 19 and Raghubans Rai (P. W. 9). A part from the fact that these witnesses did state before the police that Mulhar Singh was accompanied by Karia Bhat and that Karia Bhat suddenly disappears from the scene and is not produced as a witness in the case, the story told by these witnesses is in our opinion very discrepant and inherently improbable. There was no pressing necessity which compelled Mulhar Singh a notorious bad character to go at night time to Pura Beni Ram where he suspected treachery and trouble. It is also not understood why, if Aharwadin and Raghubans Rai were willing to be friendly with Mulhar Singh they did not see him safely to his place of destination that night. They left Mulhar Singh in the lurch after going a short distance with him. They did not run and raise an alarm nor attempt to rescue Mulhar Singh when they saw him being beaten by a dozen men or more. The cry of dacoity which these witnesses say they

heard in Pura Beni Ram is not explained. They did not state whose house was being decoited or what connexion this alleged dacoity had with the beating and the death of Mulhar Singh. All these matters the prosecution has left in the dark and there is no clear answer given in the evidence of the Crown witnesses to the many doubts that arise in our mind as to the truth of the story told by these two witnesses. Aharwadin admits that he and the deceased Mulhar Singh were suspected in the theft committed at Kandhai Kurmi's house. He is a thoroughly unreliable and dishonest witness and his evidence in our opinion is quite unbelievable. The evidence of Raghubans Rai (P. W. 9) about his seeing Mulhar Singh being beaten by 15 or 16 men is not believed even by the learned Sessions Judge because this very witness told the investigating police officer when he was first examined (vide Ex. A.) that on hearing the cry of Mulhar Singh he and Charwa Din did not go to the scene of the occurrence but returned straight home to their village.

We are in entire agreement with the learned Sessions Judge on this point and we consider that the evidence of Aharwadin and Raghubans Rai as to the circumstances in which the deceased came to Pura Beni Ram and met with his death is entirely false. The entire case for the prosecution as presented in Court is in our opinion a pure unadulterated fabrication and the investigating police officer would have been well advised if he had accepted the first information report of Mahabir and left it to the latter to prove that the death of Mulhar Singh was justifiable homicide.

The learned Sessions Judge has attempted to argue that the story of house breaking set up by the appellants "(the Sendh theory," as he calls it) is highly improbable. We find ourselves absolutely unable to accept his reasoning on this point. His argument is that because the northern and southern walls of the appellant's house are very low so there was no necessity for making a hole (sendh) in the back wall of the house. The fact that a hole in the back wall of the house had been actually dug is proved beyond any shadow of doubt. Sub-Inspector Mohammad Ishaq and chaukidar Sajan who is a defence witness

prove this fact, and it is idle to argue that because in the opinion of the trial Court there was no necessity for making a hole in the wall, that therefore the story of housebreaking set up by the appellants is improbable. Even the investigating police officer Sub-Inspector Mohammad Ishaq, though he has coolly ignored the commission of the offence of housebreaking by the deceased, does not venture to assert that no burglary was committed by the deceased. The fact that a burglary was committed and a hole made in the back wall of the appellants' house is as definitely and clearly proved as the fact that the thief Mulhar Singh was killed while coming out of the hole in the wall of that house. We see no reason to disbelieve the evidence of chaukidar Sajan Singh and of the other defence witnesses. The evidence of these defence witnesses strikes us as far more reasonable and intelligible than the remarkable and imaginary story put into the mouths of the prosecution witnesses. The medical evidence in our opinion does not in any way conflict with the defence version of the occurrence. The Civil Surgeon of Fyzabad nowhere deposes that the bruises on the left and right thighs of the deceased were caused by lathi blows. He merely deposes that the fracture of the skull was caused by blows from a blunt weapon like a lathi. This evidence of the Civil Surgeon of Fyzabad is entirely consistent with the story told by the appellant.

The fact that articles were not lying in a confused state inside the house of the appellants would not per se prove that no thieves had come on the night of the occurrence to that house. In fact the chaukidar Sajan deposes that when he reached Mahabir's house that very night immediately after the occurrence he found the body of Mulhar Singh lying inside the hole and a lota and a thali and a lathi were found outside the house near the hole. This evidence clearly proves that the deceased was committing house-breaking when he was set upon by the owner of the house and his son and unfortunately killed. The mere absence of any loss of property by the appellants because their women-folk woke-up in good time and raised an alarm will not prove that no offence of burglary or house-breaking took place. The

refusal of Mahabir after he had been charged with murder to produce the thali and lota which the thieves had taken out of his house is easily intelligible. We can fully sympathize with the bitter feelings of the outraged Mahabir and his son Narpal who found Sub-Inspector Mohammad Ishaq had put the halter round their necks instead of helping them to discover the thieves who had broken into their house. Is it to be wondered at if in these circumstances they did not trouble to comply with the thanadar's request to produce the stolen property even if we are to suppose that that officer did ask them to produce the stolen utensils?

Upon a careful consideration of the entire evidence on the record and after giving the facts and circumstances of this case our best consideration we have unhesitatingly come to the conclusion that the case for the prosecution fails and that the defence version of the occurrence is satisfactorily proved.

The learned counsel for the appellants, Mr. John Jackson, who has argued this appeal with remarkable frankness and brevity, has conceded that the burden of proving that the death of Mulhar Singh brought about by the appellants was justifiable homicide lay upon his clients: S. 105, Evidence Act. Under S. 103, I. P. C., the appellants had the right, in the exercise of the right of private defence of property, of causing even the death of the offender who committed burglary or house-breaking in their house, but this right of killing of an offender who committed burglary is subject to the provisions of S. 99, I. P. C., which lays down very clearly that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In the present case, accepting the version of the appellants themselves we find that when they had the thief at their mercy as he was coming out of the hole in the wall it was not necessary for either of them to beat him to death with lathi blows. They could have overpowered and secured him in a 100 different ways short of causing his death by fracture of his skull. We therefore hold that the appellants on their own showing exceeded the right of private defence of property. It may be noted here that no right of private

defence of person has been pleaded by the appellants. Upon the legal view of the appellants' conduct that we take in this case we hold that exception (2) to S. 300, I. P. C., applies to their case. The appellants had no intention of committing more harm than was necessary for the purpose of their defence, but without premeditation they in fact exceeded their right of private defence of property. They are therefore guilty of an offence under S. 304, I. P. C.

The learned counsel for the appellants invited our attention to a ruling of the Lahore High Court reported in *Ishmail v. Emperor* (1), in which it was held by a single learned Judge of that Court that the accused not knowing in the dark whether the burglar was armed or not did not exceed his right of self defence under Cl. (4), S. 103, I. P. C., by striking him three times and causing his death and that his conviction under S. 304, I. P. C., must be set aside. The facts of that case are entirely different from the facts of the present case. In the present case the appellants themselves admit that the burglar was entirely at their mercy as he was coming out of the hole made in the wall. At that time the burglar was unarmed and not in a position to attack them and they could have easily overcome him and arrested him without inflicting such injuries on his head as inevitably and immediately led to his death. He has also invited our attention to a ruling of the Allahabad High Court reported in *Emperor v. Hira* (2), in which the late Ryves, J., made the following notable pronouncement:

"If a man is entitled to protect his own life by using a lathi, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, in 'golden scales'; and to adjudicate with great nicety as to the exact amount of force which would be justified."

This observation of the learned Judge has however no applicability to the facts and circumstances of the present case. The appellants were not exercising the right of private defence of person. They were in no fear of their lives when they caused the death of the burglar. Equally inapplicable to the

(1) A.I.R. 1926 Lah. 28=91 I.C. 70=27 Cr. L.J. 38=6 Lah. 463.

(2) A.I.R. 1923 All. 194=71 I.C. 605=24 Cr. L.J. 189=45 All. 250.

facts of the present case is the ruling reported in *Baij Nath v. Emperor* (3).

In our opinion the appellants are clearly guilty of the offence of culpable homicide not amounting to murder under S. 304, I. P. C. We find ourselves unable under the proved circumstances of this case to hold that the acts of the appellants were committed in the exercise of the right of private defence of property and that the death of Mulhar Singh was justifiable homicide.

For the reasons given above we allow this appeal, set aside the conviction and sentence passed upon the appellants for an offence under S. 302, I. P. C., and acquit them of that charge, but we convict each of them of an offence under S. 304, I. P. C. It now remains for us to consider the question of punishment. The appellant Mahabir is an old man of 70 and his son Narpatis a young man of 24 years of age. They are villagers who hardly realized that in killing a thief caught "flagrante delicto" they were committing any serious offence. Taking all the facts and circumstances of the case into consideration we sentence Mahabir for an offence under S. 304, I. P. C., to undergo six months' rigorous imprisonment and Narpatis for the same offence to undergo one year's rigorous imprisonment. The commencement of the sentence in each case will take effect from the date of the judgment of the learned Sessions Judge of Fyzabad.

R.M./R.K.

Order accordingly.

(3) A.I.R. 1925 Oudh 425=85 I.C. 353=26
Cr.L.J. 513=27 O.C. 292.

A. I. R. 1930 Oudh 412

RAZA AND NANAVUTTY, JJ.

Wajid and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 315 of 1930, Decided on 21st July 1930, from order of Sess. Judge, Rae Bareilly, D/- 24th June 1930.

(a) Evidence Act, S. 30 — Retracted confession believed to be true by Court is sufficient evidence for convicting person making it—Corroborative evidence is necessary only in case of co-accused.

A retracted confession, even without any corroborative evidence, is sufficient evidence, if the Court believes it to be true, for convicting the person who makes it. A man of sound

mind and full age who makes a statement in ordinary simple language must be bound by the language of the statement and by its ordinary plain meaning. As regards his co-accused corroborative evidence is of course necessary: 20 All. 133; 29 All. 434; A. I. R. 1925 All. 627 and A. I. R. 1927 Oudh 17, Rel. on. [P 413 C 2, P 414 C 1]

(b) Evidence Act, S. 30—Retracted confession of accused standing unrebutted and corroborated sufficiently by material evidence is admissible and goes strongly against co-accused.

Retracted confession alone of an accused is not sufficient to justify a conviction of the co-accused, but when such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other persons falsely and the story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co-accused the evidence is admissible and is strong piece of evidence against the co-accused.—A. I. R. 1929 Oudh 167, Rel. on. [P 414 C 2]

J. N. Misra—for Appellants.

H. K. Ghosh—for the Crown.

Judgment.—Wajid Quraishi, aged forty, and his cousin, Bachcha Quraishi, aged twenty-five, of village Chaksara in the district of Partabgarh, have been convicted by the learned Sessions Judge of Rae Bareilly of an offence of murder under S. 302, I. P. C. Bachchu Quraishi, aged forty, of Kundri, has been convicted of abetment of murder under Ss. 302/109, I. P. C. They have been sentenced to death subject to confirmation by this Court. They appeal and the reference in confirmation is also before us.

Chaksara and Kundri are adjoining villages. Only a nala (ravine) intervenes between the two villages. The houses nearest to the nala are those of Wajid and Bachcha accused. Wajid is the son of Makun who was also sent up for trial, but was given the benefit of doubt and acquitted by the learned Judge. It is quite unnecessary to determine in this case whether Makun was or was not rightly acquitted by the learned Judge.

Bachchu accused is the son of Abdul Quraishi by his first wife. Abdul deserted his first wife long ago and married another woman, Mt. Nasiba by whom he has two sons, Umar Ali and Moharram. Abdul lives with his second wife and her children. Bachchu occupies a separate house which adjoins Abdul's house. He lives with his mother and his wife Mt. Jinta and his children by her. Mt. Hadisul (deceased) was one of the four children (two sons and two daughters) of Bachchu by his wife, Mt. Jinta.

The charge in this case relates to the murder of Mt. Hadisul who was of about eleven years of age. She was brutally murdered, shortly after nightfall on the night of 30th-31st January 1930. The medical evidence shows that she had received twenty-two injuries on different parts of her body and her death was due to asphyxia caused by pressure applied to the neck.

This is a case of horrible murder committed under unusual circumstances. It has been found that Hadisul's father Bachchu himself entered into a conspiracy with Wajid and Bachcha to murder her with the nefarious object of implicating his own father, stepbrothers and stepmother.

The evidence on the record shows that the relations between Bachchu and his father Abdul were very strained. Abdul has given Bachchu only a small area of the *sir* land and has kept the rest of the zamindari for himself and his children by Mt. Nasiba. Bachchu made a report of burglary against his father Abdul and his stepbrother Umar Ali about a year ago. The case was investigated by the police, but the report was found to be utterly false. The result was that ill-feeling between Bachchu and his father and stepbrothers became more acute. [His Lordship then discussed the evidence and came to the conclusion that there had been a conspiracy between the three accused to commit the offence and proceeded]. It will be convenient now to take up the case of each accused separately. We should like to note that they pleaded not guilty in the Court of Sessions Judge but produced no evidence in defence.

1. *Bachchu*.—The confessional statements made by this man show clearly that he was concerned in the crime. He made a full and detailed confession and stuck to it in his statement before the Committing Magistrate, but retracted it in the Sessions Court. He wishes it to be believed that he had made the confession at the instance of the police who had caused him to believe that his co-accused had murdered Hadisul and that if he (Bachchu) would make a confession, he would be granted a pardon and his co-accused would be convicted on his evidence. There is nothing on the record in support of this

allegation. The police officers have denied the allegation in question. After most careful and anxious consideration we have come to the conclusion that there is nothing in the confession or in the evidence to show that the making of the confession was caused by any inducement, threat or promise. The confession is full of detail and very circumstantial and bears on it the impress of truth. The man confessed and then produced the ornaments of Mt. Hadisul tied in a piece of her sari which he himself had buried in the nala. He states now that the ornaments in question were supplied to the police by his wife and that they belonged to his younger daughter, Mt. Ahidul. This is surely untrue. The evidence given by his wife, Mt. Jinta is clear on this point. There is sufficient corroborative evidence in support of the confession. We have no hesitation in finding that the confession was genuine and the retraction false. There is no doubt that Bachchu is on inimical terms with his father and stepbrothers. He went so far as to get his own daughter, Hadisul, murdered with the object that his father, his stepmother and his stepbrother might be falsely charged with the murder of the girl. The confession being in our opinion a true confession is sufficient without any corroborative evidence even for the conviction of Bachchu. This view of the law has been taken by the Allahabad High Court and by the Chief Court on many occasions. It was held in the case of *Queen Empress v. Maiku Lal* (1) that such a confession, namely a retracted confession, was sufficient evidence, if the Court believed it to be true, for convicting the person who made it. This view was carried further in the case of *Emperor v. Kehri* (2). It is there expressly laid down that as regards the person making it, the retracted confession may even without any corroborative evidence form the basis of conviction. This view has been recently confirmed by a Full Bench of the Allahabad High Court in the case of *Raggha v. Emperor* (3). The decision in *Raggha's* case (3) has been followed by this Court

(1) [1897] 20 All. 133=(1897) A.W.N. 224.

(2) [1907] 29 All. 434=5 Cr. L. J. 360=(1907) A.W.N. 140.

(3) A. I. R. 1925 All. 627=89 I.C. 903=26 Cr. L. J. 1431 (F.B.).

in several cases in particular in the case of *Raj Bahadur Singh v. Emperor* (4). A man of sound mind and full age who makes a statement in ordinary simple language must be bound by the language of the statement and by its ordinary plain meaning. As regards his co-accused corroborative evidence is of course necessary. Thus even if there was no corroborative evidence we would feel ourselves justified in upholding the conviction of the accused Bachchu on the basis of his confession alone. His appeal therefore fails and must be dismissed.

2. *Wajid*.—The evidence on record shows that this man is on inimical terms with Abdul. There has been criminal litigation between him and Abdul and Abdul had given evidence against him in the badmashi case recently. It appears that when ill-feeling between Bachchu and his father became more acute, he (Wajid) and Bachchu became friends of each other and made a common cause against their common enemy. Bachchu's confession though retracted is admissible in evidence against this man. There is sufficient circumstantial evidence in corroboration of the confession. This man was seen with the other accused sitting at the nala at about noon by Asad Ali P. W. 7. Rahmat, P. W. 4 had seen the girl Hadisul with this accused and others under a babul tree at the nala in the evening. This man had the mark of an injury on his left knee which had healed up on 11th February when he was examined in jail. The medical evidence shows that the injury could be due to friction against a kankar soil, and was about a fortnight old at the time he was examined by the Civil Surgeon on 11th February 1930. It appears that he had incurred the injury while committing murder on the kankar soil. The accused has not suggested any enmity with Asid Ali or Rahmat. There is no reason why they should have given false evidence against this man. We think the learned Sessions Judge was perfectly right in holding that Bachchu's confession implicating this man is true and that he was concerned in the crime. His appeal also fails and must be dismissed.

3. *Bachchu*. — Bachchu's confession

(4) A. I. R. 1927 Oudh 17=98 I.C. 106=27 Cr. L. J. 1258.

shows that this man was also concerned in the crime. He produced the ornaments of Hadisul by digging them out from his own gramfield. The evidence given by Asad Ali, P. W. 7 and Rahmat, P. W. 4 shows that this man also was seen with the other accused at the nala at noon and that the girl was with them in the evening. This man had also an injury on the knee as old as the time of the occurrence. He says that he has been falsely implicated by Bachchu as he had refused to give evidence for him, but he admits at the same time that he has no enmity with Bachchu. As pointed out in the case of *Sheoratan v. Emperor* (5) retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused, but where such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other men falsely, and his story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co-accused, the evidence is admissible and is strong piece of evidence against the co-accused. We find in this case that there is sufficient circumstantial evidence in corroboration of Bachchu's confession. We think the learned Sessions Judge was perfectly right in finding that this man also was concerned in the crime. His appeal also must be dismissed.

The appellants have been rightly sentenced to death. As observed by the learned Judge the offence is so heinous, inhuman and cold-blooded that the accused amply deserve the extreme penalty of the law. The result is that we dismiss these appeals, uphold the convictions, confirm the sentences and direct that Bachchu, Wajid and Bachchu each be hanged by the neck till he be dead.

R.M./R.K. *Appeals dismissed.*

(5) A. I. R. 1929 Oudh 167=114 I. C. 771=30 Cr. L. J. 360.

A. I. R. 1930 Oudh 414

PULLAN, J.

Ganga Prasad.—Accused—Applicant.

v.

Emperor — Complainant — Opposite Party.

Criminal Ref. No. 25 of 1930, Decided on 19th May 1930.

Penal Code, S. 182 — False report of dacoity by A — Police did proceed on A's complaint but prosecuted some persons under S. 326 who were acquitted — Prosecution and conviction of A under S. 182 — Conviction held to be legal—Police held to be only person who could take action and not the Court.

A made a false report of dacoity. The police did not proceed on his complaint but prosecuted certain persons under S. 324. This offence also was not brought home to them and the police made a complaint against A requesting his prosecution under S. 182 for making a false report of dacoity. A was convicted.

Held: that the conviction was legal. The complaint was properly made under S. 182. The only persons who could take action in the case were the police and not the Court which not having tried any case of dacoity was not in a position of being able to say a false complaint had been made of dacoity before it: *A. I. R. 1928 Rang. 254, Dist.* [P 415 C 1, 2]

H. K. Ghose—for the Crown.

Judgment.—This is a reference made by the learned Additional Sessions Judge of Unao requesting this Court to set aside the conviction and sentence passed upon one Ganga Prasad under S. 182, I. P. C.

It appears that this man made a false report of a dacoity at a police station. The police did not proceed on his complaint of dacoity but prosecuted certain persons under S. 324, I. P. C. That offence also was not brought home to them and the police made a complaint requesting the prosecution of this man Ganga Prasad under S. 182, I. P. C., for making a false report of dacoity. He was convicted and sentenced to pay a fine of Rs. 50.

The learned Additional Sessions Judge has found difficulties where none exist. He thinks that because the matter came into Court and the Court passed an order of acquittal, no proceedings could be instituted by the police, but that a complaint should have been made by the Magistrate who passed the order of acquittal. He bases his view upon a judgment of the Rangoon High Court recently, in *Rambrose v. Emperor* (1) reported but he failed to observe that in the present case no case of dacoity was tried by the Magistrate. Indeed no action was taken on that charge. Consequently the Court was not in the position of being able to say that a false complaint had been made of dacoity before the Court. The only persons who could take action were

the police in respect of the false report of dacoity. The complaint was properly made of an offence under S. 182. The conviction is legal and there is no reason to interfere with the sentence.

Let the record be returned.

R.M./R.K.

Order accordingly.

* A. I. R. 1930 Oudh 415

PULLAN, J.

Aulad Husain—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 51 of 1930, Decided on 21st May 1930, from order of Dist. Magistrate, Gonda, D/- 22nd April 1930.

* (a) Criminal P. C., S. 437—Dictum that further inquiry after discharge is improper unless order of discharge is perverse does not apply to Magistrate acting as Court of inquiry.

The dictum that "further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish" does not apply to a case in which the Magistrate is acting as a Court of enquiry and not a trial Court: 10 P. R. 1911 Cr. (F.B.), *Expl.*

[P 416 C 1, 2]

(b) Criminal P. C., S. 437—Order of discharge by Committing Magistrate set aside by District Magistrate and case exclusively triable by Court of Sessions committed to Sessions — High Court will not interfere unless order of District Magistrate is unjustifiable.

There is nothing in the Criminal Procedure Code which suggests that the District Magistrate should go further in case where the accused is charged by the trial Court than find that the order of discharge was improper.

But, where a District Magistrate sets aside the order of discharge passed by a Committing Magistrate and orders a case to be committed to Sessions which is exclusively triable by a Court of Sessions, the High Court will not interfere in revision unless the District Magistrate's order is, in the circumstances of the case, shown to be unjustifiable: 19 O. C. 108, *Rel. on.* [P 416 C 1, 2]

Haider Husain—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—This is an application in revision of an order passed by the learned District Magistrate of Gonda under S. 437, Criminal P. C., directing the commitment to Sessions of one Aulad Husain for an offence under S. 376, I. P. C.

The applicant was put before a Magistrate of the First Class who wrote a

(1) A. I. R. 1928 Rang. 251=6 Rang. 578.

lengthy order of discharge. The District Magistrate considered the reasons for discharge given by that Magistrate were insufficient. In his opinion there was sufficient evidence for the case to go to Sessions.

I have been asked to consider that the District Magistrate should not have taken action in this case unless he was satisfied that the order of the Sub-Divisional Magistrate was perverse or foolish, and I have been referred to a judgment of a Full Bench of the Chief Court of the Punjab reported in *Emperor v. Kiri* (1) which was followed by the Judicial Commissioner of Oudh in the case of *Emperor v. Jagadamba Singh* (2). There is nothing in the Criminal Procedure Code which suggests that the District Magistrate should go further in a case of this nature than find that the order of discharge was improper, but it is clearly within the powers of this Court to consider whether the District Magistrate himself has or has not acted properly in the discharge of his own duties in committing the case to the Sessions. The authorities to which I have referred do not lay down any definite rule for guidance in such matters. The Full Bench of the Punjab Chief Court, after saying that generally speaking further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or based upon an incomplete record of evidence, go on to observe:

"We cannot say more by way of general guidance as so much depends on the particular circumstances under which an order of discharge has been given, but if Magistrates use the discretion vested in them by law they are expected to do so with common sense and with due regard to the general consideration that an accused should not be unduly harassed by further proceedings undertaken without good cause."

It cannot be said in the present case that the District Magistrate has acted contrary to common sense or that he has unnecessarily harassed the accused and I am not prepared to accept the dictum of the Chief Court of the Punjab that

"further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish"

as applying to a case in which the Magistrate was acting only as a Court of enquiry and not a trial Court. The cases to which I have been referred are cases in which the Magistrate had power to try the case finally and two of those cases were cases taken under the preventive sections of the Criminal Procedure Code. I have been referred to one case only in which the case was exclusively triable by the Court of Sessions, and in that case the Judicial Commissioner of Oudh refused to interfere with the order of the Sessions Judge setting aside the Magistrate's order of discharge and ordering commitment to Sessions: *Harkaran Singh v. Harnam Singh* (3). In my opinion, where a District Magistrate sets aside the order of discharge passed by a Committing Magistrate and orders a case to be committed to Sessions which is exclusively triable by a Court of Session, this Court will not interfere in revision unless the District Magistrate's order is in the circumstances of the case shown to be unjustifiable.

In the present case it has been found that a young girl has been raped. She has named the accused as her assailant. The District Magistrate has in his order pointed out the nature of the defence, but he is still of opinion that the case is one in which there is sufficient evidence to justify a commitment to Sessions. I consider that the District Magistrate was acting justifiably and within his powers in making the commitment. All that I can do is to direct that the case having been committed shall be tried by the learned Sessions Judge of Gonda in person and not made over to a less experienced Judge. Subject to this direction I dismiss the application.

R.M./R.K. *Application dismissed.*

(1) [1911] 10 P. R. 1911 Cr.=11 I. C. 132=19 Cr. L. J. 364 (F.B.).

(2) A. I. R. 1924 Oudh 368=81 I. C. 802=25 Cr. L. J. 1026.

(3) [1916] 19 O. C. 109=34 I. C. 335=17 Cr. L. J. 223.

A. I. R. 1930 Oudh 417

RAZA AND SRIVASTAVA, JJ.

Manni Lal-Bishun Dayal—Plaintiffs—Appellants.

v.

Nihal Chand and another—Defendants—Respondents.

First Appeal No. 96 of 1929, Decided on 1st May 1930, from decree of Sub-Judge, Unao, D/- 29th June 1929.

Contract Act, S. 55—Breach on defendant's part—Plaintiff accepting performance at later date without, at the time, giving notice as contemplated by S. 55—No suit for compensation for breach lies.

Where it is possible to avoid a contract for delivery of goods by reason of the other party's failure to perform the promise at the time agreed, and where the contract is not avoided but on the contrary its performance is accepted without giving proper notice at the time of acceptance of deliveries to the other party that the acceptance of the deliveries was without prejudice to the claim for any loss occasioned by the non-performance of the promise at the time agreed and where such notice was given after acceptance :

Held : that such belated assertion cannot relieve a party of the consequences of its failure to give notice at the proper time of its intention to claim damages, and that therefore a suit for damages for any loss caused by breach on defendant's part cannot lie.

[P 420 C 1, 2]

A. P. Sen, M. H. Qidwai and S. C. Das—for Appellant.*Haider Husain and Jai Kishen Tandon*—for Respondents.

Judgment.—This is a plaintiff's appeal against a decision of the Subordinate Judge of Unao dated 29th June 1929. It arises out of a suit for damages. The plaintiff firm is a firm of merchants carrying on business in molasses at Unao. The defendant firm were lessees of the Unao Sugar Mills. The parties are now agreed that an agreement was entered into between them under which the defendant firm agreed to supply 10,000 maunds of molasses at Rs. 1-15-6 per maund to the plaintiffs. The terms and conditions of the aforesaid agreement are embodied in Ex. 1, the sold note dated 15th February 1926 executed by the defendants, and in the bought note Ex. A-1 dated 10th March 1926 executed by the plaintiff. The controversy in this case is centred around two of the conditions of this agreement and it would be useful to reproduce them verbatim. These conditions as embodied in Ex. 1 are as follows :

"2. The goods would be removed by you within the period up to 30th November 1926 at the rate of 1,100 maunds per month subject to the normal rail and road traffic.

3. In case of failure to remove the whole quantity or a part of it as stipulated above we will have the power to forfeit your earnest money and to determine the contract or otherwise sell on your account at our option, and you will be responsible for all losses. In case of any profit the same shall belong to us."

The parties are further agreed now that on 8th or 9th March 1926 a sum Rs. 2,500 was deposited with the defendants by way of earnest money, and that 5,655 maunds 39 seers and 14 chat-tacks of molasses were delivered between the end of March 1926 and 9th August 1926, and 518 maunds and 20 seers more molasses were delivered between the 25th August 1926 and 6th December 1926 by the defendants to the plaintiffs. Thus it is now the common case of both parties that only 6,174 maunds 19 seers and 14 chattacks out of the total quantity of 10,000 maunds, which formed the subject of agreement between them, were supplied by the defendants to the plaintiffs. The plaintiffs allege that the defendants wrongfully stopped the delivery of molasses to the plaintiffs and claimed that as, from August to November 1926, the market rate of molasses was Rs. 4-4-0 per maund, the defendants were therefore liable to pay the plaintiffs damages at the rate of Rs. 2-4-6 per maund, this being the difference between the purchase rate and the market rate as set forth above. The plaintiffs therefore claimed Rs. 9,018-6-0 damages in respect of 3,825 maunds 20 seers 2 chattacks, which the defendants had failed to supply, at the rate of Rs. 2-4-6 per maund. They also claimed Rs. 987-8-0 on account of interest on the amount of damages just stated at eight annas per cent per mensem. They further sought a refund of the earnest money amounting to Rs. 2,500 and Rs. 383-8-0 on account of interest on that amount at 8 annas per cent per mensem. The plaintiffs thus claimed a total amount of Rs. 12,888-6-0 against the defendants.

The defendants denied that there was any failure on their part to deliver the goods in accordance with the agreement. On the contrary they maintained that in spite of their having offered to deliver the goods, and having also for the convenience of the plaintiffs extended the

time of delivery till the end of December, the plaintiffs refused to take delivery because they were unable to pay the price. They therefore claimed that under the terms of the agreement the plaintiffs had forfeited to them the amount of Rs. 2,500 deposited by way of earnest money.

The learned Subordinate Judge has found that there was no failure by the defendants to perform their part of the contract and that on the contrary the plaintiffs had failed to remove the goods as agreed. He therefore held that under the terms of the agreement the amount of earnest money was forfeited to the defendants. He further held that assuming that time was the essence of the contract the plaintiffs went on accepting performance of the contract after breaches had occurred on the part of the defendants and that they could not therefore claim any compensation for any alleged loss by reason of the terms of the agreement not having been fully complied with at or within the prescribed time. As a result of these findings he dismissed the suit.

The learned counsel for the plaintiffs-appellants has impugned the correctness of all the findings of the learned Subordinate Judge which we have set forth above. He has strenuously maintained that there was no breach of any of the terms or conditions by the plaintiffs, that delivery by monthly instalments was the essence of the agreement and that the defendants had failed to make deliveries in accordance with the conditions stipulated in the agreement and were therefore clearly guilty of breach of contract. It was further contended that there had been no condonation by them of the breach on the defendants' part and that in any case there was no justification for their being refused a refund of the earnest money deposited by them.

We regret to note that the learned Subordinate Judge has done but scant justice to the mass of documentary evidence produced by the parties consisting mainly of the correspondence which went on between them which throws considerable light upon the questions at issue, and has dealt with the whole case much too summarily. Ex. A-17 is a copy of the statement produced by the defendants showing the delivery of

molasse made by them to the plaintiffs. It shows that no delivery at all was made between 10th August and 27th of November 1926. The question therefore arises whether the absence of any delivery during this period was due to the defendants' default or whether it was due to any neglect on the plaintiffs' part. The parties were agreed in the lower Court and they are also agreed before us that the working of the defendants' mill was closed on 9th August. Ex. 5 is a letter dated 2nd August 1926 sent by the plaintiffs to the defendants. In this letter they stated as follows:

"Now from several sources we gather that you are going to stop refining *Gur* by the beginning of this month and there is a little quantity of molasses in your stock which we hope could in no case suffice for the completion of our contract."

"Would you please therefore arrange to hold the complete stock which we have to take delivery of according to the terms of the contract in question. We can also take delivery of the full quantity of our contract at one and the same time if so proposed by your good selves."

It is admitted that the defendants did not send any reply to this letter. On 13th September 1926 the plaintiffs sent another letter, Ex. 6, in which they stated as follows:

"You have stopped giving us the molasses contracted for since one month and four days. As molasses are rising very high, so much so that it is now Rs. 4-4-0 a maund already, and it may go higher, so please take notice that in case you do not supply us the remaining quantity due to us under the contract we will be put to a considerable loss which you will be liable to pay."

We would therefore request you to kindly arrange for delivery to us for the above-mentioned quantity of undelivered molasses and oblige."

No reply was sent to this letter until as late as 28th October 1926 on which date they sent a reply, Ex. 7, which runs as follows:

"With reference to your letter dated the 13th ultimo we beg to confirm the arrangement arrived at between you and ourselves that we will deliver you the balance quantity of molasses, i. e. 4,344 maunds 2 chat-tacks as you allege, from the next year production, at the same rate, Rs. 1-15-6. Please confirm."

The plaintiffs wrote in reply on 12th November 1926 that

"we had made neither any arrangement to take delivery of the balance quantity of the molasses due to us from the next years' production nor are we prepared to do so (Ex. 8):

The story of the arrangement for supply of the balance from the next

year's production seems to be a pure concoction. It was promptly denied by the plaintiffs and no attempt has been made to establish any such arrangement in the present case. In this connexion reference might also be made to Ex. 15 dated 11th December 1926 in which the defendants pleaded that the shortness of delivery was due to causes beyond their control and relied upon Cl. (4) of the bought note which provided that

"in the event of the delivery of the goods or any instalment of the goods or any part thereof within period of delivery applicable thereto being prevented by damage or accident to or in the factory or by strikes or pestilence or by riot or violence of mob or other irresistible force or occurrence beyond our control, the goods shall be delivered as soon as circumstances permit and as so delivered shall be accepted by you without any allowance for late delivery."

It is difficult for us to imagine that if there had been any neglect on the plaintiffs' side, the defendants should not have referred to it in reply to the repeated complaints made by the plaintiffs and on the other hand should have offered to make good the deficiency from next year's produce or should have sought refuge behind the fact of the deliveries having been stopped for reasons beyond their control. We are therefore satisfied upon an examination of the correspondence referred to above that the absence of delivery between 10th August and 27th November was not due to any neglect on the plaintiffs' part.

The defendants have strongly relied upon Ex. 9 dated 15th November 1926 in which they asked the plaintiffs to

"arrange for the delivery of the balance quantity of molasses now if you are not prepared to take it from the next year's production."

They have also pointed out that when the plaintiffs in their letter Ex. 10 dated 22nd November 1926 complained that there was only an interval of eight days between their receipt of the letter Ex. 9 and the 30th November, on which date the contract period expired and asked for an extension of the delivery period, they agreed to extend it till 31st December 1926 (vide letter, Ex. 11, dated 25th November 1926). The question therefore arises that if the defendants failed to make monthly supplies as stipulated in the agreement, from 10th

August till 25th November, what is the effect of their offer to deliver the whole of the balance at the end of November or within the extension granted until the end of December. In other words if the failure of the defendants to make supplies after the 10th August constituted a breach of the agreement of their part, can they be relieved of the consequence of that breach by reason of their offer to supply the whole of the balance by the end of November? This makes it necessary for us to consider whether time was or was not the essence of the contract. Paras. 2 and 3, Ex. 1, which we have reproduced in an earlier part of this judgment seems to us to show that the rights of the parties were materially dependent upon the observance of the time limits prescribed in the agreement. The oral evidence of the parties also shows that the plaintiffs did not take away the goods to any storehouse of their own, but used to dispose of them to their own customers from the premises of the defendants' mills. Looking to all the circumstances it is hardly possible to say that the stipulation contained in the agreement regarding a fixed quantity being supplied every month was a matter of merely secondary importance and can be altogether disregarded. It is also important to note that para. 4 specifically makes an exception in cases in which the delivery is not possible according to the agreement by reason of circumstances beyond the defendants' control. This also seems to indicate that delivery at the stipulated periods was regarded as an essential part of the contract. We are therefore of opinion that the offer made by the defendants by their letter Ex. 9 cannot absolve them of the consequences of the breach committed by them in their failure to make any deliveries at all from 10th August till 27th November.

Next there remains the question whether the plaintiffs are entitled to claim any damage for the breach on the defendants' part. While we cannot see our way to hold with the learned Subordinate Judge that there was no breach on the part of the defendants, yet we are in agreement with him in holding that the plaintiffs are not entitled to any damage by reason of their having condoned the breach. The last paragraph

of S. 55, Contract Act (9 of 1872), provides that:

"if, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed unless at the time of such acceptance he gives notice to the promisor of his intention to do so."

It is admitted that the plaintiffs started taking deliveries from 27th November 1926 and continued to do so till 9th December 1926. It was possible for them to have avoided the contract by reason of the defendants' failure to perform their promise at the time agreed. But the plaintiffs did not do so. On the contrary they accepted performance in November and December in spite of the previous default. The question therefore arises: Did the plaintiffs at the time when they took deliveries in November and December give any notice to the defendants that their acceptance of the deliveries were without prejudice to their claim for any loss occasioned by the non-performance of the promise by the defendants at the time agreed? Ex. 10 is the letter dated 22nd November 1926 sent by the plaintiffs to the defendants in reply to their Ex. 9. In this letter the plaintiffs stated as follows:

"We have already arranged for the delivery of the molasses but as for our contract the delivery period expires on 30th November, that is, having only eight days for taking the delivery and which time is in no way sufficient to take the delivery of the molasses in question. Under the circumstances we would therefore ask you to extend the delivery period."

As stated before the defendants extended the delivery period till 31st December. It seems therefore to be quite clear that the plaintiffs condoned the breach on the defendants' part and gave no notice of their intention to claim compensation for loss occasioned by the breach at the time when they did so. The plaintiffs have relied upon Ex. 12, a letter dated 3rd December 1926, in which they said to the defendants that they would be responsible for the differences of price on account of late delivery. This was subsequent to their starting receipt of deliveries and this belated assertion cannot relieve them of the consequences of their failure to give notice of their intention to claim damages in

the letter Ex. 10 or at any time before they started to receive deliveries in November. We therefore agree with the learned Subordinate Judge that the plaintiffs are not entitled to claim compensation for any alleged loss by reason of the breach on the defendants' part.

Lastly there remains the question as regards the right of the plaintiffs to claim refund of Rs. 2,500 deposited by them for earnest money. In view of our finding that there was no breach on the part of the plaintiffs it follows that Cl. 3 of the agreement set forth above has no application to the case, and the defendants have no right to forfeit the earnest money. Para. 1 of the agreement provides that the earnest money which was to be deposited with the defendants was to carry interest at 6 per cent per annum.

The result therefore is that the plaintiffs are entitled to a decree for the amount of Rs. 2,500 together with Rs. 382-8-0 on account of interest from the date of deposit till the date of suit at 8-annas per cent per mensem. They will also be entitled to future interest on Rs. 2,500 till the date of realization at the aforesaid rate of 8-annas per cent per mensem.

We therefore allow the appeal, modify the decree of the lower Court by giving the plaintiffs a decree for Rs. 2,500 on account of earnest money, Rs. 382-8-0 on account of interest thereon till the date of suit together with interest on Rs. 2,500 till the date of realization at 6 per cent per annum. The rest of the plaintiffs' claim will stand dismissed. The parties will pay and receive costs in proportion to their success and failure in both Courts.

K.N./R.K.

Order accordingly.

A. I. R. 1930 Oudh 420

SRIVASTAVA, J.

Lachhmi Narain—Plaintiff—Applicant.

v.

Putti Lal and others—Defendants—Opposite Parties.

Civil Revn. Appln. No. 13 of 1930, Decided on 11th April 1930, from decree of Small Cause Court Judge, Har-doi, D/- 26th November 1929.

(a) Limitation Act, Art. 102—Art. 102 applies only to suits for wages as such by persons entitled to wages.

Article 102 applies only to suits for wages as such brought by the person entitled to the wages. A suit brought by persons not entitled to the wages cannot therefore be regarded as a suit for wages as such within the meaning of Art. 102. [P 421 C 2]

(b) Limitation Act, Arts. 61, 102 and 120—Dispute regarding land between A and B—C appointed to act supurdar and required to pay wages of watchmen—Suit by C against A and B to recover money paid by him held to be governed by Art. 61 or Art. 120 and not by Art. 102.

There was a dispute between A and B, and C was put in charge of the property as a supurdar pending the determination of the rights of A and B. After these rights were determined and C had restored possession, C was sued for their wages by two watchmen whom he had appointed to watch the standing crop. C paid up the decrees and instituted a suit against A and B for recovery of the money he had to pay to the watchmen.

Held: that the suit was governed by Art. 61 or Art. 120 and not by Art. 102. C was entitled to be reimbursed by A and B. The cause of action in favour of C arose when he paid up the decrees, and suit by him within three years of payment was in time. [P 422 C 1]

(c) Provincial Small Cause Courts Act, S. 25—Powers under S. 25 being discretionary, High Court should not interfere except in case of substantial injustice.

The powers of revision conferred by S. 25 are discretionary and the High Court should not interfere unless it appears that some substantial injury is done to the aggrieved party. [P 422 C 1, 2]

L. S. Misra—for Applicant.

Judgment.—This is an application for revision, under S. 25, Small Cause Courts Act, against the judgment and decree dated 28th November 1929 passed by the Munsif of Bilgram, District Hardoi, in the exercise of his Small Cause Court jurisdiction. It arises under the following circumstances:

It appears that there was a dispute between defendants 1 and 2 on one side and defendants 3 to 6 on the other as regards possession of certain lands, and there being an apprehension of breach of peace proceedings were started under S. 145, Criminal P. C. Lachhmi Narain, plaintiff, was put in charge of the property in dispute and was appointed to act as supurdar pending the determination of the proceedings under S. 145, Criminal P. C. Ultimately the criminal Court passed an order in favour of defendant 6 declaring him to be entitled to possession in respect of part of the property in dispute, which was given over by the supurdar to him. As re-

gards the rest of the property the Magistrate ordered the plaintiff to continue to retain possession until the rights of the parties had been determined by a competent Court. Subsequent to this a suit was instituted by defendant 3 in the civil Court and he obtained a decree declaring his title in respect of the said property. Thereupon the plaintiff restored to defendant 3 the remaining property in his possession. During the period that the plaintiff remained in possession of the property he had to appoint two men, Maiku and Behari, to watch the standing crops on the land in suit. These watchmen sued the plaintiff for their wages, and on 20th August 1926 they obtained decrees, Exs. 4 and 7, for their wages for the period 13th February to 5th June 1926. The plaintiff paid up these decrees on 24th September 1926 and 27th November 1926. He instituted the present suit on 3rd September 1929 claiming to recover the money which he had to pay to the above mentioned watchmen from defendants 1 to 6. They resisted the suit on several grounds of fact and law, but all these defences have been rejected by the learned Munsif, except one, namely the plea of limitation. The decision of the learned Munsif in respect of this plea is that the suit was governed by Art. 102, Lim. Act, and as the present suit was instituted more than three years after the date when the wages accrued due, he held that the suit was barred by limitation and dismissed it accordingly.

The defendants opposite party have been served with notice of this application but none of them has appeared to contest it. The only question which I am required to decide is as regards the rule of limitation applicable to the present suit. Art. 102, Sch. 1, Lim. Act, is a residuary article for suits for wages and prescribes a limitation of three years for such suits, the starting point of limitation being the date on which the wages accrued due. In my opinion this article applies only to suits for wages as such brought by the person entitled to the wages. The suits which were brought by the watchmen and which resulted in the decrees, Exs. 4 and 7 dated 20th August 1926, were clearly suits governed by this article. But the

present suit is not a suit by the person entitled to the wages and it cannot be regarded as a suit for wages as such within the meaning of this article. The plaintiff was in possession of the property as a supurdar. His possession was more or less that of a trustee. During his possession as sapurdar he had to make proper arrangements for the watching of crops and had to incur expenses for that purpose. It is obvious that he did not incur these expenses on his own account, but the money spent by him for this purpose must be regarded as money spent on behalf of the appellants for which the plaintiff is entitled to be reimbursed by them. The case therefore seems to fall within the terms of Art. 61, Sch. 1, which is to the following effect :

| | | |
|---|--------------|--------------------------|
| "For money payable to the plaintiff for money paid for the defendant. | Three years. | When the money is paid." |
|---|--------------|--------------------------|

If the present suit is governed by this article it was clearly within limitation as the dates on which the plaintiff paid up the decrees passed against him were within three years of the institution of the suit. As a matter of fact the plaintiff, on the facts stated above, could not have instituted the present suit against the defendants before he had actually paid the decrees passed against him. If he had instituted the suit before he had paid Maiku and Behari his suit would have been dismissed as being premature. His cause of action for the present claim against the defendants arises only from his payment to Maiku and Behari and not earlier. Even supposing that Art. 61 does not apply then in the absence of any specific article the case must fall within the general residuary Art. 120 in which case also it would be well within limitation. I must therefore hold that the learned Munsif is wrong in applying Art. 102 to the present case. The case in my opinion is governed by Art. 61 or Art. 120, and is therefore within time.

The next question is whether it would be proper for me to interfere with the decision of the lower Court in the exercise of my powers of revision under S. 25, Small Cause Courts Act. There is a consensus of authority that the powers of revision conferred upon the High Court by S. 25, Small Cause Courts Act, are discretionary and that the High Court should not interfere unless it ap-

pears that some substantial injustice has been done to the aggrieved party. In this case I am satisfied that the decision of the lower Court operates unjustly against the plaintiff and has the result of causing him substantial injury. He served as a supurdar to watch and supervise the property in dispute between the defendants and it is just and proper that he should be reimbursed for expenses properly incurred by him in that behalf.

I therefore allow this application, set aside the decision of the lower Court and decree the plaintiff's suit with costs and future interest at 6 per cent per annum till realization.

R.M./R.K.

Application allowed.

A. I. R. 1930 Oudh 422

RAZA AND SRIVASTAVA, JJ.

Gopal Datt—Plaintiff—Appellant.

v.

Rameshwar and another—Defendants—Respondents.

Second Appeal No. 10 of 1930, Decided on 4th April 1930, from decree of Addl. Sub-Judge, Gonda, D/- 26th November 1929.

(a) Oudh Rent Act, Ss. 21 and 131—S. 21, should be read with S. 131—Actual physical possession is not necessary.

Section 21 should be read with S. 131. It is not necessary for the landlord in order to comply with the provisions of Ss. 21 and 131 to obtain actual physical possession of the land. [P 423 C 2 ; P 424 C 1]

(b) Oudh Rent Act, Ss. 21 and 131—K tenant of C—C treating holding as abandoned giving lease thereof to G—G sued K for recovery of possession—C had given notice to K and had entered the holding—Conditions prescribed by S. 21 held to be satisfied and lease to G was valid.

Certain land was originally held by K under a lease from C. Later on C treated the holding as abandoned and gave lease thereof to G. G brought a suit against K for recovery of possession. C had issued notice prescribed by S. 21 and entered upon the holding. K instituted a suit impugning the proceedings and seeking relief under S. 103 (10), but his suit was dismissed. K's plaint was construed as containing an admission of C having entered the holding.

Held : that all the necessary conditions prescribed by S. 21 had been satisfied and C became entitled to let the holding to another person and lease executed in favour of G was valid. [P 424 C 1]

(c) Oudh Rent Act, S. 21—Notice under S. 21.

Oudh Rent Act does not contemplate any proceedings for contesting a notice issued under S. 21 other than a suit under S. 103 (10). [P 424 C 1]

R. B. Lal—for Appellant.

Radha Krishna—for Respondents.

Judgment.—This is a second appeal by Gopal Datt, plaintiff, who has been unsuccessful in both the lower Courts. It arises out of a suit for recovery of possession of certain lands in village Girdharpur, pergana Mahdewa, district Gonda, on the allegation that the lands in suit were originally held by three persons, namely Kedar, Patan Din and Ram Sudh under a lease given in their favour by the Courts of Wards, Ramnagar, and that the aforesaid Court of Wards in 1927 treated the holding as abandoned and gave a lease thereof to the plaintiff. It was further alleged that the plaintiff had been subsequently dispossessed by the defendants. The defendants resisted the suit alleging that they were relations of Kedar, Patan Din and Ram Sudh, and had as a matter of fact all along remained in possession of the land in suit on behalf of the aforesaid tenants, that the notice issued by the Court of Wards under S. 21, Oudh Rent Act, was invalid and that they had no right to grant the lease to the plaintiff.

Both the lower Courts have found that though the Court of Wards issued notice under S. 21, Oudh Rent Act, yet they never took actual physical possession of the holding and therefore they were not entitled to grant the lease to the plaintiff. As a result of these findings the Courts below have held that the plaintiff has failed to establish his title and dismissed the suit.

The only question which arises for determination in this appeal is as regards the validity of the proceedings taken by the Courts of Wards under S. 21, Oudh Rent Act. Ex. 3 is the notice dated 16th February 1927 issued by the Courts of Wards against Kedar and Ram Sudh purporting to be under S. 21, Oudh Rent Act, stating that they had treated the holding as abandoned and were about to enter on it accordingly. This notice was served on Kedar and Ram Sudh on 16th February 1927. On 11th May 1927 all the three tenants, Kedar, Ram Sudh and Patan Din instituted a suit under S. 108, Cl. (10), Oudh Rent Act, against the Court of Wards. This suit was dismissed by the Assistant Collector on 9th August 1927. Subsequent to the dismissal of this suit

the Court of Wards, on 16th September 1927, executed a lease in favour of the plaintiff in respect of the holding in question. S. 21, Oudh Rent Act, provides that when any holding has been abandoned by a tenant the landlord should issue notice in the prescribed form stating that he has treated the holding as abandoned and is about to enter on it accordingly. It further provides that after such notice has been issued, the landlord may

"enter on the holding and let it to another tenant or take it into his own cultivation."

The learned counsel for the defendants does not deny that the notice had been issued as required by this section. The only matter in controversy between the parties is whether subsequent to the issue of the notice the landlord entered on the holding in terms of S. 21, Oudh Rent Act. This section should be read with S. 131 Oudh Rent Act, which provides that a suit by a tenant for the recovery of a holding which has been treated by the landlord as abandoned under S. 21 shall be instituted within three months of the date on which the landlord entered upon the holding. Thus it will appear from the terms of both these sections that the crucial question is whether subsequent to the issue of the notice the landlord entered on the holding or not. As stated before the tenants actually instituted a suit under S. 108, Cl. 10, on 11th May 1927. Ex. 4 is the copy of the plaint of this suit. In this plaint the plaintiffs Kedar, Patan Din and Ram Sudh impugned the validity of the notice on several grounds and further pleaded that although

"the defendant has no right to take possession of the land yet he is causing interference with the plaintiffs' possession which is clearly invalid and causes injury to the plaintiffs though even now Ram Sanchi (sub-tenant) is in actual possession."

In the paragraph for relief they asked "for a declaration that the notice issued under S. 21 was invalid, that it did not give the defendant any right to take possession of the holding and that if the Court holds that the defendants have taken possession, then a decree for possession be passed in favour of the plaintiffs against the defendants."

The lower appellate Court has construed the clause of the plaint which we have reproduced above as implying merely that the fact of the Court of Wards having issued a notice against the tenants caused interference with

their rights. We find ourselves unable to accept this interpretation of the aforesaid clause. In our opinion it clearly constitutes an admission of the defendants having entered upon the holding and thereby interfered with the plaintiffs' possession though they also pleaded that the interference was not effective and that their sub-tenant continued to retain possession. We also find ourselves unable to agree with the interpretation placed by the Courts below as regards the meaning of the words "entered on the holding" as used in Ss. 21 and 131, Oudh Rent Act. We do not think that it is necessary for the landlord, in order to comply with the provisions of these sections, to obtain actual physical possession of the land. We are therefore of opinion that the admission made by the tenants in their plaint, Ex. 4, sufficiently proves that the landlord after issue of the notice had entered upon the holding. Had it not been so there was hardly any occasion for the tenants to institute the suit under S. 108, Cl. (10), Oudh Rent Act. The lower appellate Court has in its judgment reproduced the order passed by the Assistant Collector dismissing the suit. He seems to have been of opinion that the tenant should take proceedings to contest the notice under S. 21, Oudh Rent Act. This is manifestly wrong as the Oudh Rent Act does not contemplate any proceedings for contesting a notice issued under S. 21, Oudh Rent Act, other than a suit under S. 108 (10) but it is hardly necessary for us to examine the grounds on which the Assistant Collector based his order of dismissal. It is enough that the suit was dismissed and that that order was allowed by the tenants to become final. Thus in our opinion all the necessary conditions prescribed by S. 21, Oudh Rent Act, have been satisfied in the case.

The Court of Wards issued the notice as prescribed by law and entered upon the holding. The tenants instituted a suit impugning the proceedings and seeking relief under S. 108, Cl. (10) but the suit was dismissed. The result is that the Court of Wards became entitled to let the holding to another tenant and the lease executed by them in favour of the plaintiff must be held to be valid. The defendants have

no right to retain possession of the holding as against the plaintiff who has been admitted to the tenancy by the Court of Wards.

We therefore allow the appeal, set aside the decision of the lower Courts and give the plaintiff a decree for possession over the land in suit. He is also given a decree for Rs. 50 on account of damages according to the finding of the trial Court which was not disputed before the lower appellate Court. The plaintiff will get his proportionate costs in all three Courts.

R.M./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 424

SRIVASTAVA, J.

Chheda Lal and others—Applicants—Appellants.

v.

Mt. Ram Dulari—Objector—Respondent.

Misc. Appeal No. 19 of 1930, Decided on 25th April 1930, from order of First Addl. Dist. Judge, Lucknow, D/- 25th January 1930.

(a) Succession Act (1925), S. 299—Appeal is competent irrespective of whether order is passed in interlocutory proceedings or is final order.

An appeal lies under the terms of S. 299 irrespective of whether an order has been passed in the course of interlocutory proceedings or whether it is a final order. [P 425 C 2]

(b) Succession Act (1925), S. 299—Court cannot make or cause to be made extensive, detailed and minute enquiries as regards correctness or otherwise of accounts and inventories — Object of accounts and inventories stated.

The object of the accounts and inventories being exhibited seems to be that the accounts and inventories should be available for inspection by the parties interested in the administration of the estate. The proceedings are of a summary character and there is no provision in the Act to show that there was any intention that the Court should embark upon any extensive, detailed or minute enquiry as regards the correctness or otherwise of the said accounts and inventories. Court has only to see that the accounts prima facie comply with requirements of S. 299 : 31 Cal. 628, Ref.

[P 426 C 1]

Radha Krishna—for Appellants.

Hyder Husain—for Respondent.

Judgment. — These are two miscellaneous appeals arising out of orders passed by the Additional District Judge of Bara Banki in the exercise of his testamentary jurisdiction. They arise under the following circumstances.

One Janki Prasad died on 1st August 1927 possessed of considerable property

and leaving a will dated 13th February 1927 under which he appointed seven persons as executors and trustees. On 5th January 1928 the aforesaid persons made an application for grant of probate. An order was made on 2nd March 1928 granting the probate applied for. On 30th September 1929 the executors filed an account of the estate and on 9th January 1930 they filed an inventory as required by S. 317, Succession Act (39 of 1925). Mt. Ram Dulari, widow of Janki Prasad, testator, made an application dated 10th December 1929 praying for the account filed by the executors to be checked and also asking for certain maintenance allowance being paid to her and her daughters. She followed up this application with another dated 25th January 1930 praying: "that some Mahomedan legal practitioner be appointed to carry out the checking of the accounts."

This is communalism in excelsis though there is the saving grace of this extraordinary request being contained in an application made on behalf of a Hindu. The applicant also prayed:

"that clear directions may be given to the auditor to verify the entries in the bahi khatahs on the spot as well as to make local enquiries about the income and expenditure if the auditor deems it necessary in the circumstances of the case."

These applications were disposed of by the learned District Judge by an order passed ex parte under which he appointed one Mr. Mahmudul Hasan Kirmani as auditor to check the accounts of the trust. It was further ordered that:

"the fees of the auditor will be fixed at the rate of five per cent on the income of the trust."

This order dated 25th January 1930 forms the subject matter of Appeal No. 19 of 1930.

On 13th February 1930 the executors filed an application complaining against the order for the appointment of the auditor and against his being entrusted with an enquiry into the allegations made by Mt. Ram Dulari against them. They also objected to the fee allowed to the auditor and complained that the order was vague as regards the person who was to be made liable for its payment. This application was disposed of by the present District Judge by his order dated 1st March. The material portion of that order is to the following effect:

"The auditor will be paid five per cent of his fees on the annual income since the death of the testator. The costs will be borne by the trustees if it is found that they had failed to keep proper, open and accurate accounts of the property or in any duty cast upon them by the will."

Appeal No. 20 of 1930 is directed against this order.

Mr. Hyder Husain the learned counsel for the respondent, Mt. Ram Dulari, has raised a preliminary objection against the maintainability of these appeals. He has contended that the appeals are directed against orders passed in interlocutory proceedings and that there is no provision in law for appeals against such interlocutory orders. I find myself unable to accede to this contention. S. 299, Succession Act, provides that every order made by a District Judge by virtue of the powers conferred upon him by the Act shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure 1908, applicable to appeals. The provisions of this section are very wide. They seem to me to allow an appeal against every order made by a District Judge in the exercise of the powers conferred upon him by the Act. In my opinion an appeal lies under the terms of this S. 299 irrespective of whether an order has been passed in the course of interlocutory proceedings or whether it is a final order.

It is the common case of both parties that the account and the inventory in question were filed by the executors under S. 317, Succession Act. The contention urged by the learned counsel for the appellants is that the appointment of an auditor such as the one in question for the checking and examination of the accounts and for local inquiries about income and expenditure, is beyond the scope of the authority of the Court under the said section. I think the contention is correct and the appeals must be allowed on this ground. It is important to note that the section requires the executor or administrator to

"exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the creditors, and also all the debts owing by any person to which the executor or administrator is entitled in that character"

and to

"exhibit and account of the estate, showing the assets which have come to his hands and

the manner in which they have been applied or disposed of."

Clause 4 of the section further provides that :

"the exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under S. 193 of that Code."

The use of the word "exhibit" in the passages quoted above appears to me to be significant. The object of the accounts and inventories being exhibited seems to be that the accounts and inventories should be available for inspection by parties interested in the administration of the estate. The proceedings are of a summary character and there is no provision in the Act to show that there was any intention that the Court should embark upon any extensive, detailed or minute inquiry as regards the correctness or otherwise of the said accounts and inventories. If the legislature had any such intention it is to be expected that it should have made express provision for that purpose. I do not deny the right of the Court to see that the accounts and inventories filed *prima facie* comply with the requirements of the section. The learned District Judge could very well have examined them from the standpoint either himself or ordered his munsarim or some other member of his staff to do so. But I am unable to find any authority for his appointing an auditor for making local inquiries about the income and expenditure and for verification of the entries in the accounts as was prayed for and has been ordered in this case. If the accounts or inventories filed by an executor are false and untrue the executor or administrator is liable to punishment under the Indian Penal Code. Further it is open to any person interested in the administration of the estate to institute a regular suit against the executor or administrator questioning the correctness of the accounts and making him liable for any malfeasance or misfeasance on his part. The contention urged in support of the appeal is also supported by the decision of a Bench of the Calcutta High Court in *Sarat Sundari Barmaxi v. Uma Prosad Roy Chowdhry* (1). Discussing the provisions of S. 98, Probate and Administration Act (5 of 1881), which corresponds to S. 317, Succession Act

(39 of 1925), their Lordships observed that :

"the section nowhere imposes on the District Judge the duty of scrutinizing and auditing the papers and of undertaking for that purpose elaborate and expensive proceedings. Such a scrutiny would be an onerous charge which we cannot hold to have been laid on him unless the section clearly says so ; and we find no such words. Nor again does the section give the District Judge power to hold a judicial inquiry into the inventory and account of his own motion ; and to make the executor or administrator pay the costs of it. All that the District Judge has to do under the section is to see that the inventory and account *prima facie* satisfy the requirements of the section, that is, that the inventory appears on inspection to be a full and true estimate of all the property, credits and debts, and that the account on inspection appears really to be a true one showing the assets and their disposal. To ascertain this it would be necessary that the inventory and account should be passed under some examinations by the Judge's staff so as to detect manifest mistakes or omissions. If such were discussed the papers would not satisfy the section ; and the Judge would have power to require the executor or administrator to amend the account in order to comply with the section ; and for this purpose the section empowers him to extend the time. This in our opinion is the scope of the Judge's duties under S. 98. He has no power to institute an audit of the inventory and account at the expense of the executor or administrator. The section vests him with no such power, nor can such an authority be implied from the provisions of the Code of Civil Procedure as to the appointment of a commissioner to examine accounts to which provisions the District Judge has referred."

I am therefore of opinion that the orders of the learned District Judge, which are under appeal, appointing an auditor in the case and directing his fees to be paid, under the circumstances mentioned in the order, by the trustees, were not regular and proper and must therefore be set aside.

The result therefore is that the appeals are allowed with costs and the orders of the District Judge dated 25th January 1930 and 1st March 1930 are set aside.

V.B./R.K.

Appeals allowed.

(1) [1904] 31 Cal. 628=S. C. W. N. 579.

A. I. R. 1930 Oudh 426

SRIVASTAVA AND PULLAN, JJ.

Ram Pearey—Plaintiff—Appellant.

v.

Mt. Kailasha—Defendant—Respondent.

Appeal No. 25 of 1930, Decided on 14th April 1930, from decree of Sub-Judge, Unao, D/- 16th October 1929.

(a) **Hindu Law—Marriage**—Gandharva form was lawful only among warrior tribe—It is obsolete now.

Gandharva form of marriage was even in ancient days considered lawful only for the warrior tribe. It has become obsolete now.

[P 427 C 2]

(b) **Hindu Widows Remarriage Act, (1856)**. S. 6—Remarriage—Proof—Same rites and ceremonies as are necessary in first marriage should be proved to have been observed in remarriage.

To prove the remarriage of a Hindu widow the same religious rites and ceremonies that are necessary to constitute her first marriage valid should be shown to have been observed in her remarriage.

Where therefore a Hindu widow had been validly married in the Brahma form of marriage but the observance of the aforesaid rites and ceremonies in her remarriage was not established.

Held: that remarriage according to the particular form had not been proved.

[P 428 C 1]

R. B. Lal—for Appellant.

J. N. Misra—for Respondent.

Judgment.—This is a second appeal by the plaintiff who has been unsuccessful in both the lower Courts. It arises out of a suit for possession on the allegation that the defendant Mt. Kailasha succeeded to the property in suit on the death of her son Kali Charan and was in possession of it as a Hindu mother; that she contracted a remarriage with one Har Charan on 27th January 1923; that as a result of this remarriage she has forfeited all her rights in the said property under S. 2, Hindu Widows Remarriage Act (15 of 1856); and that the plaintiff who is the next reversioner to the property of Kali Charan is entitled to a decree for possession in his favour. The defendant denied the alleged remarriage, and the only question in issue between the parties was as regards the factum of the remarriage. The plaintiff led evidence to show that Mt. Kailasha was married to Har Charan according to the ordinary Brahma form and that there were priests who officiated at the marriage.

Both the lower Courts have disbelieved the evidence and held the remarriage not proved. They have found that some years before the alleged remarriage an illicit connexion had sprung up between Mt. Kailasha and Har Charan and that a child was also born as a result of it.

The learned counsel for the plaintiff-appellant has argued before us that the

fact that Mt. Kailasha and Har Charan lived as husband and wife and had a child born of the intercourse between them was sufficient to establish the remarriage of Mt. Kailasha within the meaning of the Hindu Widows Remarriage Act. He has referred to the eight forms of marriage mentioned by Manu and has contended that the connexion between Kailasha and Har Charan should be regarded as a marriage in the Gandharva form. Referring to Mayne's Hindu law, 9th edition, p. 94, he has pointed out that

"the reciprocal connexion of a youth and a damsel with mutual desire is the marriage denominated Gandharva, contracted for the purpose of amorous embraces, and proceeding from sensual inclination."

We think that the contention has no force. In the first place it is clear from the pleadings that the plaintiff set up a remarriage in the Brahma form such as is prevalent amongst the Brahmins. There was no suggestion in any of the Courts below of a Gandharva marriage. Admittedly Mt. Kailasha and Har Charan are both Kankubja Brahmins. The evidence led on behalf of the plaintiff was also to the same effect. They examined several witnesses including the priests who were alleged to have officiated at the marriage and taken part in the usual ceremonies attending such marriages. That evidence has been disbelieved by both the lower Courts. The matter being concluded by a finding of fact it is not possible for the plaintiff to set up an entirely new case like this at this stage. In the second place the contention is even on its merits altogether without substance. As remarked by Mr. Mayne at the very page containing the passage relied upon on behalf of the plaintiff-appellant even in ancient days the Gandharva like the Rakshasa form was considered lawful only for the warrior tribe. Further, as observed by the learned author at p. 97,

"Of these various forms of marriage all but two, the Brahma and the Asura, are now obsolete."

Again at p. 100 the learned author referring to the Gandharva form of marriage remarks as follows:

"It seems to me however that this form belongs to a time when the notion of marriage involved no idea of permanence or exclusiveness. Its definition implies nothing more than fornication. It is difficult to see how such

connexion could be created at present as constituting a marriage, with the incidents and results of such a union."

We must therefore hold that there could be no valid marriage in the Gandharva form between Kailasha and Har Charan. Lastly, S. 6, Hindu Widows Remarriage Act (15 of 1856), provides that

"whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow."

It is perfectly clear that when Mt. Kailasha was first married the performance of the religious rites and ceremonies prescribed for a marriage in the Brahma form would have been necessary to constitute her marriage valid. It follows that in the case of her remarriage the same ceremonies and religious rites should have been observed. As both the Courts below have found that evidence led by the plaintiff to establish the observance of the aforesaid rites and ceremonies is unworthy of credit, and the plaintiff has failed to prove remarriage in accordance with that form, the plaintiff's case based on the alleged remarriage must fail.

The result is that the appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Oudh 428

WAZIR HASAN, C. J., AND PULLAN, J.

Basdeo and others—Plaintiffs—Appellants.

v.

Indar Bikram Singh and others—Defendants—Respondents.

First Appeal No. 81 of 1929, Decided on 21st July 1930, from decree of the Sub-Judge, Gonda, D/- 15th July 1929.

(a) Oudh Laws Act, S. 9—In absence of cosharers under-proprietors have right of pre-emption.

Where there are no cosharers which is the case when the whole mahal is sold, the under-proprietors have a right of pre-emption as being members of village community.

[P 429 C 2]

(b) Oudh Laws Act, S. 9—Suit by pre-emptor cannot be defeated on change of rights during pendency of suit.

The Oudh Laws Act never suggests that any persons who had the rights of pre-emption on the grounds given therein can subsequently in course of a suit lose those rights on proof of

some act of another which he could not in any manner prevent.

A cosharer therefore cannot defeat the suit brought by a pre-emptor by acquiring the position of a cosharer during the pendency of the suit: *A. I. R. 1930 Oudh 274, Foll. ; A. I. R. 1929 Oudh 313, Diss. from.* [P 429 C 2]

(c) Oudh Laws Act—Object of—Pre-emption is not to exclude strangers

There is nothing in the Oudh Laws Act which suggests that the objects of the law of pre-emption is to exclude a stranger. [P 430 C 1]

(d) Oudh Laws Act, S. 9—Quaere.

Quaere.—Whether mere purchase of the rights of the superior proprietor ipso facto makes the purchaser a member of village community. [P 431 C 1]

(e) Oudh Laws Act, S. 9 (3)—Mahal of many villages—Inhabitants of mahals do not become members of one village community—Members of one village community cannot therefore sue for pre-emption of whole mahal.

In the case of mahals which comprise a great number of villages, all the inhabitants of the mahals do not become members of one village community within the meaning of S. 9 (3). There may be many village communities comprised in a mahal. It is not therefore possible for members of one village community to sue for the pre-emption of the whole mahal as no right of pre-emption outside the village to which they belong is given to them.

[P 431 C 1]

Bindeshwari Prasad, Ali Jawevad and Kashi Prasad—for Appellants.

M. Wasim and Karta Krishna—for Respondents.

Judgment.—These are consolidated appeals arising out of five suits for pre-emption of certain properties transferred by means of a sale deed executed by Babu Bishun Narain Bhargava in favour of the Payagpur estate on 27th August 1927. The property transferred had come into the possession of the vendor's father between the years 1890 and 1905 and we are satisfied that it represents an estate known as the Bamhnipair taluqa which was settled both in the first summary settlement of 1858 and in the subsequent regular settlement with Rani Sarfaraz Kuar, widow of Raja Inderjit Singh. It is immaterial in our opinion that the estate has from time to time received different names.

It has all along been treated as a taluqdari mahal and the rights now purchased by the Payagpur estate are those of the superior proprietor in a group of villages forming a revenue paying mahal. The mahal contains 163 villages and these suits for pre-emption relate to three only and they are filed

not by cosharers but by persons who own under-proprietary rights in the villages which they seek to acquire by pre-emption. Suit Nos. 86 and 91 of 1928 represented by Appeals Nos. 81 and 102 of 1929 are suits brought by different plaintiffs for pre-emption of four complete hamlets appertaining to the village Bakhrauli, namely Midnapur, Bakhrauli Khas and two mahals of Bhoingaon, namely Mahal Suraj Bali and Mahal Ram Harakh. Suit No. 89 of 1928, represented by Appeal No. 115 of 1929, was brought by another under-proprietor or birtdar for the village of Patijia Buzurg only. Suits Nos. 146 and 145 of 1928, represented by Appeals Nos. 124 and 125 of 1929, are brought by different plaintiffs for pre-emption of the village of Kusmi. All the suits have been dismissed by the learned Subordinate Judge of Gonda on the same grounds. He finds in the first place that the property purchased constitutes a single taluqdari mahal; secondly that the vendee has now acquired unassailable rights in the remaining 160 villages in respect of which no suit is now being maintained and

"he therefore falls under Cls. 1 or 2, S. 9, Act 18, 1876 and the plaintiffs in all the suits fall under Cl. 3 of the said section. The plaintiffs therefore have no right to pre-empt as against defendant 1."

Thirdly he finds that the plaintiffs are debarred from maintaining the present suits because they failed to apply for pre-emption of the whole mahal. All these findings have been challenged in appeal. As to the first finding we have no doubt that the decision of the lower Court is correct. It is amply proved that the property conveyed by the sale deed is a single proprietary mahal for which the proprietor has contracted to pay a definite sum by way of land revenue to the Government. It is true that each village is separately assessed to land revenue, and we have been referred to a document, Ex. X, printed at p. 78, part 3, of the paper book which is described as an agreement executed by the lambardars of this mahal. Even if this is taken to be an agreement with the under-proprietors as well as with the proprietors-in-chief, it only means that the estate should be regarded on the same lines as the estate which was considered by their Lordships of the Judicial Committee in the

case of *Sheoraj Kuar v. Harihar Bakhsz Singh* (1). But as a matter of fact we have seen that the original of this document is a printed form in which the words "ham lambardaran" and "dast-khat lambardaran" have not been deleted, but the only person signing on behalf of the lambardar or lambardars is the agent of B. Prag Narain, the superior proprietor. Thus all that is proved is that each individual village has been separately assessed to revenue and the estate may be considered to be a single mahal consisting of a large number of villages each of which is separately assessed to revenue and may be regarded as an inferior mahal. This finding is in no way fatal to the plaintiffs' suits. As under-proprietors they have a right under the Oudh Laws Act to pre-empt a sale of proprietary tenure. It is true that they come only in the third class as being members of the village community, and their right comes subsequent to that of cosharers in the mahal. But where there are no cosharers, which must be the case where the whole mahal has been sold, the under-proprietors have a right of pre-emption as being members of the village community.

It is on the other two findings that the learned Subordinate Judge has dismissed the plaintiffs' claim. The view taken by the Court below that a purchaser may use a title acquired by him subsequent to the origin of the cause of action in a pre-emption suit as a defence against a pre-emption suit instituted after his acquisition of the said title finds support in certain rulings of the late Court of the Judicial Commissioner of Oudh and in one judgment of a single Judge of this Court referred to in the judgment under appeal, *Mohammad Sher Khan v. Lal Bahadur Khan* (2); but this is not the view which has been taken by a Full Bench of this Court in a more recent case, *Gaya Prasad v. Faiyaz Husain* (3). The Full Bench found in that case that a cosharer cannot defeat the suit brought by a pre-emptor by acquiring the position of a cosharer during the pendency of the suit. The decision was based on a strict

(1) [1910] 32 All. 351=18 O. C. 165=7 I. C. 196=37 I. A. 124 (P.C.).

(2) A. I. R. 1929 Oudh 313=117 I. C. 454.

(3) A. I. R. 1930 Oudh 274=5 Luck 12 (F.B.).

interpretation of the Oudh Laws Act and it was pointed out that the judgments of the Judicial Commissioner's Court allowing the opposing parties to alter their relative positions after the execution of the sale deed are based upon certain decisions of the Allahabad High Court which were unfettered by any such statute as the Oudh Laws Act. The view taken in the Allahabad High Court was that the main object of a custom of pre-emption was to exclude a stranger from acquiring land in the village, where there was any village co-sharer or a member of the village community willing to purchase the property. There is nothing in the Oudh Laws Act which suggests that the object of the law of pre-emption is to exclude a stranger. The Act lays down that the right of pre-emption is a right of "the persons, hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immovable property in preference to all other persons."

It goes on to confine the presumption of the existence of the right to a village community and it gives the order in which certain classes of persons may claim a right of pre-emption. The first right goes to persons intimately connected with the estate, namely cosharers in the sub-division, if any, of the tenure in which the property is comprised and these have a preference inter se based on the nearness of their relationship to the vendor or the mortgagor. The second class comprises the cosharers of the whole mahal in the same order and the third class consists of the members of the village community. The whole chapter appears to us to consider only the state of affairs at the time of the proposed sale. The Act does not contemplate a constantly changing situation brought about by subsequent purchases or transfers by which the pre-emptor or the vendee may improve their relative positions during the suit. In the case of cosharers who are entitled to a notice of any proposed sale the fact that they have obtained no such notice is the first ground on which they may base a suit for pre-emption, and the other causes of action given are refusal of a tender and a lack of good faith in the proposed transaction. The statute never suggests that any person who had the right of pre-emption on the grounds given therein can subsequently in the

course of a suit lose those rights on proof of some act of another which he could not in any manner prevent. In the present case the sale in favour of the respondent gave rise in our opinion to a claim for pre-emption on the part of "the members of the village community," for prior to the sale the vendee had no share in the mahal and he was not a member of the village community.

As we have stated above the property comprises 163 villages, and as there is now no chance that any portion of the property except the three villages with which we are concerned, can be taken from the vendee by pre-emption he has no doubt acquired an indefeasible right in those villages. We are unable to see how by so doing he can meet the claim for pre-emption which arose on the date of the sale when he had no such indefeasible right and was neither a cosharer in the mahal nor even a member of the village community. Even now he is not a cosharer. He is a proprietor of an undivided share. The persons who challenge his title are not cosharers and there is no one in that class who can challenge his title. But this does not protect him from the suits brought by the under-proprietors whose relative position towards himself in respect of the villages which they claim is entirely unchanged by the fact that his sole possession of the remaining villages has not been placed beyond dispute. It is true that in the Full Bench ruling to which we have referred we were concerned with a case where a vendee acquired a right after the sale, and it is urged that in this case the right on which the vendee relies came into existence simultaneously with the sale of the villages which is challenged by the plaintiffs, but we consider that this is not a material difference. The judgment of the Full Bench lays down the date of the sale as the point in time on which the right of pre-emption comes into existence and if we were to hold that a purchaser, by including in his sale deed some property which for some reason or another could not be the subject of pre-emption, or even secured the consent of the existing pre-emptors to his retention without challenge of a small portion of the property purchased, could defeat the right of all other pre-emptors in other por-

tions of the property, we would be merely pointing out a new means of evading the statute. We have not been asked by the learned counsel for the vendee to consider his possible claim to be regarded as a member of the village community by means of his purchase.

In our opinion the claim, if it were raised, can be answered partly in the same manner as the claim set forward that he should be regarded as a cosharer. He was not at the time of the sale a member of the village community and we are far from certain whether mere purchase of the rights of the superior proprietor ipso facto makes the purchaser a member of the village community: vide the judgment of their Lordships of the Privy Council in *Pateshwari Partab Narain Singh v. Sita Ram* (4).

The last point found by the learned Subordinate Judge against the plaintiffs is that they should have sued for pre-emption of the whole mahal. In our opinion the reasoning of the learned Subordinate Judge on this point is faulty. A perusal of S. 9, Oudh Laws Act, shows that the circle of pre-emptors is gradually widened from cosharers in a sub-division to cosharers of a mahal and then to members of the village community. This presupposes in our opinion that the village community is regarded as something wider than the cosharers in a mahal. The ordinary meaning of the term "mahal" is a revenue paying area and several mahals may be included in a single village. We are not prepared to say that in the case of a mahal which comprises a great number of villages all the inhabitants of that mahal become members of one village community within the meaning of Cl. 3, S. 9. On the other hand we consider that there may be many village communities comprised in such a mahal but the members of such village communities are given no right of pre-emption outside the villages to which they belong. Thus these suits are not vitiated by the fact that the plaintiffs have claimed no more than their own villages. Indeed they could not as members of the village community sue for more than their own village. In our opinion the vendee failed to meet these suits for

pre-emption and the plaintiffs were entitled to succeed. The plaintiffs in Suits Nos. 86 and 91 of 1928 (Appeals Nos. 81 and 102 of 1929) have agreed that in the event of success they should decide the matter by lot. The plaintiffs in Suits Nos. 146 and 145 of 1928 (Appeal Nos. 124 and 125 of 1929) have agreed to divide the village half and half and effect to these agreements will be given in the decree to be prepared. We allow these appeals with costs. The sums to be paid in each case have been decided by the Court below and no objection has been taken to his decision on this matter. The vendee has asked that in the event of the plaintiff Kulman succeeding in the lot in respect of the hamlets of Bakhrauli (Appeal No. 102 of 1929) he should be required to pay a sum of Rs. 40,000 as that was the sum offered by him in his suit. We find however that Kulman's offer was to pay Rs. 40,000 or whatever sum the Court should decide and as the Court decided that the proper value of these villages is Rs. 25,736 we do not consider that he should be required to pay more than that. We therefore decree Suits Nos. 86 and 91 of 1928 for pre-emption on payment of a sum of Rs. 25,736 by whichever of the rival plaintiffs is successful in the drawing of lots, within six months of this date, failing which the suits will be dismissed with costs. If the money is paid the vendee contesting respondent will pay one set of costs to these persons based on the value of the property given in our judgment. Suit No. 89 of 1928 for pre-emption of village Patia Buzurg is decreed on payment of Rs. 10,542.8 within six months. Otherwise the suit will be dismissed with costs. If the money is paid the plaintiff will receive his costs from the contesting respondents. In Suits Nos. 145 and 146 of 1928 a decree for pre-emption will be passed on payment of Rs. 14,611 within six months. The sum will be paid half and half by the plaintiffs in the respective suits who will each be entitled to a one half-share of the village Kusmi.

If the money is not paid within six months these suits will be dismissed with costs. If the money is paid the plaintiffs in each suit will be entitled to recover half the costs from the contesting respondent.

(4) A. I. R. 1929 P. C. 259=119 I. C. 627=56 I.A. 356=4 Luck. 421 (P.C.).

Fix Monday 28th July 1930, for drawing lots and inform counsel concerned.

R.M./R.K.

Order accordingly.

*** A. I. R. 1930 Oudh 432**

WAZIR HASAN, C. J., AND RAZA, J.

Shiva Kumar — Defendant—Appellant.

v.

Thakur Prasad and others—Plaintiffs and Defendants—Respondents.

Misc. Appeal No. 15 of 1930, Decided on 8th May 1930, from order of Sub-Judge, Hardoi, D/- 14th December 1929.

* (a) Civil P.C., S. 35—Costs of witnesses summoned but not examined cannot be taxed against a party.

Costs of such witnesses as are not examined though summoned cannot be taxed in the decree against a party. [P 433 C 2]

(b) Civil P. C., Sch. 2, para. 3—Suit cannot be said to be pending by reason of possibility of appeal within prescribed limitation period—There can be no reference to arbitration through Court.

Suit cannot be said to be pending on the date of the agreement to refer to arbitration by reason of the possibility of an appeal being preferred within the period of limitation prescribed by law which period has not expired on the date of the agreement. There can be no order of reference to arbitration through the Court in such a case: *A.I.R. 1921 P. C. 770* and *41 Mad. 115, Dist.* [P 434 C 1]

* (c) Civil P. C., O. 32, R. 7—Suit not pending on date of agreement to refer to arbitration — Arbitration without Court's leave is not invalid.

When on the date of the agreement to refer to arbitration matters in difference no proceeding in suit is pending within the meaning of O. 32, R. 7 an agreement without leave of Court is not invalid: *26 Bom. 109; 29 Mad. 309* and *36 Mad. 295 (P.C.), Dist.* [P 434 C 1]

J. Jackson, Tirloke Nath Kaul and Hargobind Dayal—for Appellant.

H. Husain, Radha Krishna and Sundar Lal Gupta—for Respondents.

Judgment.—This is an appeal by one of the defendants from the order of the Subordinate Judge of Hardoi dated 14th December 1929 in proceedings instituted under para. 20, Sch. 2, Civil P. C., 1908.

The facts of the case are as follows:

On 19th April 1927 Sheo Ram, Mt. Parbati and Mt. Ram Kunwar sold certain zamindari shares situate in village Gondwa and Mohiuddinpur and groves situate in village Behariya, Pargana Gondwa, in the district of Hardoi, to Shiva Kumar, the defendant-appellant, and Jagannath Singh, defendant 2, son of Ange, by means of a deed

of sale of that date. Shiva Kumar is the minor son of Pandit Darshan Lal, a legal practitioner in the district of Hardoi. Thereupon three suits for pre-emption in respect of the sale of 19th April 1927 were filed in the Court of that Additional Subordinate Judge of Hardoi. The first suit was filed by the plaintiffs of the present proceedings, that is Thakur Prasad, Badri Singh, Jagannath Singh, son of Jham Singh, and the second by Pandit Babu Lal, defendant 3, and the third by Gaya Prasad, defendant 4. On 19th January 1929 the two last mentioned suits were dismissed on the ground that the plaintiffs of those suits had no right of pre-emption and in the first mentioned suit the Court found that the plaintiffs of that suit and Shiva Kumar, one of the vendees, had equal rights of pre-emption in respect of village Gondwa. Lots were ordered to be drawn. The appellant Shiva Kumar drew the lot. The result was that the third suit was dismissed in respect of village Gondwa and decreed in respect of the other two items of property. The Court held that out of the total consideration of Rs. 20,000, as stated in the deed of sale, only Rs. 13,000, was the real consideration and the rest was fictitious. The price of the village of Gondwa was fixed at Rs. 10,800.

On 3rd February 1929 a riot occurred in Gondwa bazar over the right of collection of rents. On 15th March 1929 the police sent two cases for trial to the Court of a First Class Magistrate of the district of Hardoi. In the first case Pandit Darshan Lal, father of Shiva Kumar, and Dulare Singh and Basdeo Singh, brother of Shiva Kumar's co-vendee were arrayed as accused persons. In the second case Jagannath Singh, one of the plaintiffs in the first mentioned pre-emption suit, and his son, Jodha Singh, and others were impleaded as accused persons. While the trial of these two criminal cases was pending, on 6th April 1929, an agreement to refer the controversy as to the title in the pre-emption suits to arbitration was executed by Darshan Lal, father and guardian of Shiva Kumar, and by Babu Lal, Thakur Prasad, Badri Singh and Gaya Prasad, plaintiffs in the pre-emption suits, and also by Jagannath Singh, the co-vendee of Shiva Kumar. Babu Mannu

Lal and Babu Raghbir Sahai, advocates, practising in the district of Hardoi, were appointed arbitrators.

It is proved by evidence and this was not disputed that the defeated plaintiffs of the pre-emption suits were contemplating to appeal from the decree of the Additional Subordinate Judge to the Chief Court of Oudh when the parties to the agreement decided to refer the matter in dispute to arbitration. Indeed two appeals on behalf of Gaya Prasad were filed on 4th May 1929. The arbitrators gave their award on 20th June 1929. The two criminal cases ended on 29th June 1929 in a charge under S. 323, I. P. C., against two servants of each of the two parties and were compromised and the four accused acquitted. The other accused whose names have been stated were discharged on the ground that there was no evidence of a riot against them. On 13th August 1929 Gaya Prasad applied for leave to withdraw his appeals which was granted on 22nd August 1929 and the appeals were dismissed as withdrawn.

The purport of that portion of the award which is relevant to the present proceedings is that the pre-emption suit of Thakur Prasad, Badri Singh and Jagannath Singh was decreed in full with the result that they got all the property converted by the deed of sale including the village of Gondwa and Shiva Kumar was awarded a sum of Rs. 15,000. It will be noted that this amount of money was in excess of what the Court had determined to be the real consideration of the sale in question.

Thakur Prasad, Badri Singh and Jagannath Singh, plaintiffs in the first suit of pre-emption, made the application out of which this appeal arises on 21st June 1929, with a prayer that the award of 6th April 1929 be filed in Court and a decree be passed in accordance therewith. On behalf of Shiva Kumar appellant several objections were raised in defence but we are now concerned with only three of such objections and the points covered by them were the only points argued before us at the hearing of the appeal. Those objections are as follows:

1. That the award was invalid for the reason that the reference was not

made under an order of Court as required by para. 3, Sch. 2, Civil P. C.

2. That the reference and consequently the award were void in law because leave of the Court was neither asked for nor given as required by R. 7, O. 32, Civil P. C.

3. That the consideration underlying the reference to arbitration was the stifling of the criminal prosecution and therefore unlawful. A subsidiary point was argued that in the decree of the lower Court costs of such witnesses were taxed against the appellant as were not examined though they were summoned.

The subsidiary point may first be disposed of. It is agreed that such costs, if any, should not have been taxed in the decree against the appellant. We therefore direct that if any such costs have been so taxed they shall be excluded by the office in preparing the decree of this Court. As regards the third objection, we agree with the Subordinate Judge that there is no reliable evidence on the record to establish the fact that the consideration for the reference to arbitration was the stifling of the criminal prosecution. Having regard to the sequence of dates and also somewhat dramatic end of the criminal prosecution there is a strong suspicion in favour of the argument advanced on behalf of the appellants. But mere suspicion is no ground for coming to a decision that the reference to arbitration rested on the unlawful consideration of stifling the criminal prosecution. We are of opinion that the learned Subordinate Judge is right in his view that the reference to arbitration was a transaction wholly independent of and separate from the cases of riot. There is evidence on the record which satisfactorily establishes the point of view that the parties aggrieved from the decision of the Court of first instance in the pre-emption suits had instructed counsel to file appeals from that decision. Indeed this fact is mentioned in the agreement of reference and the object of the reference was to obtain a decision on the matters in controversy from a tribunal chosen by the parties which decision would be final instead of preferring appeals involving uncertain chances and the probability of a second appeal to their Lordships of the Judicial Committee. This objection therefore

fails. In support of the second objection, it was argued that Gaya Prasad had filed the two appeals against the decree of the Court of first instance before the award was delivered and therefore the pre-emption suits must be held to be pending on the date of the award. To this argument so far as it goes conclusive reply seems to be that there was neither any appeal nor any other proceedings in the pre-emption suits pending on the date of the agreement to refer to arbitration. The agreement therefore without the leave of the Court was not invalid. We are unable to take the view that the pre-emption suits might be held to be pending on the date of the agreement by reason of the possibility of an appeal being preferred within the period of limitation prescribed by law which period had not expired on the date of the agreement. The learned counsel for the appellant has quoted several decisions and in particular *Virupakshappa v. Shidappa* (1) and *Arunachallam Chetty v. Ramanadhan Chetty* (2) to show that a suit must be deemed to be pending while execution proceedings in relation to the decree passed in that suit are pending. This may be so. In the present case however there were no proceedings in execution pending in any Court in relation to the decrees in the pre-emption suits on the date of the reference. The decision in *Ganesha Rao v. Tuljaram* (3) negatives the view that an agreement in the nature of a compromise entered into by the natural guardian of a minor without the leave of the Court when he is also the guardian ad litem in the suit can be valid on the ground that the guardian acted in the right of a natural guardian but the important fact to be borne in mind in understanding the true effect of the decision is that the agreement was made during the pendency of an appeal in the High Court. We think therefore that this objection fails.

In support of the first objection reliance is placed on the decisions in *Ram Prasad Surajmal v. Mohan Lal Lachminarain* (4) and *Appavu Rowther*

v. Seeni Rowther (5). In these two decisions reference is made to *Doleman & Sons v. Ossett Corporation* (6). We think however that the present case does not fall within the principle of those decisions for the simple reason, that Gaya Prasad's appeal was never intended to be filed after he had agreed to the reference as is proved by the evidence of Sharaf Rasul, clerk of the counsel, who was engaged by Gaya Prasad to file the appeal; and that it was withdrawn and not proceeded with. The award is therefore immune from the objection that unless proceedings before the arbitrators are stayed under para. 18, Sch. 2, Civil P. C., there might be a clash between the decision of the Court and of the arbitrators. It may well be repeated here that on the date of the agreement for reference there could be no reference through Court because there was no suit pending in Court. The appeal therefore fails and is dismissed with costs.

G.P./R.K.

Appeal dismissed.

(5) [1917] 41 Mad. 115=42 I. C. 514.

(6) [1912] 3 K. B. 257=81 L. J. K. B. 1092=10 L. G. R. 915=76 J. P. 457=107 L. T. 581.

A. I. R. 1930 Oudh 434

WAZIR HASAN, C. J. AND RAZA, J.
District Board, Kheri and another—
Defendants—Appellants.

v.

Abdul Majid Khan and another—
Plaintiffs—Respondents.

First Appeal No. 85 of 1929, Decided on 21st July 1930, from decree of Sub-Judge, Kheri, D/- 21st June 1929.

(a) Civil P. C. (1908), S. 96—District Board's resolution that no appeal be preferred—It is no reason for throwing out appeal when preferred by Board itself as incompetent.

That the District Board passed a resolution to the effect that no appeal need be preferred against the decision of the Subordinate Judge is not a sufficient reason for throwing out the appeal when preferred by the Board itself as incompetent. [P 437 C 1, 2]

(b) U. P. District Boards Act (1922), S. 47 (1)—“At least.”

The use of the words “at least” implies that there may be more than one meeting in a month. [P 433 C 2]

(c) U. P. District Boards Act (1922), S. 47 (2)—“At any time.”

The use of the words “at any time” in sub-S. (2) means that the meetings sanctioned by the sub-clause may be held in any month and at any time other than the time fixed for the meeting prescribed by sub-S. (1). In other

(1) [1902] 26 Bom. 109=3 Bom L. R. 555.

(2) [1906] 29 Mad. 309.

(3) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P.C.).

(4) A. I. R. 1921 Cal. 770=50 I. C. 835=17 Cal. 752.

words a meeting under sub-S. (2) could properly be held at any hour of the day previous or subsequent to the hour of the monthly meeting. [P 438 C 2]

(d) U. P. District Boards Act (1922), S. 173 (1)—Scope of regulations made under it.

The regulations do not expressly provide that if the notice of a meeting is not issued by post or that the margin of the time is less than seven days, the meeting convened in those circumstances or the acts done at the meeting shall be void. [P 439 C 1]

(e) U. P. District Boards Act (1922), S. 178—It embodies intention of legislature in matter of notice regarding acts sanctioned by Act and has no reference to notice under regulation under S. 173.

The section has no reference to a notice prescribed by a regulation framed in exercise of the power conferred by S. 173, but the section embodies the general intention of the legislature in the matter of a notice in regard to acts sanctioned by the Act. [P 439 C 1]

(f) U. P. District Boards Act (1922), S. 179—Service of notice—Provisions relating to, are not subject to those made under regulation.

The provisions relating to the service of notice are subject only to such other provisions as may be found in any section, rule or bye-law, and they are not subject to any provision made under a regulation. [P 439 C 2]

(g) Interpretation of Statutes—Intention of legislature is mandatory.

The intention of the legislature should be construed as mandatory if the aim and object of the statute would be clearly defeated if the direction to do a thing in a particular manner is not strictly observed. [P 439 C 2]

(h) Interpretation of Statutes—Prescriptions of Act relating to performance of duty by public officer is directory when no injustice is caused.

Where the prescription of an Act relates to the performance of a duty by a public officer the breach of such prescription, when it does not cause any real injustice, does not invalidate the act done under the Act and therefore such prescriptions are merely directory: 39 *Mad.* 485, *Ref.* [P 439 C 2]

(i) U. P. District Boards Act (1922), S. 179—Intention of legislature with regard to service of notice is satisfied if reasonable time is allowed.

If reasonable time is allowed to the person on whom the notice is served for the purpose of doing the act required of him by the notice, and if the notice has been served in one of the modes prescribed by the Act, the intention of the legislature is satisfied: 23 *Bom.* 66; 7 *Bom.* 399 and 21 *All.* 348, *Dist.* [P 440 C 1]

(j) U. P. District Boards Act (1922), S. 173—Election—Election is not invalidated by non-observance of regulation, unless it be contrary to principles of Act under which regulation is framed.

An election is not invalidated by the non-observance of the regulation for the conduct of elections, unless the non-observance was of a character contrary to the principles of the Act, under which the regulations are framed, or might have affected the result of the election: 47 *Cal.* 521, *Ref.* [P 440 C 2]

M. Wasim—for Appellants.

K. N. Katju and *H. Husain*—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the Subordinate Judge of Kheri dated 21st June 1929. The District Board of Kheri, as all other District Boards in the United Provinces of Agra and Oudh, is a corporate body constituted under the provisions of the U.P. District Boards Act (10 of 1922). By reason of efflux of time as prescribed by S. 29 of the Act mentioned above the terms of the personnel of the last Board of the District of Kheri came to an end on 14th December 1928. To fill up the anticipated vacancies an election was held as required by law on 9th December 1928. The results were known on the 12th of the same month. 32 members were elected and one of them was S. Abdul Majid Khan, plaintiff 1 to the suit out of which this appeal has arisen. Under the provisions of S. 6 of the same Act the Local Government nominated two more members. They were Messrs. Sukhai and Azizurrahman. The outgoing Board before vacating office had on 25th November 1928, resolved that a meeting of the incoming Board shall be held on 20th December 1928 for the purpose of electing a Chairman. The office of a Chairman of the Board is constituted by the provisions of S. 4, U. P. District Boards Act. Accordingly when the constitution of the new Board became complete both by election and nomination 34 notices, one to every member of the Board, were issued by the Secretary of the Board on 15th December 1928 (Ex. A-5) in the form prepared by the Secretary on 13th December 1928: Ex. A-5. Having regard to the shortness of time between the date of the issue of notices and the meeting fixed for 20th December 1928 the ordinary procedure of despatching notices by post was not resorted to and in its place notices were sent through special messengers. This is proved by Ex. A-5, already referred to, and the evidence of Babu Bhagwati Prasad, Secretary of the Kheri District Board, and is not disputed. On 20th December 1928 the special meeting of the Board as contemplated by the resolution of 25th November 1928 was held for the purpose of electing a Chairman and a Vice-Chairman of the Board. Out of the total number of

34 members, as indicated above, 32 members attended the meeting. The two absentees were Abdul Majid Khan, plaintiff 1, and one Babu Shyam Behari Lal. By 20 votes against 12 Raj Digbijai Singh, one of the appellants before us, was elected Chairman of the Board: Ex. A-9. He is also a member of the Board. The rival candidate, who was defeated at the election was one Thakur Jai Indra Bahadur Singh, taluqdar of Mahewa, in the District of Kheri. He is not a member of the Board, but the Act allows a non-member to be elected as and to hold the office of a Chairman: vide S. 4. Thakur Jai Indra Bahadur Singh is plaintiff 2 in the suit out of which this appeal has arisen. At the meeting of 20th December no objection was raised as to the legality or regularity in the procedure in the convening of the meeting. The election of Raj Digbijai Singh as Chairman of the District Board, Kheri, was notified in the U. P. Gazette of 29th December 1928 as required by the provisions of S. 46, U. P. District Boards Act, 1922: vide Ex. 2 in the other suit, which shall hereafter be mentioned.

On 13th January 1929 the new Board held its second meeting at which 26 members including the Chairman Raj Digbijai Singh attended and transacted business. At this meeting the proceedings of the meetings of 25th November and 20th December 1928 were read and passed: Ex. A-10. Thus the new Board commenced functioning in the ordinary course. On 28th January 1929 the present suit was instituted. To this suit the District Board of Kheri through its Official Secretary was made the sole defendant. The election of Raj Digbijai Singh as Chairman of the Board at the meeting of 20th December 1928 was challenged and the relief prayed for was: "that a perpetual injunction be issued to the defendant Board to stop it from taking any proceedings under its present defective constitution."

The learned Subordinate Judge of Kheri by his judgment under appeal has decreed the suit and granted the following reliefs:

1. Issue of an injunction "against the defendant Board of its soi-disant chairman and its members restraining it and them from acting under the chairmanship of said Takur Raj Digbijai Singh and the latter acting as such, till such a time that regularly constituted meeting is held and fresh "elections made"

and (2) calling upon the Board "to proceed with the calling of the meeting for the purpose" within three weeks. This decree was made on 21st June 1929, as already stated."

On 10th July 1929 the Board held a special meeting attended by 19 members including Abdul Majid Khan; plaintiff 1. Raj Digbijai Singh, was absent. In the proceedings of the meeting as evidenced by Ex. 4 in the other suit the decree of the Subordinate Judge dated 21st June 1929 was interpreted as if by reason of that decree a vacancy in the office of the Chairman of the Board has occurred at the date of the decree. The meeting then proceeded to elect a new Chairman and nominated Thakur Jai Indra Bahadur Singh as such. The Deputy Commissioner of Kheri on 19th July 1929 issued a notification required by S. 46 as regards the election of Thakur Jai Indra Bahadur Singh as Chairman of the District Board of Kheri at the meeting of 10th July 1929 in place of Raj Digbijai Singh "whose term of office as Chairman having been declared as invalid by the judgment of the Subordinate Judge of Kheri on 21st June 1921." This notification was published in the issue of 27th July 1929 of the U.P. Gazette. In the U. P. Gazette of 24th August 1929, Part 3, the following notification by the Local Government was published:

"No. 957/IX-123. Under the order of the Subordinate Judge of Kheri in Suit No. 5 of 1929, *S. Abdul Majid Khan v. The District Board of Kheri* it has been held that the election of a Chairman of the District Board of Kheri on 20th December 1928 was not in accordance with law and that therefore no election has been made. The District Board of Kheri having failed to elect a chairman within one month of the vacancy which occurred in December 1928, the Governor acting with his Ministers, in exercise of the powers conferred by S. 35 (3), United Provinces District Boards Act, 1922, is pleased to nominate Raja Digbijai Singh, Taluqdar of Majhgain, as the chairman of the Kheri District Board."

On 29th August 1929 Thakur Jai Indra Bahadur Singh instituted the other suit, to which reference has already been made, in the Court of the Subordinate Judge of Kheri. Raj Digbijai Singh was made the defendant to this suit. The prayer is made for the following reliefs:

"(a) It may be declared that the plaintiff is the lawfully elected Chairman of the District Board of Kheri;

(b) A perpetual injunction may be granted against the defendant restraining him from asserting his claim to the office of Chairman,

District Board of Kheri and interfering with the plaintiff in the exercise of his rights and powers and in the discharge of his duties as Chairman of the District Board of Kheri ;

(c) Cost of the suit may be awarded. "

The object of the suit is to obtain a declaration as to the legality of Thakur Jai Indra Bahadur Singh's election as Chairman of the District Board of Kheri at the meeting of the Board of 20th July 1929, to which reference has already been made, and to the illegality of the nomination of Raj Digbijai Singh as Chairman of the same Board by the Local Government.

We have transferred this suit to our own file for decision having regard to the fact that it is connected with the suit, out of which the appeal now being decided arises. We now again advert to the appeal. The decision of the learned Subordinate Judge is (1) :

" That it is proved that a notice of the meeting of 20th December 1928 was left with and tendered to a servant of plaintiff 1 (Abdul Majid Khan) who was away at the time and this was on 16th December 1928 and that the notice was defective for two reasons : (a) That it was not a seven days' clear notice; and (b) that it was not properly served as required by the regulations of the Board made on 11th August 1928, Ex. 4. "

Both these grounds of decision are challenged in appeal and the arguments on both sides are almost wholly centred on the interpretation of the said regulations.

Before entering into a discussion of the point involved in the arguments a preliminary objection as to the maintainability of the appeal must be noticed and decided. It is contended that the appeal on behalf of the District Board is incompetent for the reason that the Board, after the decision of the learned Subordinate Judge had been given, had resolved to prefer no appeal and the appeal is also incompetent on behalf of Raj Digbijai Singh for two reasons : 1. That he was not a party on the record of the case in the trial Court and (2) that he is a disqualified proprietor under the U. P. Court of Wards Act (4 of 1912). There is no controversy as to the facts involved in the objection, but we are of opinion that the objection fails. That the District Board passed a resolution to the effect that no appeal need be preferred against the decision of the Subordinate Judge is not in our opinion sufficient reason for

throwing out the appeal as incompetent. The Board has not done anything beyond passing the resolution just now mentioned to withdraw the appeal which has been properly filed in this Court. The resolution has not been acted upon. Further having regard to the true nature of the controversy in the appeal, and in the suit we do not think that the appeal can be thrown out safely on this objection.

As regards the appeal on behalf of Raj Digbijai Singh it is true that he was not made a co-defendant in the suit, but there is no doubt that in effect he was a party. The injunction issued by the judgment under appeal is directly issued to him restraining him from functioning as the Chairman of the District Board. As regards his disability under the U. P. Court of Wards Act (4 of 1912) reliance is placed on S. 55 of that Act. We are of opinion that that section is not applicable to the present case. It is admitted that Raj Digbijai Singh has succeeded to the property in his possession on the death of a ward and the Court of Wards has retained it under its superintendence as provided for by S. 45 of the Act. S. 49 therefore applies and under sub-S. (2) of the same section only suits relating to the property under the superintendence of the Court of Wards shall be brought and defended in the name of the Collector. This shows that claims of a personal nature of a disqualified proprietor are free to be brought and defended by the disqualified proprietor himself.

We now proceed to the determination of the merits of the appeal. As we have said before the decision turns upon the interpretation of the regulations : Ex. 4. These regulations were made by the Board in exercise of its power under S. 173 (1) as to (a) the time and place of its meetings ; (b) the manner of convening meetings, and of giving notice thereof.

(I) Under Cl. (a) the time and place of its meetings :

"1 An ordinary meeting of the Board shall be held on the last Sunday of each month at 3 p. m. at the District Board Hall at Lakhimpur, office will remain closed on the following Monday. "

(II) Under Cl. (b) the manner of convening meetings and of giving notice thereof :

"2 A special meeting or an ordinary meeting other than the regular monthly meeting shall be convened by the chairman or in his absence from the district by the vice-chairman whenever he thinks fit and upon a request made in writing by not less than one-fifth of the members of the Board for the time being."

"3 (a) Notice for meeting shall be issued under the secretary's signature or in his absence from the headquarters under Head Clerk's signatures on his behalf at least before seven clear days of the meeting. Notice to mufassil members for such meetings shall be sent by post under posting certificates, and notice to the members of the head quarters shall be delivered at their places."

Sub-section 2, S. 2 is not happily worded. It is agreed that the word "may" should be substituted in place of the word "shall" and after the word "and" the word "shall" be inserted. Having regard to sub-S. (2), S. 47, District Boards Act, 1922, the alteration agreed to is justified. The plaintiffs' case as regards the constitution of the meeting of 20th December 1928, at which Raj Digbijai Singh was elected Chairman, is that it was illegal for two reasons: (1) Notices to mufassil members were not sent by post but were sent by special messengers; and (2) that they were not issued before seven clear days of the meeting.

The reply on behalf of the defendants is that notices contemplated by Regn. 3 (a) are notices for the two classes of meetings enumerated in Regn. 2 and that the meeting of 20th December 1928 was not a meeting falling within those classes. In the alternative it is said that the provisions as to the form of service and the time of a notice are merely directory and not mandatory and therefore their infringement should not be held to invalidate the election unless it was shown that their compliance might reasonably be presumed to have brought a different result. We are unable to accept the first line of defence. The sanction for every meeting of the Board is to be found in the provisions of S. 47, District Boards Act. If the meeting of 20th December 1928 was a meeting the constitution of which is not sanctioned by the said provisions the meeting must be held to be illegal and everything done at that meeting as void. But we are of opinion that the meeting of 20th December 1928 must be held to be a meeting falling within sub-S; (2), S. 47. The section is as follows:

"47. (1) A Board shall meet for the transaction of business at least once in every month."

"(2) The Chairman or in his absence from the District the Vice-Chairman may, whenever he thinks fit, and shall, upon a requisition made in writing by not less than one-fifth of the members of the Board, cause a meeting at any other time."

"(3) A meeting may be adjourned until the next or any subsequent day, and an adjourned meeting may be further adjourned in like manner."

"(4) Every meeting shall be held at the office of the Board or at some other convenient place of which notice has been duly given."

Sub-section (1) definitely prescribes for one meeting in every month and the use of the words "at least" implies that there may be more than one meeting in a month. Sub-S. (2) prescribes for two classes of meetings: (1) meetings summoned by the Chairman or Vice-Chairman; and (2) meetings summoned upon a requisition by a certain number of the members of the Board. The use of the words "at any time" in sub-S. (2) clearly means that the meetings sanctioned by the sub-clause may be held in any month and at any time other than the time fixed for the meeting prescribed by sub-S. (1). In other words, a meeting under sub-S. (2) could properly be held at any hour of the day previous or subsequent to the hour of the monthly meeting. The monthly meeting was fixed by the regulation to be held on the last Sunday of each month at 3 p. m. and the meeting of 20th December was to be summoned for Thursday at 4 p. m. The time at which the latter meeting was held was therefore perfectly in accordance with the law. It is not disputed that the meeting of 25th November 1928, at which the resolution for holding a meeting for the purposes of electing a Chairman on 20th December 1928 was passed, was presided by the then Chairman of the Board, Sardar Jatendra Singh. This being so we construe the meeting of 20th December 1928 to be a meeting within the first portion of sub-S. (2), S. 47, that is to say, a meeting which the chairman had thought fit to summon for that date. Regn. 3 (a) is therefore applicable to the meeting of 20th December 1928.

As to the second line of defence we are of opinion that it succeeds. The regulations, to which reference has already been made, do not expressly

provide that if the notice of a meeting is not issued by post or that the margin of time is less than seven days, the meeting convened in those circumstances or the acts done at the meeting shall be void. It is clear therefore that the question for decision is as to whether the regulations intend by implication that such should be the effect of their infringement in those two respects or of either of them. The general principle relating to procedure in this behalf is stated by the Act (U. P. District Boards Act, 1922) in Ss. 178 and 179. S. 178 is as follows:

"Where any notice issued under any section of this Act or under any rule or bye-law requires an act to be done for which no time is fixed by such section or rule or bye-law, the notice shall specify a reasonable time for doing the same; and it shall rest with the Court to determine whether the time so specified was a reasonable time within the meaning of this section."

It is true that the section quoted above has no reference to a notice prescribed by a regulation framed in exercise of the power conferred by S. 173, but there is equally no doubt that the section embodies the general intention of the legislature in the matter of a notice in regard to acts sanctioned by the Act. Convening of a meeting is clearly an act sanctioned by the provisions of S. 47 of the same Act. The test therefore is whether the margin of time available to the plaintiff between the date of the service of notice and the date of the meeting was reasonable or not. This being the true nature of the question it follows that the regulation in this behalf did not intend that the limit of seven days should be mandatory. S. 179 relates to the service of notice and the relevant portion of it need be quoted here:

"(1) Every notice or bill issued or prepared under any section of this Act or under any rule or bye-law shall, unless it is in such section or rule or bye-law otherwise expressly provided, be served or presented (a) by giving or tendering the notice or bill, or sending it by post, to the person to whom it is addressed; or (b) if such person is not found, then by leaving the notice or bill at the last-known place of abode if within the jurisdiction of the Board, or by giving or tendering the notice or bill to some adult male member or servant of his family, or by causing the notice or bill to be fixed on some conspicuous part of the building or land (if any) to which the notice or bill relates."

It will be seen that the provisions relating to the service of notice laid

down by S. 179 are subject only to such other provisions as may be found in any section, rule or bye-law and they are not subject to any provision made under a regulation. The general principle underlying S. 179 is clear. It is sufficient service if the notice is given to the person to whom it is addressed or if it is sent by post. The procedure of transmission by post is an alternative procedure. Cl. (b) quoted above is applicable to the facts of this case. The plaintiff was not found at his house and consequently the notice was given to a servant of his family. This point need not be emphasized further for the reason that on behalf of the plaintiff it was admitted before us that the service was proper and sufficient in the sense that the plaintiff not being found at his house the notice was rightly delivered to his servant. If therefore the statutory rule as to the service of notice by post is one of the several modes of service the regulation relating to service by that mode must be deemed to be merely directory.

The principle of interpretation in such class of cases is that the intention of the legislature should be construed as mandatory if the aim and object of the statute would be clearly defeated if the direction to do a thing in a particular manner is not strictly observed: Maxwell on the Interpretation of Statutes, Edn. p. 647. The other principle is that where the prescription of an Act relate to the performance of a duty by a public officer the breach of such prescription, when it does not cause any real injustice does not invalidate the act done under the Act and therefore such prescriptions are merely directory: see the observation of Denman, J., in *Caldow v. Pell* (1) referred to in *Velliappa Chettiar v. Subramanyam Chetty* (2). In the case of *Liverpool Borough Bank v. Turner* (3), Lord Campbell, Lord Chancellor, said:

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

(1) [1876] 2 C. P. D. 562=46 L. J. C. P. 541=36 L. T. 469=25 W. R. 773.

(2) [1916] 39 Mad. 485=29 I. C. 119.

(3) [1860] 29 L. J. Ch. 827=1 Johns & H. 159.

The above was quoted by Lord Penzance in *Howard v. Bodington* (4) at p. 211. His Lordship himself made the following observation :

"There may be many provisions in Acts of Parliament which although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end."

We have already stated with reference to the sections of the U. P. District Boards Act, 1922, what the general intention of the legislature is in the matter of the time-limit and of the service of a notice. If reasonable time is allowed to the person on whom the notice is served for the purpose of doing the act required of him by the notice, and if the notice has been served in one of the modes prescribed by the Act the intention of the legislature is satisfied.

On behalf of the plaintiff-respondent our attention was drawn to the following cases : *Joshi Kalidas Sewakram v. Dakor Town Municipality* (5); *Abaji Sitaram Modak v. Trimbak Municipality* (6); *T. E. Strachey v. Municipal Board of Cawnpore* (7).

In the first mentioned case a meeting of the Municipal Board convened under the Bombay District Municipal Act of 1873 resolved to impose a house-tax on the houses in Dakor. A house-holder in the town sued for a refund of the tax which he had paid in pursuance of the resolution on the ground that the imposition was illegal. The High Court decided that notice to all the commissioners, being a material part of the machinery provided by the Act for imposing a legal tax, was a condition precedent to the validity of that tax and since the notice of the meeting was not served on three of the commissioners, they being absent at the time from the town, and no notice specifying the business to be transacted therein was posted up at the kacheri as required by S. 11 of the Act, the resolution imposing the tax was not

legal. It will be seen that the decision turned on the fact that no notice was served on some of the commissioners in any of the modes prescribed by the Act. In the present case there is no such question.

In the second case the Court held that:

"in order that a meeting of the Special General Committee of a District Municipality should be properly constituted it must be called by the President under S. 27 (2), District Municipal Act (Bom. Act 2 of 1884). If the meeting be not so called the defect is not cured by S. 27 (17)."

We do not think that this decision supports the plaintiff's case. S. 27 (2), Bombay Act 2, 1884 is similar to S. 47 of the Act with which we are concerned, and we have already held, rejecting the defendant's counsel's contention, that the meeting of 20th December 1928 was a meeting in terms of S. 47, sub-S. (2), U. P. District Boards Act, 1922. In the *Bombay* case the Court found on facts that the meeting was not called by the President. On the contrary, in the present case, we have held that it was so called.

The last case turned on the consideration of the procedure prescribed by the N. W. P. and Oudh Municipalities Act, 1873, relating to the transaction of business at a special meeting of the Board. The Court found that there was not present at the meeting the quorum required by law for a special meeting and therefore this defect invalidated the resolution for the imposition of the tax under which the amount claimed was levied from the plaintiff. It is obvious that we have no such question involved in the case before us.

The accepted rule in cases of elections seems to be that an election is not invalidated by the non-observance of the regulation for the conduct of elections, unless the non-observance was of a character contrary to the principle of the Act under which the regulations are framed or might have affected the result of the election *Woodward v. Sarsons* (8); *Phillips v. Goff* (9). Cases bearing on this subject have been exhaustively reviewed in *Shyam Chand Basak v. Chairman, Dacca Municipality* (10).

(8) [1875] 10 O. P. 733=44 L. J. C. P. 293=32 L. T. 867.

(9) [1887] 17 Q. B. D. 805=55 L. J. Q. B. 512=35 W. R. 197=50 J. P. 614.

(10) [1920] 47 Cal. 524=53 I. C. 741.

(4) [1876] 2 P. D. 203.

(5) [1883] 7 Bom. 399.

(6) [1904] 28 Bom. 66=5 Bom. L. R. 689.

(7) [1899] 21 All. 348=(1899) A. W. N. 97.

What are the facts in the present case? Out of the total number of 34 members of the Board 32 members attended the meeting. The two absentees were Abdul Majid Khan, plaintiff 1 and another member, Babu Shyam Behari Lal. 20 votes were cast in favour of the defendant Raj Digbijai Singh and 12 in favour of Thakur Jai Indra Bahadur Singh, the plaintiff in the other suit. If we add the votes of the two absentees in favour of Thakur Jai Indra Bahadur Singh the result would be the same, that is, the election of Raj Digbijai Singh as Chairman of the Board. The difference between the two sets of votes is so great that it is impossible to conceive that the result would have been different if the regulation had been strictly complied with in the matter of notice.

We accordingly allow this appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts.

In consequence of this decision of the appeal, Thakur Jai Indra Bahadur Singh's suit, No. 1 of 1930, which was instituted in the Court of the Subordinate Judge of Kheri, and which we transferred to our own file for decision is also dismissed with costs.

B.V./R.K.

Appeal allowed.

A. I. R. 1930 Oudh 441

RAZA AND SRIVASTAVA, JJ.

Alice Georgina Paschaud—Plaintiff—Appellant.

v.

Emma Bertha Paschaud Nixon—Respondent.

First Appeal No. 29 of 1929, Decided on 25th March 1930, from decree of Addl. Sub-Judge, Fyzabad, D/- 22nd February 1928.

(a) **Advancement—Presumption—** Father born and living all his life in India but of European nationality and living in European style—There is presumption of advancement if father purchases land in his daughter's name—Declarations by parent if contemporaneous with purchase are admissible to prove that his intention was that purchase should enure for his benefit—Evidence Act (1872), S. 92.

Where though the father is born in India, but he and his family are of European nationality whose mode of life and mental outlook is anything but Indian, there is a presumption of advancement if he purchases land in the name of his daughter. This presumption of advancement is, however, capable of being rebutted by evidence showing that the real intention

of the parent was that the purchase should enure for his benefit and that the child should take only as a trustee. Declarations by the parent if contemporaneous with the purchase are admissible to prove such an intention, but declarations subsequent are to be rejected: *A. I. R. 1921 P. C. 56, Appl.; Grabb v. Grabb*, 36 R. R. 362; *Sidmouth v. Sidmouth*, 50 R. R. 235 and 6 M. I. A. 53 (P.C.), *Rel. on.*

[P 444 C 1, 2; P 445 C 2]

(b) **Evidence Act (1 of 1872), S. 21 (3)—**S. 21 (3) should be strictly construed.

Section 21 (3), which lays down that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission, is an exception to the general rule and as such should be strictly construed. That clause is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the *res gestae*, as a statement accompanying or explaining a particular conduct but it cannot be held that a statement which is inadmissible in evidence under the general rule can be made admissible as such by reference to S. 21 (3). [P 445 C 1]

(c) **Specific Relief Act (1877), S. 42—**Mere failure to prove possession does not bar suit under S. 42—Defendant must be shown to be in possession.

In a suit brought for a declaration of title in respect of certain land, it is not enough to say that the plaintiff has failed to prove his possession in order to hold that the suit is barred by S. 42. It must be further shown that the defendant was in possession, otherwise it cannot be said that plaintiff is able to seek further relief than a mere declaration of title against the defendant. [P 447 C 2]

A. P. Sen—for Appellant.

M. Wasim—for Respondent.

Judgment.—This is a plaintiff's appeal. It arises out of a dispute between a mother and her daughter. The history of the family, which is admitted by both parties so far as it is material for the purposes of this case, is that one Charles Paschaud had two sons, George F. Paschaud and Charles Smith Paschaud. George F. Paschaud married the plaintiff, Mrs. Alice Georgina Paschaud. The defendant Mrs. Emma Bertha Paschaud Nixon is their only child. She was born in November 1877. Charles Smith Paschaud died a bachelor on 18th July 1903. George F. Paschaud died on 21st January 1908. In the year 1903 the defendant was sent to England for her education. There in December 1904, she married one Mr. Nixon who was a student at Oxford at that time. Subsequently he deserted his wife and later on in 1914 went to the war and has not been heard of since.

The plaintiff's case was that her husband G. F. Paschaud obtained from the

Government in the year 1879 a grant of waste land known as the village of Rampur Grant situate in pargana Mangalsi, Tahsil and District Fyzabad for a consideration of Rs. 1,750 and that at his request the deed of grant was drawn up benami in the name of his only daughter, the defendant, who was then an infant in arms. It was further alleged that in spite of the deed being drawn up in the name of the defendant, her husband got his own name entered in the khewat and continued to possess and enjoy the property in his own right till his death. He also spent a large sum of money in reclaiming the greater portion of the lands which formed the subject of the grant. The plaintiff further alleged that her husband on 27th March 1906 executed a will bequeathing all his moveable and immovable properties to the plaintiff and that she had been in exclusive possession and enjoyment of the aforesaid grant since the death of her husband. It was also averred that the defendant had been living outside India for close upon 20 years since her father's death and, therefore, even if she had any interest in the aforesaid property, she had lost all her rights on account of the adverse possession of the plaintiff for over 12 years. It was further pleaded that the defendant returned to India and applied to have the plaintiff's name removed and her own name entered in the khewat and succeeded in getting an order in her favour from the revenue Court on 5th March 1928. The plaintiff based her cause of action upon the assertion of claim made by the defendant in the revenue Court and the order passed by it. On these allegations she instituted the suit which has given rise to this appeal for a declaration that she was the exclusive owner of the grant.

The defendant controverted all the material allegations of the plaintiff. She claimed to be the absolute owner and proprietor of the grant. As regards the source of the consideration for acquiring the grant and for reclaiming the waste land she alleged that the two brothers Charles Smith Paschaud and G. F. Paschaud were joint owners of a firm of general merchants in Fyzabad carrying on business under the style of Messrs. C. Smith & Co., and that the

consideration for the grant in dispute and the costs of reclamation were met with from the income of the above mentioned firm and also from the income of the estate itself. She also pleaded that she was the sole legatee of her uncle Charles Smith Paschaud under a will dated 4th February 1903. Her alternative case was that if the consideration money for the grant belonged to G. F. Paschaud even then the grant in her name was for her benefit and advancement. As regards possession she pleaded that G. F. Paschaud was in possession of the grant merely as a manager on her behalf. It was also pleaded that the plaintiff had frequently admitted her ownership of the property and so the plaintiff was estopped from denying it. One further defence was raised to the effect that the plaintiff was not in possession of the property in dispute on the date of the institution of the suit and, therefore, the claim for a mere declaratory relief was not maintainable.

On these pleadings the learned trial Judge framed the following issues :

1. Was G. F. Paschaud the real grantee of the property in suit and was the defendant's name entered in the deed conferring the grant "benami" as alleged by the plaintiff?
- 2 (a). Did G. F. Paschaud pay the consideration for the grant and spend his own money in reclaiming the waste land as alleged by the plaintiff?
- (b). If so, did he get the defendant's name entered in the deed conferring the grant with the object of making the defendant the owner thereof as alleged in para. 20 of the written statement?
3. Did G. F. Paschaud bequeath all his property to the plaintiff as alleged by her?
4. Has the plaintiff perfected her title to the property in suit by adverse possession against the defendant?
5. What is the effect of the grant having been made by the Government in the defendant's name?
6. Was G. F. Paschaud the manager of the property in suit on behalf of the defendant as alleged by her?
7. Have the plaintiff and G. F. Paschaud been admitting the defendant to be the owner of the property in suit? If so, is the plaintiff estopped from denying it?
8. Is the suit within limitation?
9. Has the plaintiff no cause of action for this suit?
10. Was the plaintiff in possession of the property in dispute at the time of the institution of the suit?
11. Is the suit for a mere declaration maintainable?

The findings arrived at by the learned trial Judge with reference to issues 1, 2

and 6 are that the consideration of Rs. 1,750 for the grant belonged to George F. Paschaud, that he obtained the grant in the defendant's name with the object of making her the owner of the property, that the grant was not benami in her name and that he remained in possession of the property as manager on behalf of the defendant. He decided issue 4 relating to adverse possession against the plaintiff. Under issue 5 he held that the fact that the grant in question had been made in the defendant's name did not preclude the plaintiff from pleading that it was acquired benami in the defendant's name. Dealing with issue 7 he held that the plaintiff as well as her husband had on several occasions admitted the defendant to be the owner of the property in suit, but he held that the elements necessary to establish the plea of estoppel had not been made out. Issues 8 and 9 have both been decided in the plaintiff's favour. As regards the last two issues he found that the plaintiff was not in possession of the property in dispute on the date of the institution of the suit and that the plaintiff's suit for a mere declaration was therefore not maintainable.

The learned counsel for the plaintiff-appellant did not address any arguments to us against the finding of the lower Court on the question of adverse possession, but he has strongly challenged the correctness of the findings of the lower Court about the grant in suit having been acquired for the advancement of the defendant and not benami in her name and about the suit not being maintainable by reason of the plaintiff's not having been in possession at the date of the suit.

We will first take up the question as to whether the grant in dispute was obtained by G. F. Paschaud for his own benefit benami in the name of his infant daughter or whether he obtained it for the benefit and advancement of the daughter with the object of making her the absolute owner thereof. It is no longer disputed that Rs. 1,750 constituted the consideration for the grant and that it was paid by G. F. Paschaud out of his own money. The learned counsel for the plaintiff-appellant argues that G. F. Paschaud was born and bred in India, that his grandmother was an

Indian and that he should be treated on the same footing as an Indian. He therefore urged that the principle laid down by their Lordships of the Judicial Committee in *Gopeekrist Gosain v. Gungapersaud Gosain* (1), namely, that the criterion in such cases is the source of the purchase money, should be applied to the present case also and that it should be presumed that when the transaction is in the name of one of the children it is benami and not by way of advancement. We regret to note that the observations of the learned Subordinate Judge on this part of the case are not quite consistent. In one place he remarked as follows:

"This shows that he (G. F. Paschaud) regarded England as a foreign country and India as his own country. It may therefore be safely assumed that the idea of having a benami deed was not foreign to him."

At another place he observed that "having regard to these facts and to the facts that both he (G. F. Paschaud) and the plaintiff were not of purely Indian origin and were living in European style, the circumstance that the grant was acquired in the child's name raises the presumption that the acquisition was made for her advancement."

Under the circumstances it becomes necessary for us to arrive at a finding for ourselves on this point. Admittedly the ancestors of the parties were of European nationality. The suggestion of the admixture of Indian blood is based on the solitary statement of P. W. 5, C. J. Smith, the brother of the plaintiff, who at the end of his examination-in-chief stated that he came to know from Charles Smith Paschaud that his grandmother was an Indian. It is significant that even the plaintiff, when she was in the witness box, did not make any statement to that effect. The witness admits in his cross-examination that he is helping his sister in this case with his own money and that during the pendency of the suit the plaintiff has made a will bequeathing the property in suit to him. He is therefore a most interested person and we find ourselves unable to accept this statement as reliable. The trial Judge also was not prepared to rely on it. Reference was also made to Ex. A-20 which is a letter addressed by the father to the daughter in which George F. Paschaud referred to

(1) [1856] 6 M.I.A. 53=4 W. R. 46=2 Suther. 13=1 Sar. 493 (P.C.).

England as a foreign country. This is easily explained as he admittedly was born in India and remained all his life in this country. Lastly reliance was placed upon the fact that the defendant was adopted as a daughter by her uncle Charles Smith Paschaud. We find mention of this fact in the will of Charles Smith Paschaud, Ex. A-33, and three of the plaintiff's witnesses, namely P. W. 3 Charles Wordsworth, P.W.4, W. Wordsworth and P. W. 5 C. J. Smith, have also deposed to it. We may therefore accept it to be so, but we are unable to make any inference about the family being treated on the same footing as Indians for that reason. The parties are agreed that Charles Smith Paschaud did not marry. His adoption of his niece means nothing more than that she was designated as his heir which is also borne out by the fact that he bequeathed all his property to her. In spite of this so-called adoption it was possible that Charles Smith Paschaud might have had children who would have been his legal heirs in case of intestacy. It was equally possible for him to have made the will in her favour. It is therefore a misnomer to call it an adoption in the sense in which it is known to Hindus in India. On the contrary it is not denied that the family has all along been living in European style and their mode of life has been European. The defendant received her education in this country in a convent school in Chandranagar and in Naini Tal and was subsequently sent to England for the same purpose. This plea put forward on behalf of the plaintiff comes with a bad grace from her, for in one of her letters Ex. A-39 addressed to the defendant, she remarked that "all natives are rogues." Further on in the same letter referring to the education of the defendant's child she observed as follows:

"You say you wish to come to India. Your child will have an Indian education and an Indian bringing up which will mar his prospects."

In another letter Ex. A-38 the plaintiff remarked as follows:

"You know what natives are. If you do not take them on the hip they slip through your fingers."

Our finding therefore is that the parties are of European nationality and that the plaintiff has failed to prove satisfactorily the allegation about one

of the female ancestors having been an Indian. We further hold that their mode of life and mental outlook have been anything but Indian. We find it impossible to think that G. F. Paschaud shared the usages and practices of Indians in the matter of benami transactions. Under the circumstances we find ourselves unable to make any presumption in this case in favour of benami. On the contrary we think the principles laid down by their Lordships of the Judicial Committee in *Kerwick v. Kerwick* (2) fully apply to the case. In that case the appellant bought land in Burma and having caused it to be conveyed to his wife, the respondent, erected houses upon it at his own expense. Both husband and wife were born in India of English parents but had resided during their whole lives in India save for occasional visits to England. The appellant sued the respondent in Burma for a declaration that she held the houses as his benamidar and for an order that they be conveyed to him. It was held by their Lordships that the rights of the parties were to be determined according to the law applied by the Chancery in England. It was further held that according to the law in England, where a husband or father pays the money and the purchase is taken in the name of wife or child, there was a rebuttable presumption of an intended advancement. Applying the law as laid down to the present case we would presume that the grant in suit was obtained by G. F. Paschaud for the benefit and advancement of his daughter, the defendant.

Next we have to see whether there is any satisfactory evidence on behalf of the plaintiff to rebut the presumption just stated. The learned counsel for the plaintiff-appellant has relied upon certain admissions of G. F. Paschaud and has referred us to some evidence relating to his conduct and to the circumstances attending the grant, in support of his contention that the presumption should be deemed to have been sufficiently rebutted. Exs. 131 and 132 are two letters written by G. F. Paschaud one to the Tahsildar and the other to the Sub-Divisional Officer of Fyzabad in connexion with the demarcation of the

(2) A. I. R. 1921 P. C. 55=57 I. C. 834=47 I. A. 275=43 Cal. 260 (P. C.).

boundary and the survey of the grant in suit. In both these letters he refers to the grant in question as "my grant" or "my estate." The learned Subordinate Judge held that these admissions could not be proved in favour of the plaintiff who claims through G. F. Paschaud.

We think that the opinion of the learned Subordinate Judge is quite correct. On behalf of the plaintiff reliance has been placed on Cl. (3), S. 21, Evidence Act, which lays down that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. This is an exception to the general rule and as such should be strictly construed. It is argued that these statements are relevant otherwise than as admissions under Ss. 6, 9 and 11, Evidence Act. S. 6 refers to facts forming part of the *res gestae*. The extent and area of events covered by that term must depend on the facts and circumstances of each case. In our opinion this section has no application to the present case and the admissions in question cannot be made admissible under it. Similarly the arguments based on Ss. 9 and 11 to the effect that the statements in question should be held admissible because they support or rebut an inference suggested by a fact in issue or relevant fact or because they make the existence or non-existence of a fact in issue or relevant fact highly probable or improbable seem to us to be ingenious but unsound and fallacious.

The whole object of the plaintiff is to rely upon these statements as admissions of G. F. Paschaud. The admissions being in his own favour they are clearly inadmissible under the general rule embodied in S. 21, Evidence Act. Cl. 3 of that section is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the *res gestae* or as a statement accompanying or explaining a particular conduct, but we find it impossible to hold that a statement which is inadmissible as an admission under the general rule can be made admissible as such by reference to Cl. (3). The effect of the plaintiff's contention, if accepted would be that the exception contained in Cl. (3) would eat up the general rule contained in the section.

In *George Murless v. Mathew Franklin* (3) Eldon, L. C., held that in order to repel the presumption of advancement, evidence of the father's intention must be contemporaneous with the purchase and that subsequent acts will not enable him to convert an advancement for his sons into a beneficial purchase for himself. Similarly in *Grabb v. Grabb* (4), Lord Brougham, L. C. observed:

"The transfer being held an advancement, nothing contained in the codicil, nor any other matter *ex post facto*, can ever be allowed to alter what had been already done."

In *Sidmouth v. Sidmouth* (5) Lord Langdale, M. R. held that where a purchase is made by a parent in the name of a child, the contemporaneous acts and declarations of the parent are evidence to show that the child shall take as a trustee only, but the subsequent acts and declarations of the parent are inadmissible for that purpose. In *Gopeekrish Gosain v. Gangapersaud Gosain* (1), their Lordships of the Privy Council observed as follows:

"The presumption of advancement is however capable of being rebutted by evidence, showing that the real intention of the parent was that the purchase should enure for his benefit, and that the child should take only as a trustee. Declarations by the parent if contemporaneous with the purchase, are admissible to prove such an intention, but declarations subsequent are rejected. The reason of this distinction is obvious. A contemporaneous declaration is an indication of a present intention; a subsequent declaration is, at most, evidence of what a former intention was, and as such can rank no higher than any other declaration, which, unless against the interest of the party making it, is excluded by the known rules of evidence from judicial consideration."

We are therefore of opinion that the admissions above referred to are not admissible in evidence in support of the plaintiff's claim. We would further observe that even if these admissions were considered admissible their probative value is almost nil. As we will show later on George F. Paschaud was at the time when he wrote Exs. 131 and 132, acting as agent on behalf of his daughter. The reference to the property as "my grant" or "my estate" does not therefore necessarily mean that it was his personal property. The use of these words is quite consistent with the fact that he was managing the property as agent of the defendant. (Here

(3) 1 Swanst 13=18 R. R. 3.

(4) 36 R. R. 362.

(5) 50 R. R. 235.

his Lordship considered further evidence on behalf of the plaintiff and concluded as follows.) This disposes of the arguments urged on behalf of the plaintiff in support of the contention that the presumption of advancement should be considered to be successfully rebutted. We find ourselves unable to accept the contention. Before we take leave of this part of the case, it seems important to note that the plaintiff has absolutely failed to suggest any rational motive for George F. Paschaud obtaining the grant benami in the name of his daughter. Their Lordships of the Judicial Committee in *Kerwick v. Kerwick* (2) already referred to observed as follows :

"The conclusion to be drawn from this case would appear to be this, that the mere statement by a husband or father who has made an apparent advancement in favour of a wife or child that he did not intend it to confer any beneficial interest in the thing given or transferred to the donee or transferee, is of little avail unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took."

The plaintiff's story that George F. Paschaud obtained the grant in the defendant's name because of differences which arose between her and her husband as regards the person in whose name the grant was to be obtained is transparently false and we find ourselves wholly unable to accept it. In our opinion there is hardly any evidence worth the name to displace the presumption in favour of the advancement. This is enough to put the plaintiff out of Court. (Here his Lordship discussed the evidence adduced on behalf of the defendant and concluded). Taking the entire evidence and circumstances into consideration the conclusion seems to be irresistible that the grant was obtained for the benefit of the defendant and that George F. Paschaud and after him the plaintiff have all along continued to acknowledge her as the owner of the property and had remained in possession only as manager on her behalf. We therefore think that the conclusion arrived at by the learned Subordinate Judge must be accepted as correct.

In this connexion it remains only to deal with the contention urged on behalf of the defendant to the effect that the plaintiff's plea about the grant being benami was barred by the provisions of

the Crown Grants Act (15 of 1895). This contention formed the subject-matter of issue 5 in the lower Court. The learned Subordinate Judge disposed of it by saying that the Crown Grants Act did not apply to the case as the grant in question had been made not by Her Majesty the Queen-Empress or by the Secretary of State for India in Council but by the Local Government. The deed of grant is Ex 34. It shows that the grant was made by His Honour the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh in respect of a tract of waste land. S. 2 shows that it applies to grants or transfers made by or on behalf of Her Majesty the Queen-Empress, her heirs or successors or by or on behalf of the Secretary of State for India in Council. The Government of India Act of 1859 (22 and 23 Vic., S. 1, Chap. 41) lays down that

"the Governor-General of India in Council, the Governor in Council of Fort St. George, the Governor in Council of Bombay, the Lieutenant-Governor of the North-Western Provinces, now under the Presidency of Fort William in Bengal, respectively or any officer entrusted with the Government charge or care of any Presidency, Province or District in India are hereby respectively empowered to sell and dispose of all real and personal estate whatsoever in India for the time being vested in Her Majesty under the said Act within the limits of their respective Governments, Provinces or Districts."

The waste lands which formed the subject of the grant in question were lands vested in Her Majesty and the deed of grant executed by the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh must be deemed to have been made on behalf of Her Majesty under the powers conferred upon him by the section above referred to. We therefore find ourselves unable to agree with the opinion of the learned Subordinate Judge and must hold that the Crown Grants Act applies to the grant in question.

This leads us to the other question whether the provisions of the Crown Grants Act preclude the plaintiff from pleading that it was acquired benami. S. 3 of the Act lays down that all provisions restrictions, conditions and limitations contained in such grant or transfer as aforesaid shall be valid, and take effect according to their tenor, any rule of law, statute or enactment

of the legislature to the contrary notwithstanding.

Exhibit 34 at two places mentions the name of Miss Emma Paschaud as the grantee. In Cl. (11) of the deed it is stated that the grantee is to be considered during the currency of the lease as the proprietor of such mahal or estate and subject to all the liabilities legally attaching to such persons.

The question therefore arises whether the fact that the name of the defendant appears as a grantee in the deed should be regarded as a "provision, restriction, condition or limitation" within the meaning of S. 3, Crown Grants Act. The question is not altogether free from difficulty. But in view of the conclusion which we have reached on the merits of the matter as set forth above, it is not necessary for us, for the purposes of this case, to arrive at a decision on this point.

The only other point argued on behalf of the appellant is as regards the maintainability of the suit. The learned Subordinate Judge was of opinion that the plaintiff had failed to prove that she was in actual possession of the grant at the date of the suit. He therefore held that she could not maintain the suit for a mere declaratory relief. We regret we find ourselves unable to accept the decision of the learned Subordinate Judge on this point. On 8th February 1928 the defendant made the application Ex. 127 for correction of the khewat by removal of the name of her mother and by getting her name alone recorded. Ex. 104 is a copy of the siaha for 1335 F. which shows that the plaintiff actually made collections of rent from tenants up to 28th February. On 5th March 1928 the Assistant Collector ordered the name of the plaintiff to be removed from the khewat Ex. 32. The present suit was instituted on 8th March 1928. The question therefore is, who was in possession on that date? Reference was made to the statement of Bibhuti Singh, P. W. 2, who was the agent of the plaintiff. He deposes that he did not realize any rent since March 1928. Does it follow from this or even from the order of the Assistant Collector dated 5th March 1928 just now mentioned that the defendant came into possession before 8th March? Ex. 125 dated 10th March 1928 is a copy of an

order passed by the Assistant Collector which shows that the defendant made an application to him saying that her possession was being disturbed by one Mr. Smith (who is no other than the brother of the plaintiff). Thereupon the Assistant Collector, under S. 40, Cl. (2), Land Revenue Act, ordered the Naib Tahsildar to see the applicant put in possession of her property. This seems to us to show clearly that the defendant was not in effective possession of the property until this date. In order to hold that the plaintiff's suit is barred by S. 42, Specific Relief Act, it is not enough to say that the plaintiff has failed to prove her possession. It must be further shown that the defendant was in possession. Unless this is done it cannot be said that the plaintiff was able to seek further relief than a mere declaration of title against the defendant. We are of opinion that there is nothing to show that the defendant was really in possession of the property in suit on 8th March 1928 when the present suit was instituted. We are therefore unable to hold that the present suit is barred by S. 42, Specific Relief Act. As a result of our finding that the property in suit was acquired for the benefit and advancement of the defendant we hold that the plaintiff's suit has been rightly dismissed. The appeal fails and is dismissed with costs.

P.N./R.K.

Appeal dismissed.

A. I. R. 1930 Oudh 447

RAZA, J.

Wazir—Defendant—Appellant.

v.

Taluqdar and others—Respondents.

Second Appeal No. 133 of 1930, Decided on 11th August 1930, from decree of Sub-Judge, Gonda, D/- 24th March 1930.

Pre-emption—Waiver—Estoppel.

The plea of estoppel or waiver is open not to the vendees alone, but also to the rival pre-emptor who is impleaded in the suit.

By consenting to a transfer, a person entitled to pre-empt, disqualifies himself from pre-empting and loses his right of pre-emption altogether. He cannot waive his right of pre-emption in favour of a particular person and reserve it as against others. A person, who has forfeited his right of pre-emption, is debarred from asserting it either as a plaintiff or as a defendant: *A. I. R. 1925 Lah. 359; A. I. R. 1929 All. 589 and A. I. R. 1929 P.C. 259, Ref.*

[P 448 C 2]

Khaliquzzaman—for Appellant.

Ghulam Imam—for Respondent.

Judgment.—These two second appeals (Nos. 133 and 134 of 1930) arise out of two pre-emption suits decided by the Munsif of Utraula in the District of Gond on 14th December 1929. The facts of the case so far as it is necessary to state are as follows:

Basau and three others sold a two and half pies share in village Ausani Firoz in the District of Gonda to Dhauntal and Hira for Rs. 400 on 19th May 1928. Two persons, namely Taluqdar and Wazir, brought pre-emption suits in respect of that sale on 21st June 1929 (the date on which the civil Courts reopened after the annual vacation). The vendees are admittedly strangers and have no share in the mahal in which the property in suit is situate. Taluqdar is admittedly a cosharer but he is not related to the vendors. Wazir is also a cosharer and he is also related to both the vendors and the vendees. Taluqdar and Wazir were subsequently impleaded in each other's suit.

The first Court held that Wazir had preference not only as against the vendees but also as against his rival pre-emptor Taluqdar. Taluqdar appealed in both the suits. His appeals were allowed by the learned Subordinate Judge of Gonda on 24th March 1930. The learned Subordinate Judge held that Wazir had lost his right of pre-emption on the ground of estoppel, not only as against the vendees but also against his rival pre-emptor.

Wazir has now appealed to this Court in both the suits. The appellants' learned counsel contends that the plea of estoppel or waiver is not open to the rival pre-emptor, namely Taluqdar. This is the only question which has been discussed before us at the hearing of these appeals. In my opinion the appellants' contention is not well founded. As pointed out by their Lordships of the Judicial Committee in the case of *Pateshwari Pratab Narain Singh v. Sita Ram* (1) the right of pre-emption may be waived under certain circumstances. The following observations were made by their Lordships in their judgment in that case:

"Upon this state of facts their Lordships are clearly of opinion that, assuming that the prior completed purchase by the appellant would, under other circumstances, have given him the right of pre-emption in respect of the

blocks in suit, he must be taken by his conduct to have waived his right, and that it would be inequitable to allow him now to re-assert it. This principle has been recognized in previous cases by the Oudh Courts: see *Bhagwat Singh v. Nazir Husain* (2), *Bank of Upper India v. Alopri Prasad* (3), *Hanuman Singh v. Adiya Prasad* (4), and it has been applied to some extent at all events by the judgment of the Subordinate Judge in the present case."

The appellants' learned counsel concedes that the plea of estoppel or waiver can be raised in pre-emption suits but he contends that such a plea is open to vendees alone and is not open to the rival pre-emptor. However I see no reason why this plea should not be open to the rival pre-emptor. In my opinion the plea is certainly open to the rival pre-emptor also who is impleaded in the suit. By having consented to the transfer in question, Wazir disqualified himself from pre-empting and lost his right of pre-emption altogether. He could not waive his right of pre-emption in favour of a particular person and reserve it as against others. There can be no such thing as a conditional waiver. Rights having been once extinguished cannot be revived. A person who has forfeited his right of pre-emption cannot revive it if he happens to be a defendant. As pointed out by the Full Bench of the Lahore High Court in the case of *Arjumand Khan v. Shankar Lal* (5), a person who has once waived his right of pre-emption is debarred from asserting it afterwards and it is immaterial whether he occupies the position of a plaintiff or that of the defendant. The principle of the decision of a Bench of the Allahabad High Court in the case of *Ram Dawan v. Ram Surat* (6), also helps the contention of the respondents' learned counsel on this point.

In my opinion no case has been made out to disturb the judgment of the learned Subordinate Judge, hence I dismiss both the appeals with costs.

K.N./R.K.

Appeals dismissed.

(2) [1902] 5 O.C. 395.

(3) [1907] 10 O. C. 257.

(4) [1919] 22 O. C. 323=54 I.C. 520.

(5) A. I. R. 1925 Lah. 359=36 I. O. 1033=3 Lah. 243 (F.B.).

(6) A. I. R. 1929 All. 539=117 I. O. 345.

(1) A. I. R. 1929 P. C. 259=119 I. O. 627=56 I.A. 356=4 Luck. 421 (P.C.).

A. I. R. 1930 Oudh 449

RAZA AND NANAVUTTY, JJ.

Prag—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 336 of 1930, Decided on 19th August 1930, from order of Addl. Sess. Judge, Bahraich, D/- 23rd July 1930.

(a) Criminal P. C., (1898) S. 164 — Duty of Magistrate recording confession explained—Data or materials necessary to form estimate as to voluntary nature of confession stated.

It is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily, and it is further the imperative duty of the Magistrate to record those questions and answers by means of which he satisfies himself that the confession is in fact voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes data which enable the Court of Sessions and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come as regards the voluntary nature of the confession. Without these data or materials it is impossible to form any estimate as to the voluntary nature of a confession: *A. I. R. 1925 Cal. 587* and *A. I. R. 1927 Oudh 17, Ref.* [P 451 C 1, 2]

(b) Practice—Appellate Court—Genuineness and truth of confession and fact of its being voluntary are within exclusive province of Court of Sessions and of High Court—Ready made opinions of recording Magistrate without materials to prove independent opinion will not be accepted.

The Court of Session or the High Court cannot merely accept the ipse dixit of the Magistrate recording the confession as to its being voluntary. The genuineness and the truth of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the Court of Session and of the High Court, and neither of them can blindly accept the ready-made opinions of the recording Magistrate on these points without having before it materials from which it could arrive at an independent opinion on these questions. [P 451 C 2]

(c) Criminal P. C., (1898), S. 533—Scope.

Section 533 is intended primarily to cure a defect of form only and not one of substance: *A. I. R. 1922 Lah. 237, Foll.* [P 452 C 1]

(d) Criminal Trial—Proper recording of confession is of supreme importance in criminal trials.

The proper recording of confessions which can be shown on the face of them to be voluntary and apparently true is of the highest and supreme importance in criminal trials. [P 453 C 1]

Bhawani Shankar—for Appellant.

Ali Mahommad—for the Crown.

Judgment.—These are two connected appeals from a judgment of the Addl. 1930 O/57 & 58

tional Sessions Judge of Gonda at Bahraich convicting the appellants Prag Kurmi and Mt. Bishna Kurmin of an offence under S. 302, I. P. C. and sentencing each of them to undergo the extreme penalty of the law. Prag Kurmi and his wife Mt. Bishna have both appealed. The reference in confirmation of the sentences of death is also before us.

The case for the prosecution is as follows:

The deceased Thakur Nanhu Singh was in the service of a zamindar Maulak Ram, and the accused Prag was himself in the employ of Thakur Nanhu Singh. The latter though a married man was of very loose character, being fond of wine and women. For the last year or so he carried on an illicit intrigue with the married daughter of his servant Prag. Her name was Mt. Naraini. Prag resented the efforts of his Thakur Master to debauch his daughter. He entreated Nanhu Singh to desist from his evil designs, but his entreaties fell on deaf ears. Boldly and shamelessly Nanhu Singh took Mt. Naraini with him wherever he went and he even quartered himself at the house of Prag and made Prag's wife and daughter cook food for him; for his was apparently a masterful and domineering personality. In this unsatisfactory manner things went on till 14th January last which was Kichri day, the festival of Makar Shankrant. On that day Nanhu Singh came to Prag's house and told Prag that he (Nanhu Singh) was going to stay there for the night, and ordered Prag to go and sleep at his (Nanhu Singh's) house that night. Prag went away from his house in compliance with his master's orders. Nanhu Singh then ordered Dhonrey Chamar to go to the bazar and buy for him some flour (ata) and ghee and about half a rupee worth of country liquor. Dhonrey went and purchased these articles and gave them to Nanhu Singh. Nanhu Singh drank up the country liquor at once and gave the flour and ghee for the preparation of his evening meal. Dhonrey then went back to his own house. Half an hour later, as his food had not been cooked by then, Nanhu Singh himself went to Dhonrey Chamar's house to have a smoke and chat with him. Over his evening pipe full of the country liquor he had just imbibed,

Nanhu Singh opened out his heart to Dhonrey and bitterly complained to him that though he (Nanhu Singh) had lavished so much money on Mt. Naraini that faithless woman had no love for him (Nanhu Singh) and had run away to her mother-in-law's house at Gajodharpur with Nanku Brahman. After having thus unburdened himself of the sorrow which lay at his heart, Nanhu Singh went back to Prag's house to have his evening meal. Dhonrey, it is said, accompanied him again to his house and it was only after Nanhu Singh had sat down to eat his food that Dhonrey betook himself to his own home.

Next morning (15th January 1930) when Nanhu Singh did not turn up to give orders to the zamindars servants, then Dhonrey asked Ram Jiawan another servant as to where Nanhu Singh was. Ram Jiawan told Dhonrey that he had learnt from Prag that Nanhu Singh had returned late in the night to his own house. Dhonrey then went the next day (16th January 1930) to Nanhu Singh's house and asked his wife about him. Mt. Bitti, Nanhu Singh's wife, told Dhonrey that her husband had not been seen by her since khichri day. The following day the 17th January Prag gave to Nanhu Singh's wife Mt. Bitti at her house a quilt (razai) and sheet (chaddar) belonging to Nanhu Singh, saying that they were left at his house by Nanhu Singh.

Mt. Bitti then made a search for her husband and she informed her brother-in-law Kanchan Singh about his brother's disappearance. On 24th January 1930 Kanchan Singh reported at P. S. Hazurpur that his brother was missing. The thanadar sent for Prag and his wife and daughter, but only Mt. Bishna was found at home. The corpse of Nanhu Singh was recovered from a tank upon certain information given by Mt. Bishna. A Panchayatnama or inquest report was prepared and the corpse was sent to Sadr for post-mortem examination. The Civil Surgeon of Bahraich reported that the probable cause of death was "asphyxia probably by suffocation due to pressure on mouth, nose and chest." Subsequently Prag, Mt. Naraini and Ram Bali Khan were arrested and incriminating statements obtained from them also by the police. All four accused were then put up before a First

Class Magistrate, B. Bhagwati Prasad Sinha to have their confessions recorded. These confessions were recorded on 4th February 1930. The Chemical Examiner reported that the viscera of the deceased Nanhu Singh sent to him for analysis showed traces of some deleterious substance having the properties of dhatura poison. In the light of the Chemical Examiner's report the Civil Surgeon of Bahraich in his deposition before the committing Magistrate enlarged upon his opinion as to the probable cause of death given in his post-mortem report and stated that the deceased may have been first rendered powerless by the administration of some poison like dhatura, and then strangled to death, by pressure on the throat mouth and chest. We shall show later on that this opinion of the Civil Surgeon as to the probable cause of death of Thakur Nanhu Singh has a very direct and crucial bearing on the question as to the genuineness and truth of the confessions of the accused. The investigating police officer after completing his investigation prosecuted Prag and his wife Mt. Bishna and his daughter Mt. Naraini on a charge under S. 302, I. P. C. and he prosecuted Ram Bali Kahar on a charge under S. 201, I. P. C. The learned Additional Sessions Judge has acquitted Mt. Naraini of the charge of murder holding her confession to be false, and believing that on the day when the deceased was killed she was not in her father's house but that she had been taken by Bhiku Kurmi and Nankhu Brahman to Gajodharpur, a day prior to khichri day, i. e., 13th January 1930.

He has however convicted Prag Kurmi and Mt. Bishna his wife on the charge of murder and sentenced each of them to undergo capital punishment. He has also sentenced Ram Bali Kahar for an offence under S. 201, I. P. C., to undergo seven years' rigorous imprisonment, and to pay a fine of Rs. 100. Ram Bali has not appealed, and we are, therefore, not concerned in the present appeals with the question of his guilt or innocence.

It is admitted on all hands that the case for the prosecution against the appellants Prag Kurmi and his wife Mt. Bishna rests primarily upon the confessions made by them. If the confes-

sions are held to be not voluntary and not genuine and true, then it is conceded that the rest of the evidence on behalf of the prosecution is far too inconclusive and insufficient to justify the conviction of the appellants on the capital charge of murder.

The confessions of Prag and Mt. Bishna are typed in Roman Urdu, and the only thing on the record of these confessions in the Magistrate's own handwriting are his signature "B. P. Sinha" at the foot of the confession and at the bottom of the certificate required by law under S. 164, Criminal P. C.

It is with regret, with stern regret, that we note that Babu Bhagwati Prasad Sinha the Deputy Magistrate who recorded these confessions, has completely disregarded the standing orders of Government as to the method in which confessions ought to be recorded. Paras. 852, 853 and 853-A of the Manual of Government Orders, Vol. 1, lay down definite rules in this matter for the guidance of all Magistrates throughout British India. These standing orders of the Government are based upon instructions issued by the Government of India and embodied in G. G. O., Home Department, (Police) No. 36-C dated 5th January 1916. In the record of the confessions of Prag and Mt. Bishna (not to speak of the confessions of Mt. Naraini and Ram Bali) in the present case there is nothing to show that Babu Bhagwati Prasad Sinha informed any of these confessing prisoners that he was a Magistrate of the first class, empowered under the law to record a confession which could subsequently be utilized in the Court of Session and be sufficient to base a conviction of the confessing prisoner on the capital charge of murder. Had he done so, one of the confessing accused could not subsequently with any show of reason or decency, have urged (as did Mt. Naraini afterwards) that the person recording the confession was understood by the prisoner to be a police officer and not a Magistrate.

As pointed out by Government in para. 853-A of the Manual of Government Orders quoted above, it is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily; and it is further the imperative duty of the Magis-

trate to record those questions and answers by means of which he has satisfied himself that the confession is in fact voluntary. It is only by recording those questions and answers prior to taking down the story of the accused, that the Magistrate recording the confession furnishes data which enable the Court of Session and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come, as regards the voluntary nature of the confession. Without supplying these data or materials it is impossible for the trial Court (i. e., the Court of Session) or for this Court to form any estimate as to the voluntary nature of these confessions. The Court of Session or this Court cannot merely accept the ipse dixit of the Deputy Magistrate recording the confession as to its being voluntary. The genuineness and truth of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the Court of Session and of this Court and neither the Court of Session nor this Court can blindly accept the ready-made opinions of the recording Magistrate on these points without having before it materials from which it could arrive at an independent opinion on these crucial questions on which the fate of the accused hangs.

In the present case there is a complete absence of these questions and answers tending to show that the confessions were made voluntarily. The data therefore upon which this Court could have formed a sound and well-founded opinion as to the voluntary nature of the confessions of Prag and Mt. Bishna (with whom alone we are at present concerned) are entirely missing. The learned Additional Sessions Judge, in a legitimate attempt to help the prosecution, examined Babu Bhagwati Prasad Sinha before him. In his deposition, before the Court of Session Babu Bhagwati Prasad Sinha stated that he satisfied himself in each case that "the statements" (i. e., the confessions) were voluntary. We find that with the exception of Prag's confession there is no note of any kind at the commencement of the confessions of Mt. Bishna, Mt. Naraini or Ram Bali to show what step this Deputy Magistrate took to satisfy

himself that these confessions were voluntary. Further in his cross-examination, Babu Bhagwati Prasad Sinha admitted that he did not remember what questions he asked the accused prior to recording their statements, nor did he enter them on the proceedings connected with the recording of those statements. That being the case, it is not possible for this Court to form any opinion as to the voluntary nature of these confessions, and even the Deputy Magistrate who recorded those confessions was, according to his own deposition in the Court of Session, not in a position to say then that these confessions were voluntarily made.

Convictions and beliefs in respect of the voluntary nature of a confession that have been strained through the crucible of a record of confession properly and carefully prepared, with due prudential regard to the interests of the confessing accused, and after making him fully realise the dreadful and terrible consequences of making a confession which will send him straight to the gallows, differ immeasurably in solidity and weight from those airy beliefs to which Babu Bhagwati Prasad Sinha has given expression in the typed certificates which he has perfunctorily signed at the foot of each of these four confessions of Prag, Bishna, Naraini and Ram Bali as required by S. 164, Criminal P. C. We do not agree with the learned Additional Sessions Judge of Bahraich in considering that these grave and serious defects in the procedure of Babu Bhagwati Prasad Sinha which go to the root of the matter and which injuriously affect the accused in their defence on the merits can be cured by the provisions of S. 533, Criminal P. C. That section in our opinion is primarily intended to cure a defect of form only, and not one of substance. Thus, for instance, if perchance Babu Bhagwati Prasad Sinha had omitted to append at the foot of each of these confessions the certificate required by S. 164, Criminal P. C., but had, on the other hand, brought on the record an account of all the steps he took to satisfy himself that the confessions were voluntarily made and if he had questioned the confessing prisoners with a view to ascertaining the exact circumstances in which these confessions were made and

the connexion of the police with them, and if he had endeavoured to record the confessions of each of the four accused brought before him in as much detail as possible with a view to affording material and internal evidence from which their genuineness could be judged and whether they were freely made or were the outcome of suggestion, and the questions and answers referred to above were fully recorded so as enable one to detect any misuse of his powers on the part of the Magistrate, then in that case we would have been ourselves the first to apply the provisions of S. 533, Criminal P. C., to cure that defect, for obviously it was one of form only and not of substance.

In the present case however the facts are very different. The Deputy Magistrate, Babu Bhagwati Prasad Sinha, when he was asked to record the confessions of the accused failed to realise that he was asked to create new evidence on behalf of the prosecution, to forge, in fact, the strongest link in the chain of evidence that was to send these accused to the gallows. In these circumstances it behoved him not only as a Magistrate discharging his legitimate judicial duties but even as a mere man clothed with ordinary decent human instincts and human sympathy to take a little human interest in these unfortunate fellowmen brought before him and to make them fully understand where they stood and before whom, to remove from their minds all fear of the police and all wordly hope of pardon or any other benefit, to bring to them the fact that there was no police round about them at the time they were brought before him to confess, and above all that there was no need for them to make any statement or confession of any kind and thereby to put the halter round their necks unless they desired to make their peace with God or were urged by some irresistible impulse to do so. The record of the confessions before us shows how utterly callous and indifferent B. Bhagwati Prasad Sinha was as to the fate of these accused. He did not look upon the recording of these confessions as work of the highest importance inasmuch as he was asked to create fresh evidence of supreme importance in a murder case. Such work called for the

sound and discreet exercise alike of the powers of the intellect as of the heart. But the labour of recording these confessions did not strike B. Bhagwati Prasad Sinha in that light. He looked upon his work as Treasury Officer as his legitimate work and the recording of these confessions as a piece of forced labour (begar) to be finished somehow in the quickest manner possible. We regret to have to make these trenchant observations, but the proper recording of confessions which can be shown on the face of them, to be voluntary and apparently true is of the highest and supreme importance in criminal trials, especially in those of murder and dacoity and the consequences of B. Bhagwati Prasad Sinha's mistakes are tragic indeed, for, thanks to his blunders, the murder of Nanhu Singh must now go unpunished.

We next turn to consider the truth of these confessions of Prag and his wife. The learned Additional Sessions Judge has expressed

"grave doubts as to the truth of the contents of the confession of Mt. Naraini."

He has believed the evidence of the defence witnesses Bhiku and Nanku and others who deposed that Mt. Naraini had gone to Gajodharpur to her mother-in-law's house on 13th January 1930, a day before Nanhu Singh came to Prag's house and was murdered on the night of 14th January 1930. We have carefully examined the evidence of Dhonrey Chamar. He deposed in the Court of Session, as well as before the police in the course of the thanadar's investigation (Ex. B), that the murdered man Nanhu Singh complained to him that Mt. Naraini, in spite of all the love and money that he had lavished on her, had proved a fickle and faithless woman and had deserted him that Khichri day by running away with Nanku Brahman to her mother-in-law's house at Gajodharpur. The evidence of the defence witnesses of Mt. Naraini, namely Bhiku (D. W. 1), Parbhu (D. W. 2), Raghubar (D. W. 3) and of Nanku Brahman (D. W. 4), fully corroborates the truth of the remarks of Nanhu Singh quoted by Dhonrey as to Mt. Naraini's absence from her father's home that fatal Khichri day. We have read and re-read the original deposition of Dhonrey in Urdu, and

we are satisfied by the turn of the phrase used by Dhonrey that Nanhu Singh was referring not to any previous visit of Mt. Naraini to her mother-in-law's house but to the very last visit of hers made the day before Khichri day. There is also internal evidence to corroborate this fact in the statement of Dhonrey (Ex. B) in which Dhonrey nowhere mentions the presence of Mt. Naraini at her father's house on the day that Nanhu Singh arrived there on 14th January 1930. In his statement (Ex. B) Dhonrey does not state that Nanhu Singh gave the flour and ghee to Mt. Naraini to cook his evening meal. For the first time in the committing Magistrate's Court, Dhonrey introduces the story of Nanhu Singh giving flour and ghee to Mt. Naraini to cook puris for him. We have no hesitation in coming to the conclusion that this portion of Dhonrey's evidence in Court is false. We have no doubt that Mt. Naraini was not at her father's home on the night of the murder, and that her confession as well as the confessions of her father and mother on this point are absolutely false. It is beyond our powers to explain why father, mother and daughter all three, chose to make a false confession on this point, but the fact remains that they did so, and that being our opinion, these confessions must be rejected on this ground also as being utterly worthless and unreliable.

Then again there is a clear contradiction between the confession of Prag and that of his wife as to who mixed the poison in the food which Nanhu Singh ate. According to the confession of Prag poison was mixed in the food by Mt. Naraini, whilst Mt. Bishna in her confession stated that it was she who mixed the powder in the food which Nanhu Singh ate. According to both these confessions Nanhu Singh fell down in a heap the moment he had eaten the poisoned food and died shortly afterwards. Now the medical evidence goes directly against this portion of the confession. The Civil Surgeon deposes that death was due to asphyxia, probably by suffocation due to pressure on mouth, nose and chest. Even when the Chemical Examiner's report was received which showed that the viscera of Nanhu Singh contained some deleterious substances like dhatura, the Civil Surgeon stuck to

his opinion that although the man may have been rendered powerless by the administration of poison, still his death was caused by suffocation. Not a word is said by either of the confessing accused that anybody throttled Nanhu Singh by pressing his mouth, and nose or chest. According to the medical evidence death was not due to the administration of poison and so the accused cannot, even on their own confessions be held guilty of an offence under S. 328, I. P. C. The confessions of both accused do not reveal the commission of any such acts as resulted in the murder of Nanhu Singh whose death in the opinion of the Civil Surgeon was caused by asphyxia. In plain English the accused Prag and Mt. Bishna do not admit that they suffocated Nanhu Singh after having administered some poisonous stuff to him. On this point, as to the cause of death of Nanhu Singh, we prefer to accept the testimony of the Civil Surgeon rather than the tainted confessions of Prag and Mt. Bishna. In arriving at this conclusion we have been also influenced by the further consideration that the living do not give up their secrets with the candour of the dead.

The results of our scrutiny of these confessions of Prag and Mt. Bishna have thus far shown that not only are these confessions not voluntary, but they are also false in two important and essential particulars, namely as to the presence of Mt. Naraini on the night of the murder and as to the manner in which Nanhu Singh was done to death. Envisaging the story told in these confessions of Prag and Mt. Bishna as a whole we find that there are many other latent defects besides the shortcomings pointed out above. If Nanhu Singh realized that the Kurmin, Mt. Naraini, had no love for him, would he venture to give her a poisonous powder to be administered to her own father? When and where was poison given by Nanhu Singh to Naraini? How long did Naraini keep it with her? When did she tell her father about it? Where did she keep it? Who really administered the powder to Thakur Nanhu Singh? Why was this powder administered in Prag's house where his whole family ran the risk of being charged with murder when it could have been secretly administered with much greater safety at Nanhu Singh's own

house? These and many other similar and cognate questions arise out of the story told in these confessions, but no answer can be given to any of these queries, because the record of the confessions is incomplete, apart from any question as to the falsehood of these confessions.

We have given these confessions of Prag and Mt. Bishna our very best consideration, and we have come to the conclusion after much serious thought that these confessions are not only not voluntarily made, but are also false and untrue, and we have therefore no hesitation in rejecting them as worthless and of no evidentiary value, and in fact not even admissible in evidence.

The principles that have guided us in arriving at the conclusion to which we have come, have received judicial recognition from all High Courts in India. In *Emperor v. Panchkouri Dutt* (1) it was laid down by the Calcutta High Court that to ensure the voluntariness of a confession the Magistrate must question the accused before the latter makes his confession, that the Magistrate must make a real endeavour to ascertain whether the prisoner was about to make a voluntary confession by questions directed to the eliciting of facts which would enable him to judge of the character of the confession, that it was not sufficient for the purpose merely to ask the accused whether his confession was voluntary or to put a few formal questions or some set formulae which the prisoner could scarcely comprehend. It was further held in that case that the omission to warn the accused that he was before a Magistrate was material. It was also laid down in this ruling that if there was a doubt as to the admissibility of a confession, then the prosecution must satisfy the Court affirmatively that it was made voluntarily, otherwise the Court should reject it.

In *Farid v. Emperor* (2) it was held by a Bench of the Lahore High Court consisting of the Hon'ble the Chief Justice and Martineau, J., that as the Magistrate failed to question the confessing prisoner as to whether he was making his statement voluntarily, and

(1) A. I. R. 1925 Cal. 587=86 I. C. 414=26 Cr. L. J. 782=52 Cal. 67.

(2) A. I. R. 1922 Lah. 237=65 I. C. 613=28 Cr. L. J. 149=2 Lah. 325.

as that omission prejudiced the accused in his defence, on the merits the confession was inadmissible in evidence, and the defect which was one of substance and not of form only could not be cured by S. 533, Criminal P. C. In *Raj Bahadur Singh v. Emperor* (3) a Bench of this Court, to which one of us was a party, laid down in some detail what particular steps a Magistrate should take so as to satisfy himself that the confession was voluntarily made before he started recording the confession of the accused.

The circumstances of each case vary, and the form of the question put by the Magistrate so as to satisfy himself that the prisoner is in fact making a voluntary confession may also in consequence vary, but fundamental principles must ever remain constant, and their application needs only the exercise of a little intelligence and a little sympathy and understanding on the part of the Magistrate of the needs and the limitations of the confessing prisoner.

The confessions in the present case, it may be noted, were retracted by Prag and Mt. Bishna in the Court of Session; but before the committing Magistrate both Prag and Mt. Bishna admitted the correctness of their confessions. In face of their absolute denial of the charge of murder before the committing Magistrate, these acknowledgments of the correctness of their confessions are meaningless and inconsistent with their plea of not guilty, and merely betray the low standard of intelligence of these Kurmi accused, besides revealing the fact that the confessions in question were not made voluntarily.

If the confessions are rejected as inadmissible in evidence and as false then the rest of the prosecution evidence merely consists in the recovery of the corpse of Nanhu Singh at the instance of Mt. Bishna and the story of the illicit connexion between Mt. Naraini and Nanhu Singh as furnishing the motive for the murder of Nanhu Singh by these appellants.

Even if the story as to the illicit connexion between Nanhu Singh and Mt. Naraini be accepted as correct, that will not help to advance the case for the prosecution on the actual charge of

murder in the absence of any evidence, direct or circumstantial, connecting these appellants with the murder of Nanhu Singh. As to the evidence regarding the recovery of the corpse at the instance of Mt. Bishna, that only goes to prove that Mt. Bishna knew something about the disposal of the corpse, but it will not by itself be sufficient to justify the charge of murder of Nanhu Singh by Mt. Bishna. Even the presence of Nanhu Singh at the house of Prag, though it may raise grave suspicions against Prag as to his complicity in the murder, would not, in the absence of any other evidence, direct or circumstantial, connecting him or his wife with the murder of Nanhu Singh, justify this Court in finding either of them guilty of murder. For the reasons given above we are constrained to allow these appeals. We accordingly set aside the convictions and sentences passed upon the appellant Prag and Mt. Bishna, acquit them of the offence charged and order their immediate release

G.P./R.K. *Conviction set aside.*

A. I. R. 1930 Oudh 455

RAZA AND NANAVUTTY, JJ.

Bachchu—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 70 of 1930, Decided on 25th July 1930, from order of Spl. Sess. Judge, Bahraich, D/- 11th January 1930.

(a) Penal Code, S. 400—Nature of evidence necessary for conviction under S. 400.

The term "belong" in S. 400, implies something more than the idea of casual association: it involves the notion of continuity and indicates a more or less intimate connexion with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity: 13 O. C. 243, *Ref.* [P 458 C 2]

It is not necessary for a conviction under S. 400, I. P. C., that the person convicted must have taken part in any one dacoity. Evidence showing the actual participation by an accused in any given dacoity is evidence both of his association with the gang and of his object in such association. Evidence which though not believed for the purpose of a conviction under S. 395, I. P. C., may yet be relied upon for the purpose of a conviction under S. 400, I. P. C. A conviction under S. 400, I. P. C., cannot be considered bad in law merely because the evidence on the record would also have justified

(3) A. I. R. 1927 Oudh 17=98 I. C. 106=27 Cr. L. J. 1258.

a conviction of a specific offence under S. 395, I. P. C. : 13 O. C. 235 and *A. I. R. 1929 Oudh 321, Ref.* [P 458 C 2]

(b) Evidence Act, S. 133—It is not safe to convict on the sole testimony of accomplice unless corroborated in material particulars by direct or circumstantial evidence.

The evidence of accomplices is always admissible and is always relevant, but under a very old practice of the Courts in England some evidence is accepted only with great caution and after the closest scrutiny and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justified. The practice in India is the same as the practice in England. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connexion with the crime : *A. I. R. 1927 Oudh 369, Ref.* [P 459 C 1]

(c) Criminal Trial — Identification of accused — Evidence of identification is admissible though its value is weakened subsequently.

The power to identify varies according to the power of observation and observation may be based upon small minutiae which a witness cannot describe himself or explain. It is impossible to lay down any useful principles as to the exact amount of identification which is required in any particular case. The Court will consider the value of the evidence of identification against each accused, and satisfy itself as to whether the man is or is not guilty : *A. I. R. 1923 Oudh 430, Ref.*

The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court : *A. I. R. 1927 Oudh 598, Ref.* [P 459 C 1]

(d) Evidence Act, S. 14 — Evidence of previous conviction, admissible aliunde, should not be excluded—It is admissible to prove habit and association for conviction under Penal Code, S. 400.

Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible aliunde, it should not be excluded. Where the accused is charged under S. 400, I. P. C., such evidence is admissible, not as evidence of character but as evidence to prove habit and association. [P 459 C 2]

(e) Criminal P. C., S. 403—Acquittal on charge of dishonest possession of property

stolen in dacoity is no bar to prove that the accused actually took part in the dacoity.

Where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity it is open to the Crown to prove that he actually took part in the dacoity, for the latter was not the offence of which he was acquitted. Even if he has been acquitted on a charge of dacoity it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of the dacoity : *A. I. R. 1923 Oudh 430, Ref.* [P 459 C 2]

H. K. Ghosh—for the Crown.

Judgment.—These appeals (Nos. 70 to 90, 157 to 184 and 197 of 1930) arise out of a gang case known as the Bahraich gang case. This was the principal case (Sessions Trial No. 1 of 1929). Seventy persons were sent up for trial in this case. In the supplementary case (Sessions Trial No. 4 of 1929) only one person, namely, Gur Charan was tried. Gur (sic) Charan also appealed and his appeal is No. 91 of 1930. Thus 71 persons in all were placed on their trial on a charge under S. 400, I. P. C. Of these 71 persons, 16 were acquitted and the remaining 54 convicted by the learned Additional Sessions Judge of Bahraich. The charge against one man, namely Ramzan, was withdrawn. It appears that he was seriously ill and has since died. Of the 54 persons convicted by the learned Judge, 20 were sentenced to transportation for life and the remaining 34 to ten years' rigorous imprisonment each. 51 out of 54 persons convicted by the learned Judge have appealed to this Court. The remaining three persons, namely, Nanhu, Parbhu Din and Ram Prasad, who have been sentenced to transportation for life, have not appealed. It is to be noted that out of the 54 persons convicted, 51 were found guilty by all the four assessors who assisted the learned Judge in the decision of these cases. The only three persons who were not found guilty by the assessors were Ajudhia Prasad, Babadin Singh and Mohammad Zaman Khan alias Kanabadoh.

The appellants were not represented by any counsel in this Court at the hearing of these appeals; but we have examined the record carefully to see whether the evidence on record is sufficient to justify the conclusion that they were concerned in the crime. We should like to note also that the learned

Government Advocate has laid before us the whole evidence, in a fair and proper manner. The charge against each appellant was that he belonged to a gang of persons associated for the purpose of habitually committing dacoities during the period between January 1924 and October 1927.

There are jungle tracts in the northern part of the Bahraich District which have since time immemorial given refuge to criminals of every description. This area is near the border of the Nepal State. The evidence on record shows that the dacoits had their rendezvous in this area, which was the scene of their operations. Bands of dacoits used to sally forth from these jungles for the purpose of committing dacoities. There are 28 dacoities which we have to take into consideration in disposing of these appeals. The detail is as follows:

| Name of dacoity. | Date. |
|---------------------------------|-------------------|
| 1. Santalia Sarak Danda ... | January 1924. |
| 2. Gajpatipurwa ... | 1st Feb. 1924. |
| 3. Raniser Badla ... | 15th Feb. 1924. |
| 4. Fathawapur ... | 27th April 1925. |
| 5. Murtazapur Kharia Hansan ... | 10th Aug. 1925. |
| 6. Sahdei ... | 11th May 1926. |
| 7. Sunrai ... | 18th May 1926. |
| 8. Raidih Bihorwa ... | 5th Sep. 1926. |
| 9. Krihipurwa Narainapur ... | 23rd Jan. 1927. |
| 10. Chandanpur ... | Do. |
| 11. Khairia Jungle ... | 24th Jan. 1927. |
| 12. Chhitalahwa Lakkarsah ... | 15th Feb. 1927. |
| 13. Shankarpur ... | 28th Feb. 1927. |
| 14. Kirhipurwa Balsinghpur ... | March 1927. |
| 15. Banjaran Tanda ... | 23rd April 1927. |
| 16. Pairwa ... | 9th May 1927. |
| 17. Parsa Deheria ... | 20/21st June '27. |
| 18. Majhawan ... | 20th Sep. 1927. |
| 19. Piprahwa Chak ... | 22nd Sep. 1927. |
| 20. Chhasarka Abdullaganj ... | 8th Oct. 1927. |
| 21. Amrahwa ... | 9th Oct. 1927. |
| 22. Phul Takra ... | Do. |
| 23. Malonapurwa ... | Do. |
| 24. Ramlalgaon ... | 19th Oct. 1927. |
| 25. Karinga (Bhagwanpur) ... | 19/20th Oct '27. |
| 26. Manobra Chak ... | 25th Oct. 1927. |
| 27. Chaugoin ... | 26th Oct. 1927. |
| 28. Ganeshpur ... | 26/27th Oct. '27. |

Balraj Singh, Mahadeo Singh, Hukum Singh and Turab were convicted in the Ganeshpur dacoity under S. 396, I. P. C., on 8th March 1928. They were sentenced to death subject to confirmation by this Court. The sentences were confirmed by this Court on 5th April 1928. It appears that these men were hanged some time in May 1928.

Two persons, namely, Banwari Bania and Danku Gararya were made approvers and examined as such in the principal case. Banwari speaks of eight dacoities in which he himself has taken part along with the members of his gang. These dacoities were committed at Santalla Sarak Danda, Sahdei, Sungai, Ramlalgaon, Haringa (Bhagwanpur), Manobra Chak, Chaugoin and Ganeshpur. Danku gives evidence about one dacoity only which was committed at Pairwa on 9th May 1927. All other dacoities out of the 28 dacoities mentioned above have been proved by other evidence. It appears that the Bahraich police had been on the look-out for the dacoits long before October 1927. They tried their best to capture the gang and armed police were posted on duty at various places in the district. The Superintendent of Police visited different places with mounted and armed police and the Nepal Government police also started similar operations on their side of the border. Sub-Inspector Umrao Singh received information on 15th May 1927 that dacoits had assembled at the house of Ram Bilas accused on the pretence of celebrating the Janeo ceremony of the son of Ram Bilas. He gave the necessary information to the Superintendent of Police, Mr. Waddell, who with the Sub-Inspector and the Circle Inspector and armed and mounted police raided the house of Ram Bilas. Ram Bilas was found at the house of one Bansidhar in the same village. He was captured and a bag of ammunition was found at the head of his bed. Bansidhar made over a gun to the police admitting that it belonged to Ram Bilas. Bachan and Sattan accused were also arrested at the same time. Ram Bilas was convicted under the Arms Act and proceedings were taken against Bachan and Sattan under the preventive sections of the Code of Criminal Procedure. Banwari (approver) was arrested on 28th October 1927 in Abdullaganj forest with his companions Walidin, Berai and Nanhu Lonia immediately after the night on which the Ganeshpur dacoity was committed. He made a confession before Mr. Mohammad Abbas Khan, Deputy Magistrate, on 30th October 1927 naming his associates and several of them were arrested by the police. The information which the police re-

ceived from Banwari helped them in arresting Turab, Mahadeo Singh, Banney Chhutkao, Balu, Hukum Singh and others. Then many other persons of the gang were arrested. Danku (approver) was arrested in August 1927 and he also gave useful information to the police about the gang. It was decided after the arrest of Banwari, Danku and others that the arrested persons should be tried together in a gang case and the charge of the case was made over to the Special Dacoity Police. Rai Sahib Nand Kishore Inspector was placed in charge of the case and Umrao Singh, Sub-Inspector was appointed to help him. It appears that Danku had committed several dacoities before he had committed the dacoity at Pairwa in May 1927. He had however committed only one dacoity out of the 28 dacoities mentioned above. He and his small gang had joined Banwari's gang in the beginning of May 1927 and the Pairwa dacoity was then committed on 9th May 1927. Hukum Singh, Balraj Singh, Turab, Nazar Muhammad Khan, Banwari, Danku and Ram Bilas were said to be the leaders of the gang. It appears that Nazar Muhammad Khan was a resident of Nanpara and had removed to Nepal and was sent to jail there. He however succeeded in escaping from the jail and is now one of the accused in this case. Turab while lying under sentence of death in the Fyzabad jail made a full and detailed confession before Mr. Ramakant, Deputy Magistrate, on 10th and 11th April 1928. This confessional statement was produced before the learned Judge, but he rejected it on the ground that Turab was hanged before his statement could be taken in Court and that the statement in question could not be used against any of the accused in the present case. The learned Government Advocate has asked us to admit the document in evidence under S. 32, Cl. (3), Evidence Act. It need not be decided in this case whether or not the confessional statement in question is admissible in evidence as we are satisfied that the rest of the evidence on the record sufficiently establishes the guilt of the appellants before us.

We have carefully considered the whole evidence produced in this case. The prosecution have produced evidence to prove the dacoities mentioned above.

They have also produced evidence of identification and evidence of specific and general association and also evidence of recovery of arms and ammunitions and some of the stolen property. Some evidence has also been produced to prove previous convictions of some of the accused. Evidence of this description is generally produced in gang cases.

Before discussing the case of each individual appellant, we think it proper to refer to some principles of law, which should be borne in mind in considering the evidence produced in gang cases under S. 400, I. P. C.

Section 400, I. P. C., is in the following terms:

"Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

The term "belong" in S. 400, I. P. C., implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connexion with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity: see *Hira Lal v. Emperor* (1).

It is not necessary for a conviction under S. 400, I. P. C., that the person convicted must have taken part in any one dacoity. Evidence showing the actual participation by an accused in any given dacoity, is evidence both of his association with the gang and of his object in such association. Evidence which though not believed for the purpose of a conviction under S. 395, I. P. C., may yet be relied upon for the purpose of a conviction under S. 400, I. P. C. A conviction under S. 400, I. P. C., cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 395, I. P. C.: see *Gaya Din v. Emperor* (2) and *Lala v. Emperor* (3).

(1) [1910] 13 O. C. 243=11 Cr. L. J. 554=7 I. C. 1012.

(2) [1910] 13 O. C. 235=11 Cr. L. J. 551=7 I. C. 1006.

(3) A. I. R. 1929 Oudh 321=1929 Cr. C. 143=118 I. C. 423=30 Cr. L. J. 922.